

COPYRIGHT LIMITATIONS AND CONTRACTS
An Analysis of the Contractual Overridability
of Limitations on Copyright

Lucie M.C.R. Guibault

INFORMATION LAW SERIES – 9

COPYRIGHT LIMITATIONS AND CONTRACTS

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by

Lucie M.C.R. Guibault

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*To Twan
and my parents*

Foreword

At the close of this rather ambitious project, for which I not only moved from Montréal over to Amsterdam but for which I also learned the Dutch language, I would like to thank my supervisor Bernt Hugenholtz, and the director of the *Instituut for Informatierecht*, Egbert Dommering, for their confidence in me and for their patience in waiting months after months for the completion of my ‘chef d’oeuvre’. I would also like to thank the ITeR (*Informatietechnologie en Recht*) program, which sponsored this research.

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Many thanks to my parents, who were sad to see me leave Montréal in June 1997, not knowing that I would like it so much here that I would want to stay. Nevertheless, their constant support and pride in my work is always a great comfort. A special thanks to my mother, Mrs. Lisette Lévesque Guibault, who on very short notice, took care of the French translation of the summary.

Most of all, I wish to express my deepest love and gratitude to my husband Twan, whose (technical and moral) support and positive approach to life kept me going until the end. I don’t know how I would have managed without him. From day one, he has made me feel welcome in the Netherlands. Twan’s hospitality and warmth is shared by his family and friends (who have become my Dutch family and friends), to whom I would also like to extend my thanks for the support they have given me over the years.

In the end, all this is for the ‘Progress of Science and the Useful Arts’.

The research for this book was completed on 1st July, 2001.

Amsterdam, November 1st 2001.

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List of abbreviations

AA	Ars Aequi
AGBG	Gesetz über den Allgemeinen Geschäftsbedingungen
aff'd	affirmed
AfP	Archiv für Presserecht
ALAI	Association Littéraire et Artistique Internationale
AMI	Auteurs, Media- en Informatierecht
ARRvS	Afdeling rechtspraak Raad van State
BC	Berne Convention
BGB	Bürgerliches Gesetzbuch
BGBI	Bundesgesetzblatt
BGH	Bundesgerichtshof
BIE	Bijblad bij de Industriële Eigendom
BUMA	Vereniging Buma (previously: Het Bureau voor Muziekauteursrecht)
BverfGE	Bundesverfassungsgerichtsentscheidungen
CD-ROM	Compact Disk Read Only Memory
cert. denied	certiorari denied
Cir.	United States Circuit Court of Appeals
CPI	Code de la Propriété Intellectuelle
EEA	European Economic Association
EC	European Community
ECHR	European Convention on Human Rights
ECR	European Court Reports
EIPR	European Intellectual Property Review
F.	Federal Reporter
F.2d	Federal Reporter, Second Series
F.3d	Federal Reporter, Third Series
F. Supp.	Federal Supplement
FuR	Film und Recht
GEMA	Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigung
GG	Grundgesetz
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
GRUR Int.	Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil

LIST OF ABBREVIATIONS

Gw	Grondwet
H. Rep.	House of Representatives of the United States
HR	Hoge Raad
IER	Intellectuele eigendom & reclamerecht
IIC	International Review of Industrial Property and Copyright Law
JCP	Juris-Classeur, Pratique
NBW	Nieuw Burgerlijk Wetboek
NCCUSL	National Conference of Commissioners on Uniform State Laws
NJ	Nederlandse Jurisprudentie
NJB	Nederlands Juristenblad
NJCM-Bulletin	Nederlands Tijdschrift voor Mensenrechten
NJV	Nederlandse Juristenvereniging
OJ	Official Journal
OLG	Oberlandesgericht
rev'd	reversed
RIDA	Revue Internationale du Droit d'Auteur
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UCC	Uniform Commercial Code
UCITA	Uniform Computer Information Transaction Act
UFITA	Archiv für Urheber-, Film-, Funk- und Theaterrecht
UNIDROIT	International Institute for the Unification of Private Law
U.S.	United States Supreme Court decisions, official reports
U.S.C.	United States Code
U.S.P.Q.	United States Patent Quarterly
UWG	Gesetz gegen den unlauteren Wettbewerb
VG Wort	Verwertungsgesellschaft Wort
WIPO	World Intellectual Property Organisation
ZUM	Zeitschrift für Urheber- und Medienrecht

Chapter 1

Introduction

This book explores the intersection between copyright rules and contract rules, and more particularly, it studies the question of the contractual overridability of statutory limitations on copyright. Increasingly, copyrighted works are put on the market subject to contractual terms of use. Some of these contractual arrangements actually purport to restrict the user's actions with respect to protected material beyond the bounds normally set by copyright law. This book therefore examines the question of whether and to what extent the limitations on copyright constitute mandatory or default rules of law and whether the rights owner's freedom of contract with respect to the use of protected material can be limited either under the rules of copyright law or under the general rules of law.

1.1 Current trends in the information trade

The copyright regime¹ traditionally strikes a delicate balance between the interests of authors and other rights holders in the control and exploitation of their writings on the one hand, and society's competing interest in the free flow of ideas, information and commerce on the other hand. But the copyright balance has never been under as much strain as it is today.² Historically, copyright protection has never been so broad, whether it is in terms of protectable subject matter – including photography, phonograms, films, computer programs and other digital works –, in terms of the scope of exclusive rights – covering new dissemination techniques, such as radio, television, magnetic tape recorders, VCR's, copy machine, cable and satellite – or in terms of the duration of protection. Moreover, the use of digital technology is modifying the production and distribution patterns of

¹ Unless stated otherwise, the expression 'copyright regime' refers in the following pages both to the common law system and the *droit d'auteur* system.

² Dreier 2001, p. 295; and Quaedvlieg 1998, p. 420.

copyrighted works, as well as consumer habits.³ 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. Even private copying activities, which were traditionally kept outside the scope of copyright protection, are now deemed commercially relevant to the interests of the rights holders and are considered by many as a competing activity. Creative activities are also undergoing 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. The distribution of works is also simpler in the digital networked environment and, instead of going through complex distribution networks, users progressively seek direct online contact with producers.⁴ The traditional line between creators and users of copyrighted material and between private and public acts of use is gradually fading away.

In the digital networked environment, producers are also in a better position to dictate the terms of use of their works. Encryption methods and other similar techniques allow rights holders to control the use made of their works more effectively. Some of these techniques can have the effect of blocking access to the work altogether, while other techniques permit rights owners to monitor the actual use that a person makes of a copyrighted work with relative ease. Moreover, the digital environment fosters the conclusion of contracts, thanks to its structure and its interactive nature. Contracts are thus seen, in addition to or in place of copyright law, as a ready solution for the determination of the conditions of use of protected material in the digital networked environment. As a consequence of these market changes, concerns arise that an unbridled use of technological measures coupled with 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 risk being seriously disrupted, if rights owners were able to contractually impose any term and condition of use, irrespective of the copyright rules.

1.2 Definition of the problem

The practice of licensing the use of copyrighted works is probably as old as the copyright regime itself. Of all times, authors have relied on the

³ Dommering 2001, p. 120.

⁴ Hugenholtz 2000b, p. 79.

instrument of contract to grant publishers the permission to exploit their works.⁵ With the expansion of the copyright protection to new subject matter and new dissemination techniques, rights owners have come to deal with an increasing number of users in view of the exploitation of their works. Among the typical users of copyrighted material are newspaper or book publishers, database, record or software producers, broadcasters and information providers. On occasion, the contractual arrangements concluded for the exploitation of a copyrighted work purport to restrict the user's actions with respect to that work, sometimes even beyond the bounds normally set by copyright law.

By contrast, the use of standard form contracts to bind consumers, or end-users, to restrictive terms of use of copyrighted material is a fairly recent phenomenon. Traditionally, copyright owners never held absolute control over the consumption of their works. Today, encryption technology makes it possible to license and enforce copyright even in cases of mass distribution of copyrighted works. While the newly developed practice of marketing copyrighted works to end-users subject to the terms of a standard form contract primarily aims at regulating instances of private use, the broad language used in these contracts often has the effect of restricting the end-users' capacity to make a number of otherwise legitimate uses, such as quotations and parodies.

The question, which the contractual practice for the use of copyrighted material raises, is whether the copyright limitations, like the right to reproduce a work for private research, the right to quote, and the library privilege, are mandatory provisions that override any contractual clause to the contrary. To what extent are parties bound to respect the copyright bargain inside their private contractual relations? If statutory copyright limitations are simply default rules that can be excluded from the application of a fully negotiated contract between two business entities, does this hold true as well in the case of non-negotiated contracts with end-users, such as shrink-wrap licences? The answer to these questions depends on a variety of factors, among which are the circumstances surrounding the formation of the contract – whether it is fully negotiated or presented in a standard form – the respective interests of the parties involved, the applicable laws and the legislature's general copyright and information policy.

This aspect of the intersection between copyright law and contract law arose in the United States in the highly criticised decision of the Court of Appeal for the Seventh Circuit, *ProCD v. Zeidenberg*.⁶ It has also been the

⁵ Seignette 1994, p. 15.

⁶ 86 F.3d 1447 (7th Cir. 1996).

object of much attention during the drafting process of the Uniform Computer Information Transactions Act (UCITA).⁷ Once adopted and implemented into State law, these new rules would not only validate shrink-wrap and other mass-market licences of information, but would also set rules about electronic contracting for information products and services. However, at the conclusion of intense negotiations over the text of the UCITA, the question of the precedence of the copyright limitations over contractual provisions to the contrary was left essentially unresolved. By contrast, the contractual overridability of limitations on copyright is only starting to draw attention in the European Union.⁸ Only a few legislative provisions regulate the intersection between copyright limitations and contracts.⁹ Moreover, the new Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society¹⁰ remains basically silent on this issue. Absent precise indications from the legislator, the question of whether specific copyright provisions constitute imperative or default rules must otherwise be determined in light of other applicable laws and public interest considerations.¹¹

The question of copyright overridability has significant practical implications. As transactions relating to digital information are increasingly being completed through licensing agreements, practical problems are likely to arise regarding the validity of the conditions of use of copyrighted material set out in such licences. Moreover, the interest surrounding the provisions of the UCITA should not be exclusively American. In view of the global nature of digital networked transactions, it is to be expected that once the text of the UCITA is implemented in a majority of States, some pressure will be exercised on foreign countries to adopt similar provisions.¹² Consequently,

⁷ National Conference of Commissioners on Uniform State Laws, 'Uniform Computer Transactions Act', St-Augustin (Fl.), August 4, 2000.

⁸ Guibault 2000, p. 125; Commissie Auteursrecht 1998, p. 45.

⁹ Council Directive 91/250/EC of 14 May 1991 on the legal protection of computer programs, *OJ L 122*, 17/05/1991, p. 42, art. 5 ('Computer Programs Directive'); Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, *OJ L 77*, 27/03/1996, p. 20, art. 6 ('Database Directive'); and Loi transposant en droit belge la directive européenne du 11 mars 1996 concernant la protection juridique des bases de données, *Moniteur Belge*, 31 August 1998, art. 23 bis.

¹⁰ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, *OJ No 2001/L 167/010* [hereinafter referred to as the 'Directive on Copyright in the Information Society'].

¹¹ See: Lemley 1995, p. 1274.

¹² Elkin-Koren 2001, p. 220.

the study of the contractual overridability of restrictive copyright licence terms must be based on a comparative law approach. I will therefore analyse not only the relevant provisions and case law of the United States, but also those of France, the Netherlands, and Germany, including the applicable European directives and the relevant multilateral agreements. The comparison of the laws of these four countries will help bring to light the numerous distinctions that exist on this particular issue between the continental European and the American legal systems. These two legal systems are indeed well-known to display substantial differences not only with respect to copyright protection, but also with respect to contract law, where the continental European authors' rights and civil law tradition is opposed to the American copyright and common law tradition. However, the legal systems of continental European countries also diverge on a number of important respects, as the study of French, Dutch, and German law will reveal.

Although interesting and relevant to my topic, several questions remain outside the scope of my study. First, the laws of France, the Netherlands, Germany and the United States contain an impressive number of limitations on copyright. However, the objective of this book is not to make an exhaustive account of all existing limitations or to examine their compliance with the requirements of such instruments as the Berne Convention, the TRIPS Agreement, the WIPO Copyright Treaty or the new European Directive on Copyright in the Information Society. Moreover, considering that the achievement of the copyright balance is matter best left to the national legislator, I will not discuss the limitations' political desirability. In addition, the copyright regime's inherent limits, like the fixed duration, the idea/expression dichotomy, the criterion of originality or the first sale/exhaustion doctrine, are mentioned only in passing and are not examined in full detail. Finally, issues relating to private international law, or conflicts of laws, are not treated in this book. Nor are those issues that concern the implementation of technical measures and copyright management information, or that relate to the level of liability of Internet intermediaries examined here.¹³

1.3 Structure of the Book

This book is further divided into three main chapters. Chapter two focuses on the substance of copyright rules and limitations, while chapter

¹³ See: Hugenholtz 2000c, p. 1-5.

three describes the principle of freedom of contract, and chapter four studies the intersection between copyright rules and contract law. Before turning to the specific question of the contractual overridability of statutory limitations on copyright, I must first put these limitations into context. Chapter two opens with a description of the general structure of the copyright system. In this first section, I give a brief overview of the foundations of and objectives pursued by the copyright system, as well as of the structure and the form of the statutory limitations. The following section examines the statutory limitations on copyright and the grounds for their implementation in more detail. The focus on the four following rationales: the protection of constitutional rights, the regulation of industry practice and competition, the dissemination of knowledge, and market failure considerations. The review of the form given to the limitations and of the rationales behind their adoption brings me to consider their legal nature, i.e. to identify the type of entitlement or claim that users may assert over the subject matter covered by such limitations.

On the basis of my findings in the second chapter, I turn to the analysis of the intersection between copyright rules and contract law. The principle of freedom of contract plays a central role in chapter three. In the first section, I take a look at the principle of freedom of contract through the lens of the classic contract model and of the standard form contract model. The following section deals with the recognised general limits on the principle of freedom of contract. I focus on the limits set by the norms of economic and protective public order, the constitutional rights as well as the notion of abuse or misuse of right. This theoretical development leads me to the heart of the question: are rights owners free to set the statutory limitations on copyright aside or are there limits to their freedom of contract and if so, on what grounds? Chapter four opens with an overview of current licensing practices governing the use of copyrighted material. Section 4.2 follows with an inquiry as to how and to what extent the rights owner's freedom of contract must take account of the user's legitimate interests and of the legislature's copyright policy as embodied in the copyright limitations. More specifically, I take a look at the limits to the freedom of contract set by the copyright regime and the general principles of law. In chapter five, I draw general conclusions regarding the contractual overridability of the limitations on copyright.

Chapter 2

Copyright rules and limitations

2.1 General structure of the copyright system

2.1.1 OBJECTIVES OF THE COPYRIGHT SYSTEM

A lot has been written on the foundations and objectives of the copyright system.¹ In view of the breadth of this topic, on which so much could be written without fear of exhausting it, I will limit myself in the following pages to a brief overview of the different arguments put forward in support of the creation of the copyright system. The study of the objectives of copyright law, both under the American copyright and the continental European *droit d'auteur* systems, is not a purely academic question: the objectives pursued by each system constitute an important factor in the determination of the scope of rights conferred on rights owners. In the presence of uncertainties in the law, lawmakers will have the tendency to revert to the rationales behind particular provisions in order to interpret, apply, or modify them. The fact that a particular copyright regime is based primarily on utilitarian principles, rather than on natural law principles, gives an indication as to where the balance rests between the conflicting interests of the rights holders and the public.

The American copyright and the continental European *droit d'auteur* regimes are well known as opposites. One is said to pursue utilitarian objectives, while the other derives from the author's personality rights. Several commentators have attempted to reconcile the historical foundations of both regimes and to show that the differences between the American

¹ For a detailed account of the objectives of the copyright system, see: Strowel 1993; and Grosheide 1986 and the references cited therein.

copyright and the *droit d'auteur* regimes should not be overemphasised.² The movement of harmonisation of copyright principles at the international level has led countries from the *droit d'auteur* tradition to adopt measures more akin to public interest considerations and countries from the copyright tradition to recognise concepts which had until then remained foreign to their legal regime. Moreover, as Davies points out, while the world generally tends to be divided into countries of common law tradition and those of civil law tradition, the considerable differences existing among the national systems make it difficult to draw a distinct and consistent line between the two groups.³ In fact, as will become obvious later on in this book, there are substantial differences of approach in each tradition. Although the foundations and objectives of the copyright system could be subdivided into several components,⁴ I focus in the pages below on three main arguments: the natural rights argument, the utilitarian argument and the economic argument.

2.1.1.1 *Natural Rights Argument*

Centred on the person of the author, the natural rights argument holds that 'all human beings who create works of the mind are entitled to a specific right embracing protection of their moral and economic interests and covering all use of their works'.⁵ This statement can be broken down into two elements: the 'personality rights' element, and the 'reward' element. Both elements find their justification in the ideology of the 'personal creation', i.e., in the intimate relationship that the authors entertains with their work.⁶ Both attest to an essentially individualistic approach to the copyright protection, where the 'reward' argument puts the accent on the material interest of the author (i.e., exploitation rights), while the 'personality rights' argument concerns the immaterial interest of the author (i.e., moral rights).⁷ The natural rights theory evolved as a result of the accentuation of the individuality throughout the Renaissance and Enlightenment periods, which culminated in the French Revolution of 1789. According to the natural rights philosophy, authors' rights are not created by law but always existed in the

² See: Sterling 1998, p. 302; Davies 1995, p. 964; Strowel 1993, p. 144; Ginsburg 1991, p. 125-289; and Grosheide 1986, p. 11.

³ Davies 1995, p. 964-65.

⁴ See: Grosheide 1986, pp. 128-145, where the author distinguishes no less than seven rationales behind the adoption of the copyright system.

⁵ Sterling 1998, p. 306.

⁶ Seignette 1994, p. 20.

⁷ Grosheide 1986, p. 131.

legal consciousness of man.⁸ This philosophical conception is inspired by John Locke's *Second Treatise of Civil Government* of 1690. In his chapter on the justification of individual property, Locke wrote:

‘Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.’⁹

Although Locke was referring to physical property, his theory undeniably applies to intellectual property. Following Locke's postulation, the author, through her intellectual labour, has a right on her own creation. In modern times, Locke's theory has been extended thereby recognising that an author should be able to profit from the fruits of her intellectual labour, provided that ‘enough and as good’ is left for others.¹⁰

The naturalist approach is generally associated with the continental European *droit d'auteur* tradition, above all with the French and German systems. In France, the natural rights argument has gained renewed importance in the copyright literature of the last fifty years, where the ‘personality rights’ element has been to the fore.¹¹ This approach is often said to find its origins in 1791 with the famous words of Le Chapelier: ‘the most sacred, the most invulnerable, and (...) the most personal of all properties is the work, fruit of the intellectual thought of its writer.’¹² Contemporary scholars rely on the natural rights theory to insist that moral rights constitute the most important aspect of the French *droit d'auteur* system. In Germany, the author's immaterial interest in her work is protected under Article 5 of the *Grundgesetz* (GG), which guarantees freedom of expression, and under Article 1(2) of the GG, which guarantees the author's

⁸ Hugenholtz 2000e, p. 344.

⁹ *Second Treatise of Civil Government*, Chap. 5, sec. 27.

¹⁰ Spector 1989, p. 270; Gordon 1993, p. 1609.

¹¹ Lucas and Lucas 1994, p. 34.

¹² Strowel 1993, p. 90.

right to personality. The author's material interests are protected as a property right guaranteed under Article 14(1) of the GG.¹³ Similarly, the interests of authors have received protection under Article 27(2) of the Universal Declaration of Human Rights, which guarantees 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'. This provision has been invoked on occasion to support the claim that copyright constitutes a human right.¹⁴ And although the American copyright regime is officially based on utilitarian principles, natural rights arguments are not entirely absent from the courts' and commentators' analysis of the foundations of the copyright system.¹⁵

2.1.1.2 *Utilitarian argument*

However, the natural rights argument has failed to explain certain aspects of the copyright regimes,¹⁶ which not only protect the individual interests of the author, but clearly follow public interest objectives as well. Following the utilitarian argument, the primary objective of the copyright system is to promote the social good, by encouraging the creation and the dissemination of new works to the public. This theory is based on the principle of utility, or the ability of an action to please individuals and more particularly its ability to please as many individuals as possible, thereby achieving 'the greatest good for the greatest number'. Late eighteenth and nineteenth century English philosophers and economists Jeremy Bentham and John Stuart Mill established that human behaviour is limited to the extent of avoiding as much 'pain' and seeking as much 'pleasure' as possible by way of action. The utility of any action, therefore, would depend upon the minimisation of 'pain' and maximisation of 'pleasure' resulting from it in the largest group of people possible. The role of government is to, as a result, achieve utility by this simple 'pleasure-pain scale' for any action, with the most favourable action giving the most pleasure to the largest number of individuals possible. The way the legislator usually achieves the social good is by rewarding and punishing individual actions to induce society to follow a desired path.

The utilitarian approach is generally associated with the American copyright law system. The U.S. Constitution leaves no doubt as to the

¹³ Kirchoff 1988, p. 11.

¹⁴ See: Dessemontet 1998, p. 113; and Vivant 1997, p. 60; Strowel 1993, p. 157.

¹⁵ Waldron 1993, pp. 848-849; Ginsburg 1991, p. 125; and Yen 1990, p. 517.

¹⁶ Dommering 2000, p. 449.

utilitarian basis of the American copyright regime. Congress has indeed been given the power to legislate in the field of copyright ‘to promote the Progress of Science and Useful Arts’.¹⁷ The adoption of the laws on copyright is subservient to a specific policy goal: it is a means to an end. As the Supreme Court has constantly reaffirmed, the economic philosophy behind the clause empowering Congress to grant copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts’.¹⁸ The reward to the owner therefore becomes a secondary consideration under American copyright law.¹⁹ The focus of the utilitarian argument inside copyright law is thus to find a balance between those aspects of the common good that are best served by recognising intellectual property rights and those that are best served by preserving the public domain and disseminating information.²⁰

In this sense, I believe that the ‘incentive’ argument put forward by the utilitarians differs significantly from the ‘reward’ argument recognised by the naturalists. Admittedly, the utilitarian ‘incentive’ and the naturalist ‘reward’ are both concerned with the author's material interests and this might explain why these concepts are sometimes confused with each other.²¹ But the ‘reward’ is attached to the person of the author and is granted as compensation for her creative effort, whether or not it can serve any other possible benefit to society. On the other hand, the ‘incentive’ is awarded to the author with a view to achieving a certain result for the benefit of society. If the social good is deemed to be better served by the preservation of the free circulation of ideas, then there is no reason to give authors an economic incentive in the form of an intellectual property right. From this perspective, one can easily understand that the determination of the scope of the utilitarian ‘incentive’ plays an important role in the dissemination of new works to the public. The determination of the form of the author's ‘incentive’ to create new works may also serve as a tool in the hands of lawmakers for example in the maintenance of free competition, the defence of freedom of speech values,²² the elaboration of an information policy, and the enhancement of democracy.²³

¹⁷ U.S. Constitution, art. I, cl. 8, § 8.

¹⁸ *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

¹⁹ *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340.

²⁰ Waldron 1993, p. 849.

²¹ Grosheide 1986, p. 128.

²² *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539 (1985).

²³ Netanel 1996, p. 325; and Elkin-Koren 1996, p. 217.

Even in countries like France and Germany, where the copyright regimes are strongly rooted in natural law principles, the notion that the law must preserve a balance between the interests of authors and those of users is generally accepted.²⁴ Contrary to French or Dutch copyright law, the public interest dimension of the German copyright system is expressly laid down in the German constitution. While the economic rights granted under the German Copyright Act have been recognised as a form of constitutionally protected property, these rights must also serve the public interest pursuant to Article 14(2) of the GG.²⁵ This requirement is unique to Germany and is known as the principle of *Sozialbindung*, according to which the legislator has the explicit task of determining the content and limits of property rights in a manner that not only takes account of the interests of authors, but also of those of the general public. Among the different public interest objectives pursued by the continental European copyright regimes are the safeguard of fundamental freedoms, including freedom of expression, the right to privacy,²⁶ and the promotion of culture.²⁷ It has been argued for example that without the copyright system, there would be no work to protect with freedom of expression and that the latter would be a dead letter.²⁸

2.1.1.3 *Economic argument*

Derived from the utilitarian approach, the economic analysis approach is increasingly used by American commentators and courts to explain the underpinnings of specific legal institutions, such as that of property.²⁹ The economics approach looks at resources as something that needs to be exploited to maximise the collective welfare of the society. Over the last thirty years, the principles of economic analysis of the law have occupied a prominent place in American literature on intellectual property law.³⁰ During this time, a number of schools of thought have put forward somewhat divergent views and premises concerning the economic foundations and objectives of intellectual property law. I choose to focus here on the theories set forth by the Chicago School of Economics and its related schools of thought, most notably neo-classical economics, because they represent in my

²⁴ Sirinelli 1998, p. 27; Hugenholtz 1997, p. 5; Lepaulle 1927, p. 1; and Renouard, vol. 1, 1838, p. 437.

²⁵ Melichar 1999, p. 737.

²⁶ See: Hugenholtz 1989, pp. 150-70.

²⁷ Dommering 2000, p. 449; Schricker 1999, p. 7; and Grosheide 1986, p. 137.

²⁸ Haeck 1998, p. 36.

²⁹ Croskery 1993, p. 631.

³⁰ Mackaay 1990, p. 894.

opinion the most commonly accepted point of departure for an analysis on the subject.

The theory developed by the Chicago School postulates that, in a perfect market economy,³¹ the attribution of property rights or 'individual entitlements' offers the most efficient solution to the allocation of scarce resources among individuals. If there were no private property rights over a resource or if these rights were not well defined, there would be a lack of incentive to the users of the good to make the most efficient use of that good. In general, property rights are deemed economically efficient if they are exclusive, transferable, and enforceable.³² Exclusivity ensures that the owner of the good is the only one able to participate in the profits generated by the use of that good. Being the only one to benefit from the good, the owner will have the incentive to make use of that good in the manner that best suits her interest.³³ Transferability ensures in turn that, absent any transaction cost,³⁴ the control over the good can be transferred to anyone able to make a better use of it. Subsequent transfers of the good to persons that are in a position to make the best use of it tend to maximise profits and thereby to maximise social welfare. Enforceability guarantees that property rights are secure from involuntary seizure or encroachment by others.

Contrary to tangible goods, like cars, food, or clothing, intangible goods like copyrighted works have the characteristics of a public good, that is, that they are partially non-excludable and non-rival. The characteristic of non-excludability may be defined as follows: once a good is produced, it is impossible to prevent anyone from consuming it, even if they do not want to pay for it, so that the good benefits everyone. Typical examples of non-excludable goods are the traditional governmental services, like national defence and the legal system. If exclusion is impossible, then the price system cannot be used, because consumers have no incentive to pay. Those who refuse to pay will get a free ride. If a sufficiently large number refuse to pay, the good will not be produced. Because of the problem of non-

³¹ Perfect market conditions are said to exist when all resources are fully appropriated, where there are many small firms in the market (firms are price taker) that produce homogeneous goods, and where economic agents are perfectly informed. See: Strowel 1993, p. 200 and ff.; and Cohen 1998a, p. 474.

³² Strowel 1993, p. 196.

³³ Lehmann 1985, p. 531.

³⁴ Transaction costs are traditionally defined as the ex ante and ex post costs of completing a transaction. The ex ante costs include the expense of searching for a trading partner, specifying the product(s) to be traded and - most importantly - negotiating the price and contract. The ex post transaction costs relate to the costs associated with the enforcement and the performance of the contract.

excludability, the private sector will not usually produce public goods or will produce at sub-optimal quantities. In turn, a good is non-rival when the consumption by one citizen does not affect the consumption level of any other citizen. Television transmission is a non-rival good: having one more viewer tune in to a television channel involves no additional cost, even though this action would result in additional consumption taking place.³⁵ Expressed in more economic terms, a good is said to be non-rival if consumption of additional units of the good occurs at zero or very low marginal social cost. Since the socially optimal price of a non-rival good or service is equal to the marginal cost of consumption – e.g., zero – private supply of the good is likely to be unprofitable. Thus, although private production of non-rival could be possible, the private sector will produce sub-optimal quantities.³⁶

Copyrighted works are thus non-excludable and non-rival goods, because once produced, the social cost of their use by any additional individual is zero. The information contained in a book is no less available for other users, and no new unit of the information needs to be produced to satisfy the need of other users. On the other hand, the *communication* of the information contained in that book is of course a rival good: to have access to it, people must buy the book and spend time and effort reading and understanding it.³⁷ The production and consumption of public goods is characterised by under-production or over-consumption (free-riding).³⁸ Absent public involvement, the private sector would provide sub-optimal amounts of public goods. The copyright regime has therefore been adopted to overcome the problems associated with the production of public goods: it allows authors to appropriate the fruits of their intellectual labour and makes the private production of such goods possible, which in turn maximises the collective welfare of the society. In theory, therefore, copyrights are economically justified since they give authors incentives to create while maintaining the public's access to their works.³⁹ However, whether the grant of copyrights has actually an overall effect on the creative process has never been demonstrated empirically.

Legal literature traditionally relies on one line of argumentation to describe the foundations and objectives of a given national copyright regime. Hence, the French *droit d'auteur* system is recognised for its naturalist

³⁵ Nicholson 1989, p. 727.

³⁶ Belli 1997, p. 6.

³⁷ Benkler 1999, p. 424, fn. 272.

³⁸ Mackaay 1986, p. 35.

³⁹ See: Landes and Posner 1989, p. 325.

approach, where copyright is an absolute, unrestricted, and essentially individualistic natural right.⁴⁰ American copyright law by contrast is explained mostly in utilitarian terms: the primary objective of the copyright system is to promote the social good, by encouraging the creation and the dissemination of new works to the public. Between these two poles, German and Dutch copyright laws espouse the natural rights theory, but at the same time leave ample room for public interest considerations. While international copyright harmonisation efforts have reduced the gap between the continental European and the American copyright systems, the different philosophy behind each system still plays a determinative role in the specific area of limitations on copyright, as will become clearer later on in this book.

2.1.2 LIMITATIONS INSIDE THE COPYRIGHT SYSTEM

The objectives set out above are generally met by granting authors exclusive rights in their works. The two most important prerogatives recognised under the copyright regime are the rights owner's exclusive right to authorise or prohibit the reproduction of a work, and its communication to the public. At the same time, all copyright regimes share a number of inherent limits that are designed to promote the dissemination of new works and to ensure the preservation of a vigorous public domain.⁴¹ These limits are the fixed duration of the copyright protection, the requirement of originality, the idea/expression dichotomy, and the exhaustion or first sale doctrine. Hence, copyright protection is not perpetual. It typically lasts for the life of the author plus seventy years after her death.⁴² When the protection of a work lapses, the work normally falls into the public domain for everyone to freely reproduce or communicate to the public. Thus, part of the public domain is composed of works once subject to copyright, but created so long ago that the copyright has since expired. But the public domain also comprises elements of copyrighted works that copyright does not protect. The principle according to which copyright protection vests only in original works contributes also in maintaining the strength of the public domain. The level of originality necessary to obtain protection is the one criterion used to distinguish protectable from non-protectable subject matter. Corollary to the requirement of originality is the principle that copyright only

⁴⁰ Grosheide 1994, p. 207.

⁴¹ Litman 1990, p. 975.

⁴² Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, Official journal No. L 290, 24/11/1993, P. 9 – 13; in the United States: Pub. L. 105-298, 27 October 1998, 112 Stat. 2829.

protects the form of expression and not the underlying ideas.⁴³ Anyone may communicate or reproduce the ideas contained in copyrighted material provided that the form of expression is not also reproduced.⁴⁴ Finally, according to the exhaustion or first sale doctrine, once a work is sold or distributed on a specific territory with the consent of the rights holder, the latter may not control or prevent the further distribution of that work. Some exceptions to this rule have been made however with respect to the rental and public lending of works.

Apart from the copyright regime's inherent limits, a balance of interest between encouraging the creation and the dissemination of new works is further achieved through the recognition of limitations on the rights owners' exclusive rights. In this sense, limitations are but one tool in the hands of lawmakers for defining the scope of a rights owner's exclusive rights.⁴⁵ Several words are used to refer to the derogations from copyright, such as 'limitations', 'restrictions', 'permissions', and 'exceptions', which all raise different connotations in the mind of the reader.⁴⁶ Although the term 'exception' would seem more widely accepted, certainly in international instruments like the Berne Convention and the new European Directive on Copyright in the Information Society, I refer in this book to the general term of 'limitations' (i.e., *bepenkingen* or *Beschränkungen*). The reason for this choice is that the term 'limitations' has the merit of being more neutral than other terms: it is to be understood as permitting certain acts that will not constitute an infringement of copyright. The word 'limitations' is also broader than other words: it encompasses all possible types of restrictions on the rights holder's copyright, ranging from exemptions to the mandatory collective administration of rights. Furthermore, the term 'limitations' is, in my opinion, more capable of taking account of the characteristics of each copyright regime under review in this book. Let me now examine the general structure of the limitations, and more particularly let me look at whether the system of limitations is open or closed and at the different types of limitations.

⁴³ Hugenholtz 1989, p. 166.

⁴⁴ Johnston 1996, at p. 6; see for example: U.S. Copyright Act 1976, § 102(b): 'In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work'.

⁴⁵ Dreier 2000, p. 307; Hugenholtz 1997, p. 14; and Legal Advisory Board 1997, § 7.

⁴⁶ Spoor 1999, p. 29.

2.1.2.1 *Open or closed system of limitations*

As a number of authors have observed, the essential difference between Europe's 'naturalist' conception of the author's rights regime and the American notion of a 'utilitarian' copyright system is immediately visible in the way the rights and limitations are expressed in legislation.⁴⁷ Generally speaking, the scope of rights granted to creators can be stated either in broad or in narrow terms. When creators enjoy broad exclusive rights, which encompass all possible uses of a work, some limitations on the exercise of their rights may be justified to preserve, in specific circumstances, the public's right to make unauthorised uses of protected material. By contrast, when the rights are stated in narrow terms, thereby excluding certain acts from the protection regime, exemptions in favour of users may not be needed at all. The choice of a broad or narrow formulation of rights and limitations in a given copyright act ultimately determines how a court will let the balance tip in a particular case between protecting the author's rights and allowing the public to make certain unauthorised uses of copyrighted material.

In continental Europe, the economic rights are generally drafted in flexible and open terms, allowing the exclusive rights to encompass a wide range of exploitation acts, while limitations are strictly defined and closed.⁴⁸ Accordingly, European courts and commentators tend to construe the rights owner's exclusive rights as broadly as possible, whereas limitations are interpreted restrictively and are not to be applied by way of analogy.⁴⁹ This is certainly true in France and Germany, where commentators insist that the lists of limitations provided under the French Intellectual Property Code (CPI) and the German Copyright Act are exhaustive, and that whenever there is any doubt about the limitations, these must be interpreted in favour of the author.⁵⁰ However, the French courts have accepted one exception to this general principle in cases where publicly accessible works of art are shown on television or in films. In *Société Civile ADAGP v. Société ADR Productions*,⁵¹ the Court of Appeal of Paris ruled in favour of the defendant, thereby allowing the unauthorised reproduction in the opening scenes of a film of a fresco painted on the outside wall of a building in Marseilles. The Court of Appeal held that the principle of exclusivity, which is subject to the

⁴⁷ Hugenholtz 2000e, p. 352.

⁴⁸ Strowel 1993, p. 144.

⁴⁹ Lucas and Lucas 2001, p. 253; Fromm and Nordemann 1998, p. 377; and Schricker 1997, p. 139.

⁵⁰ Lucas and Lucas 2001, p. 287; Melichar 1999, p. 742.

⁵¹ Cour d'appel de Paris, 1st Ch., section A, 14 september 1999 in *Légipresse* no. 169, Marsh 2000, p. 33.

limitations of Articles L. 122-5 and 122-6 of the CPI, must take account of the principle of the unrestricted reproduction of landscapes. Such reproductions have therefore been tolerated under two conditions, that the work reproduced be located in a public place and that the reproduction only serve as an accessory to the main subject of the incorporating work.⁵²

In the Netherlands, limitations are generally seen as an integral part of the copyright system: they do not constitute exceptional measures and they are to be interpreted in the same way as other provisions in the Copyright Act.⁵³ Whereas the list of limitations enumerated in the Dutch Copyright Act is usually considered exhaustive, the Dutch Supreme Court has opened the door to a 'fair use' type of limitation in the *Dior v. Evora* case.⁵⁴ This case involved the reproduction of protected perfume bottles in advertisements by a retailer offering parallel imported goods for sale. As Hugenholtz explains, 'the Court agreed that no express exemption applied to the facts of the case, but went on to hold that there was room to move *outside* the existing system of limitations, by balancing interests on a rationale similar to that underlying the existing exemptions'.⁵⁵ Arguably, article 23 of the Dutch Copyright Act, according to which the owner of a work of applied art is entitled, without the consent of the copyright owner, to exhibit the said work publicly or to reproduce it in a catalogue in order to sell it, could have been applied directly to the reproduction of perfume bottles in an advertisement brochure.⁵⁶ Nevertheless, some commentators saw this decision as a step towards the recognition of a fair use-type defence,⁵⁷ while others have interpreted it merely as a form of reasoning by a kind of analogy well-known in other areas of the law.⁵⁸ In fact, the idea was put forward by the *Commissie Auteursrecht*, an advisory body to the Department of Justice, of introducing into Dutch law a 'catch-all' provision like the fair use defence, that would be better able to adapt to technological changes.⁵⁹ The Minister of Justice responded favourably to the proposal.⁶⁰

⁵² Gallot Le Lorier and Varet 2000, p. 35.

⁵³ Spoor and Verkade 1993, p. 190.

⁵⁴ HR 20 October 1995 (*Christian Dior/Evora*), reproduced in *Informatierecht/ AMI* 1996, 51; see: Grosheide 1996, p. 43.

⁵⁵ Hugenholtz 2000e, p. 353.

⁵⁶ Kabel 1999, p. 241.

⁵⁷ Dommering 2000, p. 454; Hugenholtz 1999, p. 8; Alberdingk Thijm 1998, p. 147.

⁵⁸ Grosheide 1996, p. 43.

⁵⁹ Commissie Auteursrecht 1998, p. 45.

⁶⁰ Letter from the Minister of Justice to the Second Chamber of Parliament, 10 May 1999, Second Chamber, Session 1998-1999, 26 538, No. 1, § 16.

The principle according to which economic rights are drafted in flexible and open terms while limitations are strictly defined and closed, also applies at the level of the European Union. Article 5 of the new Directive on Copyright in the Information Society provides for an exhaustive list of limitations,⁶¹ which means that Member States may not adopt any limitation other than those in the list. All but one are optional. During the negotiation process, the drawing up of the list of limitations proved highly controversial. Between the initial introduction of the proposal in December 1997 and the final version of the Directive in April 2001, the list of limitations has been considerably lengthened, going altogether from ten to twenty-three limitations. A 'grandfather clause' is also included in this list, which allows Member States to continue to apply existing limitations in minor cases for analogue use only. As a result, the actual harmonisation of the laws of the Member States regarding the limitations on copyright is very improbable. However, for some Member States, like the Netherlands and Germany, only minor amendments will have to be made to their national laws to comply with Article 5 of the Directive, since most if not all of the existing limitations have been incorporated into the list of the Directive.

By contrast, economic rights are narrowly defined under the U.S. Copyright Act and are limited by the open defence of fair use, which leaves courts sufficient room to interpret a variety of unauthorised uses as non-infringing.⁶² The fair use defence constitutes in fact the main form of limitation on the exercise of exclusive rights under American copyright law. Initially developed by the English courts as a remedy in equity allowing the unauthorised reproduction of copyrighted material in certain circumstances, the doctrine of fair use was codified in Section 107 of the U.S. Copyright Act of 1976, which reads as follows:

'Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -

⁶¹ Directive on Copyright in the Information Society, Recital 32: 'Whereas this Directive provides for an exhaustive enumeration of exceptions to the reproduction right and the right of communication to the public.'

⁶² Strowel 1993, p. 144 and f.; Lucas 1998, p. 173; and Hugenholtz 1999, p. 8.

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.⁶³

Unlike the limitations recognised under continental European author's rights law, the defence of fair use can be raised in relation to a large number of different factual circumstances, which courts examine on a case-by-case basis according to the factors laid down in Section 107 of the Act. The fair use doctrine basically incorporates as one open limitation the many closed limitations that exist in the continental European authors' rights systems. In practice, the doctrine has been raised in an endless variety of situations and combinations of circumstances and it was the legislator's intent, at the time of its codification in the Act, that the doctrine evolve with time, especially in view of rapid technological change. The doctrine of fair use is thus an open limitation on copyrights, which should not be interpreted restrictively. Although courts have considered and ruled upon the fair use doctrine on numerous occasions, no real definition of the concept has ever emerged and each case raising the question must be decided on its own facts.⁶³

2.1.2.2 *Forms of limitations*

Whether formulated in open or closed terms, copyright limitations can generally be classified into four main categories. The most common form of limitation recognised in favour of users consists of a full exemption from the scope of the rights owner's exclusive right, where the right to prohibit is withdrawn without monetary compensation to rights owners for the use of their work. The second main type of limitation is the statutory licence, which has become a popular solution for legislatures grappling with the inevitable conflicts of interests that arise as technology allows new forms of use of copyrighted material. Under a statutory licence, the copyrighted material may be used without authorisation from the rights owner but against payment of an equitable remuneration. Contrary to negotiated licences, the amount of remuneration to be paid to rights owners under a statutory licence is fixed by

⁶³ Leval 1990, p. 1105.

the legislator or by some regulatory authority.⁶⁴ The third but already less frequent form of limitation on copyrights is the compulsory licence. When subject to a compulsory licence, a rights owner is obliged to grant individual licences, at a price and under conditions to be determined jointly with the user or fixed by the authorities where agreement cannot be reached. The last category of limitation has emerged in recent years also in response to the increasing complexity of legal relations flowing from technological developments. The mandatory collective administration of rights is seen as a weaker and less constraining form of limitation on copyrights, which only requires that certain rights be exercised exclusively through a collective rights society.⁶⁵ In this section, I give an overview of these different types of limitations.

2.1.2.2.1 Exemptions

In each case where the public interest justifies overriding the private rights of rights owners on their works, users obtain the right to utilise works on an authorisation-free and remuneration-free basis. This authorisation-free and remuneration-free right of the user to make unauthorised use of a copyrighted work is the form of limitation to which I refer in this book as an 'exemption'. Exemptions essentially carve out certain uses from the scope of the rights owner's exclusive right to prohibit, without giving rise to the payment of compensation for the use made of the work. In this sense, exemptions constitute the most serious encroachment upon the copyright owner's exclusive rights.⁶⁶ But their creation is most often justified by the importance that the exempted uses bear on freedom of opinion, of information and of the press, as well as on the dissemination of information and culture. In Europe, the scope and number of exemptions recognised under national law vary widely from country to country. The most common exemptions provided under continental European copyright legislation allow quotations, and reproductions for the purposes of private use or news reporting, for critical analysis and comment, for scientific research and for the purposes of facilitating administration and justice. In some countries, exemptions are also recognised to the benefit of particular types of users, such as educational institutions, newspapers and broadcasting organisations.

⁶⁴ Elsner 1997, p. 2.

⁶⁵ Sterling 1998, p. 358.

⁶⁶ Schricke 1999, p. 736.

The United States fair use doctrine remains one of the most important limitations on the exclusive right of copyright owners under American law. Although not an exemption in the strict sense of the word, the fair use doctrine has nevertheless some of its attributes. Indeed, just as in the case of exemptions, uses made of copyrighted material under the fair use doctrine are accomplished on an authorisation-free and remuneration-free basis. Rather than exempting certain uses from the right to prohibit of the rights owner, the fair use doctrine is a defence raised in copyright infringement actions. Besides codifying the fair use doctrine, the Copyright Act of 1976 brought significant changes to the American copyright law by introducing specific exemptions and limitations into the Act. Sections 108 to 121 of the Copyright Act now comprise an extensive list of exemptions from the scope of exclusive rights. These provisions exempt a wide range of acts, such as the performance or display of a work in the course of teaching activities, at a place of worship, and at an agricultural or horticultural fair or exhibition,⁶⁷ the reproduction of works by libraries and archives,⁶⁸ as well as the secondary transmission of works by public broadcasting organisations.⁶⁹

2.1.2.2.2 Statutory licences

That limitations on copyright are a tool in the hands of legislators to balance the interests of rights owners and users is no more evident than in the case of statutory licences. Uses permitted under a statutory licence are allowed to take place without authorisation from the rights owner but against the payment of an equitable remuneration. Two main arguments have been put forward in support of the creation of statutory licences. According to the first argument, this type of limitation would constitute an appropriate compromise in cases where the right of the copyright holder to control certain forms of use would run counter to important public interests, but where such uses are not so paramount that they should occur on a remuneration-free basis.⁷⁰ The second argument justifying the creation of statutory licences is that they contribute to the alleviation of the symptoms of market failure raised by constant technological developments, which make effective control of exclusive rights practically impossible.⁷¹ Techniques such as reprography and home-taping have invariably made the reproduction of copyrighted

⁶⁷ U.S. Copyright Act, § 110.

⁶⁸ U.S. Copyright Act, § 108.

⁶⁹ U.S. Copyright Act, § 111.

⁷⁰ Fromm and Nordemann 1998, p. 381; and Neumann 1994, p. 46.

⁷¹ Visser 1996, p. 51.

material easier, cheaper and of better quality. In the necessity of providing a solution to this form of market failure became pressing in the late 1960's, when the normal exploitation of works and the legitimate interests of rights holders began to be seriously affected by the massive reproduction of copyrighted works. To cope with the more severe problems of market failure, certain exclusive rights of the rights owners were replaced by a right to equitable remuneration.⁷²

Opinions are divided as to the desirability of establishing statutory licences. Some authors argue that such licences are the result of a compromise between the traditionally protected interests of creators and the pressures exercised by representatives of the new copyright industries and that these licences ultimately only benefit economic intermediaries. Strowel sees in the standardisation of non-voluntary licences an illustration of the socialisation of copyright law, that is, of the erosion of the principle of exclusive rights.⁷³ Another objection to statutory licences relates to the fact that not only is the amount of remuneration established by the legislator generally too low to reflect the real value of a use, but rights owners thereby lose all negotiating power to obtain 'more reasonable' remuneration.⁷⁴ Interestingly, the new European Directive on Copyright in the Information Society does not refer to the notion of 'equitable remuneration', but rather to that of 'fair compensation'. The concept of fair compensation was introduced as a political compromise designed to accommodate the legal systems of all Member States. However, Recital 35 of the Directive specifies that:

'In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In

⁷² Stewart and Sandison 1989, p. 84.

⁷³ Strowel 1993, p. 286.

⁷⁴ Fromm and Nordemann 1998, p. 380.

certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.’

In the United States, the same critique has been formulated as follows: ‘Such licensing schemes treat all works alike, even though their value in a competitive marketplace would likely vary dramatically. It also treats all users alike. It alters the free market relationship between buyers and sellers.’⁷⁵ For others, however, the substitution of the exclusive right to prohibit the use of a work with a right to remuneration is a legitimate compromise between the interests of authors and those of the public: on the one hand, the interests of rights owners are preserved, insofar as a right to an equitable remuneration is granted and on the other hand, the public interest is taken into account with the guarantee that works will be available.⁷⁶

Admittedly, these views are influenced by their author's conception of the foundations of the copyright regime. Naturalists will tend to disapprove of any restriction on the rights owner's exclusive rights, in the absence of important public interest considerations, while authors who base the existence of the copyright regime on arguments of public interest or information policy may accept such limitations more easily.⁷⁷ To some extent, the objections expressed above are reflected in national legislation. In France, the legislator gave in to the economic necessity of adopting a statutory licence regime only to cope with the problems raised with respect to the private copying of sound and audio-visual works. In the eyes of the French lawmakers and commentators, if a public interest is not strong enough to justify the creation of an exemption, then it is not strong enough to justify the creation of any limitation at all. In the Netherlands and Germany, statutory licences have been put in place not only as a cure for symptoms of market failure in areas like home-taping and reprography, but also on the basis of public interest considerations, such as the use of works for teaching purposes.⁷⁸ In the United States, statutory licences exist, for example, with respect to the home taping of digital sound recordings and the secondary retransmission of works. Like the French legislator, the American Congress considers that if a use does not fall under the fair use doctrine or one of the many exemptions listed in the Copyright Act, rights owners should be able to negotiate the amount of royalties to be paid for the use of their work.

⁷⁵ NII Task Force, White Paper, September 1995, p. 52.

⁷⁶ Neumann 1994, p. 47.

⁷⁷ Strowel 1993, p. 635.

⁷⁸ Melichar 1999, p. 743.

2.1.2.2.3 Compulsory licences

The terms ‘statutory’ and ‘compulsory’ licences are sometimes used interchangeably. The essential difference between compulsory and statutory licences lies in the fact that the compulsory licence is really an obligation on the rights owner to contract with the user. Thus, contrary to the statutory licence where the user is free to use the work without prior authorisation provided that she pays remuneration, under a compulsory licence regime, the user has no right to make use of the work without the prior authorisation of the rights owner.⁷⁹ On the other hand, the rights owner does have the duty to grant a licence to those users that request one. This form of limitation on copyright acts primarily as a restriction on the rights holder's freedom to choose her contracting partner, rather than as a restriction on the scope of the exclusive right. The compulsory licence has in principle no effect on the rights owner's freedom to decide the content of the contract, provided, of course, that the conditions are reasonable.⁸⁰

In practice, compulsory licences are a common phenomenon in antitrust cases, where they are applied as a judicial remedy to control or to prevent anti-competitive behaviour.⁸¹ In certain well-defined circumstances however, the legislator may decide to impose on rights owners a legal obligation to contract in the form of a compulsory licence. Rights owners are then required by law to grant the necessary authorisation to use their work, without being deprived of their right to negotiate the terms of the authorisation. If no amicable agreement can be reached between the parties, the administrative or judicial authorities are empowered to fix the amount of remuneration. The two best known examples of compulsory licences are the ones admitted under the Berne Convention concerning the broadcasting of literary and artistic works and the recording of musical works⁸². In practice, these compulsory licences have hardly ever been implemented into European national legislation, because they are seen as merely reflecting the particular interests of an industry rather than those of society as a whole.⁸³ In the United States, by contrast, a compulsory licence regime authorises the making and distributing of phonorecords of non-dramatic musical works,

⁷⁹ Rossbach 1990, p. 18.

⁸⁰ Melichar 1999, p. 749.

⁸¹ Stewart and Sandison 1989, p. 84; Schricker 1999, p. 736.

⁸² Berne Convention, art. 11*bis*(2) and 13(1).

⁸³ Del Bianco 1951, p. 168.

including the distribution of the phonorecord by means of digital phonorecord delivery.⁸⁴

2.1.2.2.4 Mandatory collective administration of author's rights

In certain circumstances over the years, rights owners have had a *de facto* obligation to administer their rights through collecting societies, because the effective individual exploitation of their works proved impossible. This is the case, for instance, for the right to perform musical works to the public, where the number of works and potential users is simply too great for any efficient clearance of rights to take place. On other occasions, the collective administration of rights is required under the law. In such circumstances, rights owners can only exercise their rights by assigning them to a collecting society, which exercises them on their behalf. Collecting societies then negotiate bulk-licensing agreements with users or user organisations. This form of bulk licensing has very similar economic effects for the rights holders to those of compulsory licences. In both cases, remuneration is established through a negotiation process between the parties, or in the absence of agreement, is fixed by the competent authority. In situations where copyrights can no longer be exercised efficiently by individual or corporate owners, the choice between a compulsory licence and a system of collective administration of author's rights is a delicate one, which is ultimately decided in accordance with the social and philosophical preferences of the country concerned.

Accordingly, the European Commission chose the route of the mandatory collective administration of rights with respect to cable retransmission rights. Consequently, pursuant to article 9(1) of the Satellite Broadcasting and Cable Retransmission Directive⁸⁵, Member States have had to ensure that the right of copyright owners to grant or refuse authorisation to a cable operator for a cable retransmission is exercised only through a collecting society.⁸⁶ In principle, this obligation to exercise one's rights through a collecting society does not affect the nature of the exclusive right to authorise or prohibit the use of the work. However, the exclusive right may no longer be exercised on an individual basis, only through a collecting society. Technically speaking, such a measure constitutes a condition to the

⁸⁴ U.S. Copyright Act, § 115.

⁸⁵ Council Directive 93/83/EEC of 27 September 1993 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, O.J. No. L 248 , 06/10/1993, p. 15-21.

⁸⁶ Sterling 1998, p. 358.

exercise of a right rather than a limitation on that right. In France, the problem of unauthorised reproductions by means of reprography has been solved by the mandatory administration of the reprography right, unlike most other Member States of the European Union where reprography is allowed under a statutory licence.⁸⁷ According to this provision, the publication of a work carries with it an automatic assignment of the author's reproduction right by means of reprography to a collecting society.

2.2 Justifications behind the limitations

Limitations on copyrights are designed either to resolve potential conflicts of interests between rights owners and users from within the copyright system or to implement a particular aspect of public policy. Technically, limitations should reflect the legislator's assessment of the need and desirability for society to use a work against the impact of such a measure on the economic interests of the rights holders. The outcome of this evaluation will most often determine the form of a particular limitation. This weighing process often leads to varying results from one country to the next. While legislators generally agree that certain unhindered uses of copyrighted material bring such clear benefits to society as to justify allowing these specific uses to take place without the rights owner's authorisation, they often disagree on the question whether these limitations are so fundamental as to be permitted on a remuneration-free basis. The main difference between systems lies therefore in a legislator's assessment of a particular limitation's importance for society in relation to the need to provide for the payment of an equitable remuneration to the rights owner.

Potential conflicts between the interests of rights owners and those of society take place at different levels and have different grounds. Some of these potential conflicts might concern particular types of uses, such as quotations, news reporting, parodies, or private, administrative or judicial uses. Other conflicts might relate to particular classes of works, such as computers or databases, whereas others may arise with respect to particular categories of users, like libraries, archives, and educational institutions. There are thus several reasons to limit the scope of copyrights so as to avoid such conflicts and maintain a balance between the interests of rights holders and users⁸⁸. In light

⁸⁷ Loi n° 95-4 du 3 janvier 1995, article 1 Journal Officiel du 4 janvier 1995 adding art. L. 122-10 to the Intellectual Property Code.

⁸⁸ See for example: WIPO Copyright Treaty, preamble: "The Contracting Parties, recognising the need to maintain a balance between the rights of authors and the larger

of this, limitations typically protect freedom of expression and the right to privacy, safeguard free competition, promote the dissemination of knowledge, or respond to symptoms of market failure. The defence of fundamental rights and freedoms, and freedom of expression and the right to privacy in particular, therefore constitutes one of the main justifications for the adoption of limitations on copyrights.⁸⁹ Other limitations are founded on the rules of competition law and industry practice. The promotion of culture and knowledge forms the basis of yet another category of limitations. Finally, some limitations are adopted essentially for practical reasons. This is the case, for example, when market conditions make bargaining between individual copyright owners and potential users of copyrighted material impossible or prohibitively costly, or when copyright owners are unable in practice to enforce their rights effectively against unauthorised users. Of course, certain limitations may have been adopted on more than one ground and the justifications underlying a particular limitation may change over time.

In the following pages, I analyse the rationales behind the adoption of limitations on copyrights under four separate headings. The first section examines those limitations that are based on the defence of fundamental rights, focussing on freedom of expression and information on the one hand, and the right to privacy on the other. The second section deals with the small number of limitations adopted for the regulation of competition and industry practice, and more precisely those provisions concerning the use of newspaper articles and computer programs. The third section pertains to limitations that are meant to promote the dissemination of knowledge, more particularly to limitations adopted for the benefit of public libraries, archives, and educational institutions. The final section of this chapter concerns limitations based on market failure considerations.

2.2.1 PROTECTION OF CONSTITUTIONAL RIGHTS

Tension can arise between the exclusive rights granted under a copyright act and the fundamental rights of users in several circumstances. Firstly, the recognition and exercise of exclusive rights on works impose a burden on freedom of expression of those who wish to use copyrighted material to convey their own message and on the right to information of those who simply wish to use the information and ideas contained in copyrighted

public interest, particularly education, research and access to information, as reflected in the Berne Convention have agreed as follows”.

⁸⁹ Hugenholtz 1997, p.18; and Melichar 1999, p. 735.

expression.⁹⁰ Specific limitations have thus been recognised in copyright law to allow users to make certain uses of copyrighted material in furtherance of their own freedom of expression and right to information. Another potential conflict arising from the grant to copyright owners of exclusive rights in their creation concerns the protection of the users' fundamental right to privacy. The relationship between copyright law and the right to privacy had remained largely unexplored until the advent of new technologies that allowed rights owners to control the use of their works right into each individual's home.⁹¹ Conflicts take place today about the scope of exclusive rights granted to copyright owners and consequently, about the breadth of the private use exemption. By permitting rights owners to control access, track, record and charge for all uses of copyrighted material, digital technology has brought a new dimension to the question of users' fundamental right to privacy.

2.2.1.1 Freedom of expression

Legal literature and case law give a number of justifications for the guarantee of freedom of expression. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment.⁹² Freedom of expression can be broadly defined as the freedom to communicate. This concept transcends mere speech and embraces the prerogative of every citizen to express herself by any means without prior restraint.⁹³ In most jurisdictions, freedom of expression extends not only to speech and press, but also to numerous areas where individuals or groups might feel the need to express themselves: in the political arena, in the media, in research, in assemblies, in the arts and culture, or in the course of lawful picketing and other social or political demonstrations. Freedom of expression also entails the freedom to gather and to impart information as an essential prerequisite to the shaping of one's opinion and beliefs.

In view of its importance for the individual and for society, freedom of expression has been enshrined as a fundamental right in the Universal Declaration of Human Rights⁹⁴ and incorporated thereafter in article 19 of the

⁹⁰ Netanel 1999, p. 9.

⁹¹ Koelman & Bygrave 2000, p. 37.

⁹² Nieuwenhuis 1997, p. 9.

⁹³ Abraham and Perry 1998, p. 164.

⁹⁴ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), art. 19.

International Covenant on Civil and Political Rights (ICCPR)⁹⁵, Article 10 of the European Convention on Human Rights (ECHR)⁹⁶ and Article 11 of the Charter of Fundamental Rights of the European Union.⁹⁷ Article 10 of the ECHR guarantees freedom of expression, i.e. the freedom to gather, to receive and to impart information and ideas, regardless of frontiers or media. Freedom of expression therefore encompasses not only the communicator's freedom to impart information to others but also, expressly recognised, the freedom of the recipient, or the public, to seek and receive information.⁹⁸ Freedom of expression is also guaranteed under article 11 of the French *Déclaration des droits de l'homme et du citoyen de 1789*, under article 7 of the Dutch *Grondwet* (Gw) and under Article 5 of the German *Grundgesetz* (GG). In the United States, free speech is guaranteed under the First Amendment of the Constitution, which states that 'Congress shall make no law (...) abridging the freedom of speech'. In the following pages, I give an overview of the limitations adopted as a safeguard of the user's freedom of expression, first in Europe and then in the United States.

Europe

The fact that, in principle, copyright law protects only the form of expression and not the underlying ideas, tends to limit the possible impact of copyright protection on freedom of expression. According to this principle, anyone may publish or reproduce the ideas of another contained in copyrighted material provided the form of expression is not also reproduced⁹⁹. While the idea/expression dichotomy 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 her form of expression in order to have effective reporting or criticism of her thoughts.¹⁰⁰ For example, it may be important for a news reporter or a critic to capture the

⁹⁵ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, art. 19.

⁹⁶ Convention For The Protection Of Human Rights And Fundamental Freedoms, Rome, 4 November 1950, Council of Europe, ETS No. 5, art. 10(1): '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.'

⁹⁷ O.J.E.C. 18 December 2000, C 364/1.

⁹⁸ De Meij 2000, p. 21.

⁹⁹ Johnston 1996, p. 6.

¹⁰⁰ Spoor and Verkade 1993, p. 5.

mood, the tone or the nuances of an address, which may not be possible without reproducing part of the speaker's form of expression. Historians, biographers, and scientists also need to be able to portray reality in a truthful manner in their own work, by relying on prior writings. As early as the beginning of the 19th century, authors recognised the importance for the creative process to be able to build on existing works and make certain borrowings from previous authors.¹⁰¹ As Kéréver points out in the case of polemic writings and political speeches:

'However, in the case of polemic writings – and political addresses or platforms obviously lend themselves to polemic – the polemist is 'justified' to quote the works of his adversary insofar as it is necessary to identify and authenticate the issues that he intends to challenge. *The quotation is even demanded by intellectual honesty, for fear that the author is suspected of deforming the challenged opinions.* These opinions being duly identified, it is the polemist's task to demonstrate through developments of his own the falsity or the dangers of that which he intends to combat. *To prohibit the freedom to quote in polemic matters would amount to paralyse freedom of expression in this field (...).*'¹⁰² (Emphasis added)

The ECHR provides that limitations on the freedoms guaranteed therein may be 'subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, (...) for the protection of the reputation or rights of others.'¹⁰³ Copyrights could thus be construed as a limitation on people's freedom of expression that is determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of authors and creators. However, limitations on copyright may in turn be perceived as ones that are determined by law solely for the purpose of securing due recognition and respect for the freedom of expression of others.¹⁰⁴ Most countries have thus enacted limitations on copyright designed to safeguard the user's freedom of speech and the public's right to information, and to promote the free flow of information.

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

¹⁰¹ Renouard 1838, t. 2, p. 17.

¹⁰² Kéréver 1996, p. 323.

¹⁰³ ECHR, art. 10(2).

¹⁰⁴ Spoor and Verkade 1993, p. 187; see also: District Court of Amsterdam, 8 July 1999 (*Anne Frank Fonds v. Het Parool*), in *Mediaforum* 1999/9, p. 252, §4.14.

rights holder's consent. While these limitations are generally subject to strict conditions of application, most of them take the form of exemptions thereby providing for no monetary compensation for the rights holders. It is deemed to be 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 fee¹⁰⁵. Among the numerous limitations that have been introduced into national legislation for the promotion of the free flow of information are the following:

1. The right to quote works or public addresses of critical, polemical, educational, scientific or information character for the purposes of criticism, news reporting;¹⁰⁶
2. The right to reproduce, make available, or broadcast political speeches and other public addresses;¹⁰⁷
3. The right for a daily or weekly newspaper or radio or television broadcast to reproduce 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;¹⁰⁸
4. The 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;¹⁰⁹ and
5. The right to reproduce works for the purposes of parody.¹¹⁰

In my opinion, the right to quote is the most important limitation for the safeguard of the user's freedom of expression as it is at the root of most other limitations on copyright. This right is, in fact, the only mandatory limitation under the Berne Convention. The right to quote and the right to reproduce works for the purposes of criticism and news reporting are generally subject to specific conditions of application, the scope and rigour of

¹⁰⁵ Schricker 1997, p.161.

¹⁰⁶ French CPI, art. L. 122-5, 3° (a); Dutch Copyright Act, art. 15a; and German Copyright Act, § 51.

¹⁰⁷ French CPI, art. L. 122-5, 3° (c); German Copyright Act, § 48.

¹⁰⁸ Dutch Copyright Act, art. 15; and German Copyright Act, § 49. Since the authorisation to make press reviews is partly justified by industry practice, this provision is examined in greater detail in subsection 2.2.2.1 below.

¹⁰⁹ Dutch Copyright Act, art. 16a); and German Copyright Act, § 50. See: BGH, 1 July, 1982, I ZR 119/80 (*Presseberichterstattung und Kunstwerkwiedergabe II*), in *GRUR* 1983/01, p. 28.

¹¹⁰ French CPI, art. L. 122-5, 4°.

which may vary from one country to another. In most cases, quotations are only allowed with respect to works that have been lawfully communicated or made available to the public.¹¹¹ It is also required that the name of the author and the source of the work be given in the quotation or reproduction. Often, legislation or case law will provide that quotations must be made in conformity with that which may be reasonably accepted in accordance with social custom and the number and length of the quoted passages must be justified by the purpose to be achieved.¹¹²

The French Intellectual Property Code (CPI) states that once a work is made available to the public, the author may not prohibit, subject to the indication of the name of the author and of the source, the making of analysis and short quotations justified by the critical, polemical, educational, scientific or information character of the work to which they are incorporated.¹¹³ The requirements of brevity and finality of the quotations have generally been interpreted restrictively. These requirements are assessed—taking account of both the nature of the first work, and that of the quoting work. With respect to artistic and plastic works, for example, the courts have refused to apply the exemption of quotation arguing that works are either reproduced partially and thereby violate the author's moral rights, or they are reproduced integrally and the reproduction is not a 'short' quotation any more.¹¹⁴ Quotations of musical or artistic works have also been declared inadmissible because none of the purposes enumerated in the act may be inferred from the incorporating second musical or artistic work. Furthermore, quotations of musical or artistic works can hardly comply with the legal obligations to indicate the source and to mention the name of the author in the second work. However, in the famous and controversial *Microfor* case, the *Cour de cassation* departed from the traditionally restrictive interpretation of the requirement of finality in the case of a second work that displayed an 'information character'.¹¹⁵ In this case, the newspaper *Le Monde* had brought a copyright infringement action against the makers of an electronic database that contained a chronological index of articles published in a number of newspapers: an index which was composed of the title and the reference to each article, as well as a summary of the subject treated. These summaries allegedly infringed *Le Monde's* copyright, since the quotations were not accompanied by any additional commentary or discussion inside the

¹¹¹ See: Kabel 1999, p. 237 and ff. where the author argues that the requirement according to which quotations can only be made from works that have been made available to the public is meant to protect the author's right to privacy and right of first publication.

¹¹² Guibault 1998, p. 25.

¹¹³ French CPI, art. L. 122-5, 3° (a).

¹¹⁴ Lucas and Lucas 2001, p. 281.

¹¹⁵ Cour de Cassation, 1st Ch. Civ., 9 November, 1983, in *RIDA* 1984/119, p. 200.

incorporating work. Contrary to its established jurisprudence, the Court ruled in favour of the defendant saying that, in the case of a work having an informative character like the one at hand, the collection and classification of short quotations taken from pre-existing works could constitute a valid quotation.¹¹⁶

The decision of the *Tribunal de Grande Instance* of Paris in *Fabris v. France*¹¹⁷ offers another example of the scope of the right to quote under French law. In this case, France 2 had broadcast a television news report on the paintings of Maurice Utrillo exhibited at the museum of Lodève, in which France 2 showed images of the paintings in their entirety without prior authorisation from the rights holder. Utrillo's assignee, Fabris, brought an action for copyright infringement against the broadcaster. Because the exemption for short citations provided under article L. 122-5, 3° of the CPI is not applicable to the reproduction of artistic works in their entirety, France 2 based its defence on the public's right to information as guaranteed under Article 10 of the ECHR. The Tribunal ruled in favour of France 2, saying that the report, which was of short duration and transmitted as part of a news item, did not affect the intellectual property rights of others, since it was justified by the public's right to be informed rapidly and in an appropriate way about cultural events that are part of current news. The Tribunal further estimated that the report did not conflict with the normal exploitation of the work and that to subject the broadcast of such reports to prior authorisation would deprive part of the public of the knowledge about the existence of the event and of the painter's work. Moreover, to hold otherwise would have been contrary to the principle of equality for all regarding information.

This decision, which is now under appeal, contrasts sharply with established jurisprudence on the diffusion of artistic works in television news broadcasts.¹¹⁸ In *France 2 v. France*,¹¹⁹ the television station France 2 had broadcast the mural frescos of painter Edouard Vuillard for a total of 49 seconds as part of a news report on the restoration of the Champs-Élysées Theatre. On the basis of the right to quote for information purposes, France 2 contended that the refusal to admit a right to quote with respect to artistic works was a direct violation of its freedom of expression as guaranteed under Article 10 of the ECHR. The European Commission on Human Rights disagreed, ruling that the author's right to prohibit the reproduction of his

¹¹⁶ See: Lucas and Lucas 2001, p. 286.

¹¹⁷ Tribunal de Grande Instance de Paris, 3^e ch., 23 February 1999 (*Fabris v. France 2*), *Le Dalloz* 1999, No. 38, p. 582; *RIDA* 2000/184, p. 374.

¹¹⁸ Hugenholtz 2000e, p. 359.

¹¹⁹ European Commission on Human Rights, 2d. Chamber, 15 January 1997 (*France 2 v. France*) partly reproduced in *Informatierecht/AMI* 1999, p. 115.

work constitutes in fact a limitation on the station's freedom of expression that is 'determined by law' and 'necessary in a democratic society'. As a result, commentators have expressed divergent opinions concerning the outcome of the *Fabris v. France 2* decision.¹²⁰ Nevertheless, they seem to agree that the *Tribunal de Grande Instance* could have been more careful in its examination of the criteria developed under Article 10 of the ECHR, and more specifically, in its application of the proportionality test.¹²¹ Some commentators believe that the author's rights should have weighed more heavily in the balancing of interests.

In the Netherlands, authors hold that copyright law recognises the right to make quotations as a means to exchange opinions and to develop culture and science within society.¹²² The same remark holds true for the right to reproduce public documents and to make news reports. However, article 15(a) of the Dutch Copyright Act 1912 allows the making of quotations only in an 'announcement, criticism, polemic or scientific treatise'. For many authors, the circumstances listed in the Act are the most controversial element of the provision.¹²³ Such restriction on the scope of the limitation appears strange not only in light of the neutral concept of 'quotation', but also in light of the social reality. In view of the narrow formulation of the right to quote under the Dutch Copyright Act, some defendants in copyright infringement actions have had no choice but to invoke, with limited success, the protection of Article 10 of the ECHR.

In one of these cases, the District Court of Amsterdam had to rule on a conflict between a copyright owner's exercise of the right to prohibit the reproduction of his artistic work and a newspaper's unauthorised publication of a photograph of that work.¹²⁴ In this case, the newspaper *De Volkskrant* published the text of an interview with a Dutch businessman along with a photograph taken in the interviewee's office. Prominent in the picture was one of the many works of art on display in the office, namely the statuette of an archer, which was still protected by copyright vested in the copyright collective society, *Stichting Beeldrecht*. The society brought a copyright infringement action against the newspaper. Since no other statutory limitation could be applied in the circumstances, the newspaper argued that

¹²⁰ Kamina 1999, p. 586; and Kéréver 2000, p. 383.

¹²¹ The proportionality test of Article 10 of the ECHR is explained in more detail in section 3.2.2.2 below.

¹²² Hugenholtz 1989, pp. 150-70; Verkade 1990; Spoor and Verkade 1993, p. 5 and ff.; Quaedvlieg 1987, p. 286; and De Zwaan 1995, p. 183.

¹²³ De Zwaan 1995, p. 183; and Spoor and Verkade 1993, p. 208.

¹²⁴ Arrondissementsrechtbank te Amsterdam, 19 January 1994 (*De Volkskrant v. M.A. van Dijk en de Stichting Beeldrecht*), reproduced in *Informatierecht/AMI* 1994, p. 51.

the publication of the photograph was covered by freedom of expression, which also includes the right to gather and impart information, as described in Article 10 of the ECHR. Applying each of the criteria developed under Article 10(2) of the ECHR, the court proceeded to balance the interests of the copyright owner against those of the newspaper. In doing so, the court admitted that the right to prohibit granted under copyright law could, in certain circumstances, constitute a restriction on freedom of expression of another. However, in the case at hand, the court believed that the statuette did not appear in the photograph 'by coincidence' or 'because it was practically impossible to avoid it', but was rather photographed on purpose and made to look bigger than it did in reality. Consequently, the court ruled that the exercise of the exclusive right by the copyright owner did not constitute an unlawful restriction of the newspaper's freedom to gather and impart information as guaranteed under Article 10 of the ECHR.¹²⁵

Another conflict of rights arose more recently in the context of the publication by the newspaper 'Het Parool' of the 'missing pages' of Anne Frank's diary.¹²⁶ In the trial, the newspaper admitted that its reproduction of the 'missing pages' did not fall under any of the limitations listed in the Dutch Copyright Act 1912, but based its defence on the public's right to information guaranteed under Article 10 ECHR. This defence was accepted at first instance, where the District Court of Amsterdam ruled that freedom of expression and information prevailed over the copyright claims of the Anne Frank Foundation. The decision was reversed on appeal.¹²⁷ The Court of Appeal of Amsterdam reiterated that copyrights granted under the Dutch Copyright Act 1912 and the Berne Convention constitute a 'right of others' on the basis of which the freedom of information can be limited pursuant to Article 10(2) ECHR. The Court had to decide whether, under the circumstances, the exercise by the Anne Frank Foundation of its right to prohibit publication amounted to a limitation on the newspaper's freedom of expression that was 'prescribed by law' and 'necessary in a democratic society'. The newspaper based its defence on Article 10 ECHR and on the significant newsworthiness of Anne Frank's annotations made on February 8, 1944. 'Het Parool' was thus referring to the public's interest in gaining knowledge about the unpublished annotations in the diary of such an important public figure as Anne Frank. This argument was rejected. In doing so, the Court declared that, all things considered, the interest of 'Het

¹²⁵ Hugenholtz 2000e, p. 357.

¹²⁶ Arrondissementsrechtbank te Amsterdam, 12 November 1998, No. 6 (*Anne Frank Fonds v. Het Parool*), in *Mediaforum* 1999, p. 39 with note from Hugenholtz.

¹²⁷ Hof Amsterdam, 8 July 1999, No. 44 (*Anne Frank Fonds v. Het Parool*), in *Informatierecht/AMI* 1999, p. 116, with comment from Hugenholtz.

Parool' was not predominant enough that it should prevail over the copyrights owned by the Anne Frank Foundation.¹²⁸

The right to quote constitutes one of the most important limitations on copyrights under German law.¹²⁹ Literary works represent the principal field of application of quotations. In many areas and primarily in academia, no one would be able to work adequately without the possibility to make quotations. There is therefore no doubt that the right to quote was introduced in the public interest, the heart of which is free intellectual debate. Thus, quotations are not only permissible in science and the arts, but also in other areas of creation, such as for news reporting or for the expression of political opinions. The freedom to quote generally serves to promote cultural development in the widest sense.¹³⁰ Paragraph 51 of the German Copyright Act provides, for example, that isolated scientific works may be reproduced in their entirety, in an independent work, for the purpose of explaining the new work's content. The same provision expressly allows the reproduction of small portions of published musical works for incorporation into other works, as justified by the purposes of the quoting works.¹³¹ However, and although the Act is silent on this point, the German courts have upheld by analogy the right to quote artistic and film works, but only to the extent that these quotes are part of a political debate or of an information broadcast.¹³²

In the *Maifeiern* case,¹³³ for example, the defendant had rebroadcast portions of a news report taken from an East German documentary producer about 1st of May demonstrations in West Berlin that had occurred two years earlier. In this case, the exemption for reporting current events did not apply because the facts filmed were historical and not current. Moreover, since the plaintiff's film of the protest march of 1957 was not sufficiently original to be protected as such, the images received protection as photographs, a category of works that do fall under the exemption of quotations according to the Act. Considering the importance of the subject treated in the broadcast, the District Court of Berlin found that it was the right and the obligation of the defendant, under Article 5 of the GG, to freely express its opinion in image and word and to obtain information from generally accessible sources. Central to the decision was the fact that the re-broadcast only served as contextualisation of the author's historical and political presentation; an

¹²⁸ See: Kabel 1999, p. 237 and ff.

¹²⁹ Leinemann 1998, p. 100.

¹³⁰ Melichar 1999, p. 796; BGH *GRUR* 1994, 803 – *Museumskatalog*.

¹³¹ German Copyright Act, § 51(3).

¹³² Ekruitt 1973, p. 54; Fromm and Nordemann 1998, § 51, p. 267; BGH *GRUR* 1987, 362 – *Filmzitat*; OLG Köln *GRUR* 1994, 47/48 (*Filmausschnitt*).

¹³³ Landgericht Berlin, 12 December 1960 (*Maifeiern*), in *GRUR* 1962/04, p. 207.

explanation which was considered necessary to put the viewer in a position to learn about the historical events and to form her own opinion. According to the court, this was therefore a legal exercise of the constitutionally guaranteed freedom of opinion and of the right of criticism on television.

This approach was later followed in other instances as well,¹³⁴ but most notably in two recent decisions of the Constitutional Court (*Bundesverfassungsgericht*).¹³⁵ In the *Havemann* case, the Constitutional Court unequivocally gave precedence to the public's right to information over the author's right to personality, guaranteed under Articles 1(1) and 2(1) of the GG, and his exclusive property right in a work, guaranteed under Article 14 of the GG.¹³⁶ In this case, the plaintiff was a Member of the Bundestag and the leader of the PDS party. In the former Democratic Republic of Germany, the plaintiff had practised as a lawyer and had acted as defence attorney to professor Havemann, a prominent critic of the regime, against criminal charges brought for an alleged violation of the foreign exchange regulations. In 1998, an editor published a historical book on the criminal case against Havemann, in which excerpts from the plaintiff's unpublished statement of appeal in that case were reproduced. More importantly, perhaps, the book further revealed that the lawyer entertained a close relationship with the state secret service (Stasi) during the time that he was representing Havemann, but without his knowledge. The plaintiff opposed the publication of the book and argued that the reproduction of the passages from his written statement of appeal violated his right of personality and his copyright in the work. The Constitutional Court rejected both arguments. The Court held that the lower courts did not err in appreciating the facts of the case or in concluding, after balancing all interests at hand, that the public's right to information should prevail over the plaintiff's right to personality and right to property.

A conflict between the copyright of a first author and the freedom of creation of a subsequent author, guaranteed under Article 5(3) of the GG,¹³⁷ is at the root of the second decision of the German Constitutional Court.¹³⁸

¹³⁴ Kammergericht Berlin, 26 November 1968 (*Bild Zeitung*), in *UFITA* 1969/54, p. 296; Landgericht Berlin, 26 May 1977 (*Terroristenbild*), in *GRUR* 1978, p. 108; Landgericht München, 21 October 1983 (*Monitor*), in *AfP* 1984, p. 118; and BGH, 7 March 1985 (*Lili Marleen*), in *GRUR* 1987, p. 34. See: Wild 1999, p. 1502-1503 and Hugenholz 2000e, p. 355.

¹³⁵ BVerfGE, 17 December 1999, 1 BvR 1611/99 (*Havemann*), *ZUM* 2000/4, p. 316; and BVerfGE, 29 June 2000, 1 BvR 825/98 (*Germania*), *AfP* 2000/5, p. 451.

¹³⁶ BVerfGE, 17 December 1999, 1 BvR 1611/99.

¹³⁷ Art. 5(3) of the GG reads as follows: 'Art and science, research and teaching are free'.

¹³⁸ BVerfGE, 29 June 2000, 1 BvR 825/98 (*Germania*).

The *Germania* case dealt with the (posthumous) edition of a theatre play written by Heiner Müller, entitled 'Germania 3 Gespenster am toten Mann'. The play was 75 pages long and gave a view of social development in Germany between the years 1941 and 1956. In a scene entitled 'Massnahme 1956', which had a length of approximately 18 pages, Müller had inserted without prior authorisation excerpts from two plays by Bertold Brecht, totalling about four pages. The excerpts were printed in italic and general sources were indicated in the first few pages of the book. Bertold Brecht's assignees sued for copyright infringement. The court of appeal of Munich (*Oberlandesgericht München*) ruled that the excerpts could not fall under the scope of the right to quote, provided for under Article 51(2) of the Copyright Act, because there was no 'internal connection' or 'functionality' between the quote and the rest of the text. In other words, the court estimated that without the quote, the text of the scene had no independent meaning.

At the request of Heiner Müller's assignees, the Constitutional Court was asked to decide whether Bertold Brecht's copyright or Heiner Müller's freedom of creation should prevail. The Constitutional Court pointed out that in the case of an artistic quote in a literary work, the right to quote should be given a broad interpretation in light of the freedom of creation. Furthermore, the freedom of creation guaranteed under Article 5(3) of the GG demanded that when interpreting and applying Article 51(2) of the copyright act, the 'functionality' or 'internal connection' of the quote also be recognised as a means of artistic expression and artistic creation. This requirement should thus be given a broader interpretation with respect to artistic works than to other types of works. In addition, the Court reiterated its view that once published, a work is no longer at the sole disposal of its holder.¹³⁹ Moreover the work enters the social sphere in accordance with the copyright provisions and is able to become an independent factor in the definition of the cultural and intellectual climate of the time. With time, the work leaves the private sphere to become part of the intellectual and cultural public domain. For the Court, this view not only provided an internal justification for the limited duration of the copyright protection, but also allowed it to hold that the more a work can serve as reference in an artistic discussion, the more it fulfils its desired social role. This social integration of art also implied that artists must, to a certain extent, tolerate some interference with their copyright from other artists who include their work as part of their critical look at society. The statutory limitations on copyright determine the scope of such tolerated interference. These limitations must in turn be interpreted in light of the

¹³⁹ The Constitutional Court had already expressed this view in the *Kirchen- und Schulgebrauch* case, BverfGE, 79, 29 at p. 42.

freedom of creation and be weighed against with the different legitimate interests concerned. Therefore, the Court concluded that whenever the artistic freedom of an author interferes with the copyright of another but without causing significant economic harm, the exploitation interests of the copyright holder must give way to the second author's interest in an artistic debate.

United States

In the United States, freedom of expression is guaranteed primarily under the First Amendment of the Constitution. Furthermore, Article I, § 8, clause 8 of the U.S. Constitution grants express power to Congress to enact copyright legislation and ‘to make all laws, which shall be necessary and proper for carrying into execution the foregoing powers’. Courts have found that, under this authority to make any law necessary and proper for the exercise of its powers, Congress does not exceed its power as long as the means adopted for achieving a constitutional end are ‘appropriate’ and ‘plainly adapted’ to achieve that end.¹⁴⁰ In principle, if copyright truly ‘abridged’ the guarantees of the First Amendment, the latter would prevail as a mandatory provision. The majority opinion holds however, that since the same Congress that adopted the First Amendment enacted the Copyright Act, the legislator could not have exercised its power over copyright law in a way that runs afoul of the First Amendment. In this sense, the idea/expression dichotomy, the originality requirement, the fair use doctrine, the first sale doctrine, and the fixed duration, are all consistent with the constitutional prescription that Congress ‘shall make no law... abridging the freedom of speech’.¹⁴¹

There are however, situations in which strict enforcement of a copyright would inhibit the very ‘Progress of Science and useful Arts’ that copyright is intended to promote. An obvious example is the researcher or scholar whose own work depends on the ability to refer to and to quote the work of prior scholars. Obviously, no author could create a new work if he were first required to repeat the research of every author who had gone before him. The scholar, like the ordinary user, of course could be left to bargain with each copyright owner for permission to quote from or refer to prior works.

¹⁴⁰ See: Patry, W.F. (1995), p. 577, citing *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 860 (9th Cir. 1979).

¹⁴¹ Benkler 1999, p. 394.

‘The author’s consent to a reasonable use of his copyrighted works had always been implied by the courts as a necessary incident of the constitutional policy of promoting the progress of science and the useful arts, since the prohibition of such use would inhibit subsequent writers from attempting to improve upon prior works and thus... frustrate the very ends sought to be attained’.¹⁴²

The relationship between copyright law and the First Amendment has given rise to several articles¹⁴³ and court decisions.¹⁴⁴ For some, First Amendment principles and copyright rules serve in harmony to foster the creation and dissemination of ideas.¹⁴⁵ On occasion, tension does arise between the two sets of norms. Courts and legal literature have long recognised that besides the idea/expression dichotomy, the fair use doctrine is the most important element for reconciling copyright protection with freedom of speech in the United States.¹⁴⁶ Situations where First Amendment interests appear in direct conflict with those granted under copyright law are evaluated on a case-by-case basis according to the criteria of section 107 of the U.S. Copyright Act 1976. The courts have generally been reluctant to admit a separate First Amendment defence in copyright infringement cases.¹⁴⁷ The argument put forward when refusing to consider a First Amendment defence commonly holds that if the use of copyrighted material does not meet the criteria of the fair use defence, there is no reason why it should be exempted

¹⁴² Ball 1944, p. 260; *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 477-78 (1984).

¹⁴³ See: Netanel 2000; Benkler 1999, p. 386; Nimmer 1999, § 1.10[A], p. 1-6.42 and ff.; Fraser 1998, p. 1; Patry 1995, p. 574 and ff.; Zimmerman 1992, p. 665; Patterson 1987, p. 1; Goldwag 1979, p. 321; Denicola 1979, p. 285; Rosenfield 1975, p. 795; Nimmer 1970, p. 1180; and Goldstein 1970, p. 983.

¹⁴⁴ *Rosemont Enterprises v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966); *Time, Inc. v. Bernard Geis Assocs.*, 293 F.Supp. 130 (S.D.N.Y. 1968); *Sid & Mary Krofft Television v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977); *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977); *Wainwright Securities v. Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977); *Triangle Publications, Inc. v. Knight-Ridder Newspaper, Inc.* 626 F.2d 1171 (5th Cir. 1980); *Harper & Row v. Nation Enterprises*, 471 US 539 (1985); *Los Angeles Times et al. v. Free Republic*, U.S. District Court Central District of California, 8 November 1999, No. CV 98-7840-MMM.

¹⁴⁵ Patry 1995, p. 576.

¹⁴⁶ Nimmer 1970, p. 1189; Goldwag 1979, p. 340; and Benkler 1999, p. 387.

¹⁴⁷ See: *Harper & Row, Publishers, Inc. v. Nation Enterprise*, 471 U.S. 539 (1985); *Sid & Mary Krofft Television Productions, Inc. V. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977); *Meeropol v. Nizer*, 560 F.2d 1061(2d Cir. 1977); *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978); *Wainwright & Co. v. Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977).

under the First Amendment.¹⁴⁸ However, there might be room in certain circumstances for a defence based on the First Amendment rather than on fair use.¹⁴⁹ The main difference between a test conducted under the fair use doctrine and one conducted under the First Amendment relates to the impact of the non-authorised use on the marketability of the work copied. Fair use is limited to copying by others that does not materially impair the marketability of the work copied, while the First Amendment privilege may be invoked despite the fact that the marketability of the copied work is thereby impaired.¹⁵⁰ In most cases, the courts have found that the purpose of the use in the instant circumstances did not bear such importance to the public interest as to outweigh the harm caused to the market of the copyrighted work.¹⁵¹

One of the first cases in which a defence based on the user's First Amendment rights was raised against an allegation of copyright infringement was in *Rosemont Enterprises v. Random House*.¹⁵² This case involved a series of articles published in *Look* magazine entitled 'The Howard Hughes Story'. When Hughes found out that defendant Random House intended to publish a biography of him that drew heavily on the *Look* articles, he had Rosemont purchase *Look's* copyright to the articles. Rosemont then sued to prevent publication of the biography on the basis of copyright infringement. The Court of Appeals for the Second Circuit found that the public had a significant interest in free dissemination of information about Hughes. It noted that an injunction would deprive the public of 'an opportunity to become acquainted with the life of a person endowed with extraordinary talents who, by exercising these talents, made substantial contributions in the fields to which he chose to devote his unique abilities'. The Court also found that while the use of the *Look* articles was necessary for defendant's book, the economic injury to the plaintiff was minimal. Justice Lumbard, concurring with the majority, declared:

'The spirit of the First Amendment applies to the copyright laws at least to the extent that the courts should not tolerate any attempted interference with the public's right to be informed regarding matters of general interest when anyone seeks to use the copyright statute which was designed to protect interests of quite a different nature'.¹⁵³

¹⁴⁸ Patry 1995, p. 578.

¹⁴⁹ Fraser 1998, p. 52; Denicola 1979, p. 283.

¹⁵⁰ Nimmer 1999, p. 1-92 and 1-93.

¹⁵¹ Patry 1995, p. 578; Goldwag 1979, p. 321; Goldstein 1970, p. 983.

¹⁵² *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966).

¹⁵³ *Id.*, at p. 311 (J. Lumbard).

Some twenty years later, the Court of Appeals of the same circuit issued an opposite decision in *Salinger v. Random House*.¹⁵⁴ In this case, the well-known writer, J.D. Salinger, sought to obtain a preliminary injunction against Ian Hamilton and Random House, the author and publisher, respectively, of a book about Salinger and his writings. It was submitted in evidence that Salinger had not published since 1965 and had chosen to avoid all publicity and enquiry concerning his private life. In 1983, the defendant Ian Hamilton informed Salinger that he was undertaking a biography of him to be published by Random House and sought the author's co-operation. Salinger refused, informing Hamilton that he preferred not to have his biography written during his lifetime. Hamilton nevertheless proceeded and spent the next three years preparing a biography. An important source of material was several unpublished letters written by Salinger between 1939 and 1961. After reviewing the four fair use factors, the Court of Appeals for the Second Circuit found that Hamilton's use of the unpublished letters was not fair. In the opinion of the Court, Salinger had 'a right to protect the expressive content of his unpublished writings for the term of his copyright, and that right prevails over a claim of fair use under 'ordinary circumstances'. The difference between the two decisions of the Second Circuit therefore was that, whereas the *Rosemont* case concerned published magazine articles, the *Salinger* case involved unpublished letters for which the courts accepted a narrower defence of fair use.¹⁵⁵

The outcome of the *Salinger* case was to a large extent predicated on the Supreme Court's decision in *Harper & Row Publishers, Inc. v. Nation Enterprises*.¹⁵⁶ There, the magazine 'The Nation' had published extracts from an unpublished manuscript of President Ford's memoirs without the copyright owner's consent. As a result, 'Time' magazine cancelled the contract it had with the rights owner for exclusive first publication of the memoirs. 'The Nation' argued that the public's interest in learning about the President's memoirs, guaranteed under the First Amendment, outweighed the right of the author. The Supreme Court did recognise that 'the Framers [of the U.S. Constitution] intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas'.¹⁵⁷ Where

¹⁵⁴ *J.D. Salinger v. Random House*, 811 F.2d 90 (2d Cir. 1986). See Zimmermann 1992, p. 671-72.

¹⁵⁵ The non-applicability of the fair use defence to unpublished letters had long been established in *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4,901).

¹⁵⁶ 471 U.S. 539 (1985).

¹⁵⁷ Patry 1995, p. 558.

freedom of thought and expression included both the right to speak freely and the right to refrain from speaking at all, the Court did not suggest that 'this right not to speak would sanction abuse of the copyright owner's monopoly as an instrument to suppress facts'. However, after examining the facts in the context of the four fair use factors, the Supreme Court ruled that the reproduction of excerpts of the memoirs by 'The Nation' was not a fair use. The Court's ruling is based on two essential findings, which were influenced to a large extent by the fact that President Ford's Memoirs were unpublished.¹⁵⁸ First, in the opinion of the Court, 'The Nation' went beyond simply reporting non-copyrightable information and actively sought to exploit the headline value of its infringement, making a 'news event' out of its unauthorised first publication of a noted figure's copyrighted expression. Moreover, the Court estimated that although a quotation of 300 out of 200,000 words was an insubstantial portion of the Ford manuscript, it was 'essentially the heart of the book' and therefore could not constitute fair use. The second finding relates to the impact of the defendant's use on the market for the work. In the case at hand, the Court considered that there could be no clearer evidence of actual damage to the rights owner's interests than the cancellation of the contract with 'Time' magazine.

The publication in a book of several picture frames copied from the Zapruder film on the assassination of President John F. Kennedy probably offers the clearest example of a conflict between copyright protection and the exercise of free speech rights. *Time Corp. v. Bernard Geis Associates*¹⁵⁹ involved the Zapruder film, generally considered to be the best filmed record of President Kennedy's assassination, which 'Time' had purchased and copyrighted. Several years after the assassination, defendants published a book discussing the conclusions of the Warren Commission's Report on the assassination. Because the Warren Commission had relied heavily on the Zapruder film, defendants, after an unsuccessful attempt to obtain permission from 'Time', included significant parts of 22 copyrighted frames from the film. 'Time' sued for copyright infringement. Rather than relying on a separate First Amendment defence, the District Court of New York relied on the fair use doctrine to uphold the defendant's copying of the film. The Court concluded that 'there is a public interest in having the fullest information available on the murder of President Kennedy', and that although the Zapruder film was not absolutely essential to defendant's work, it was very important to the clarity of their presentation and the force of their thesis.¹⁶⁰

¹⁵⁸ See: Kabel 1999, p. 237 and ff.

¹⁵⁹ 293 F.Supp. 130 (1968).

¹⁶⁰ *Id.*, at p. 146. See Fraser 1998, p. 22 and ff.; and Goldwag 1979, p. 330-31.

The only decision so far to have expressly upheld a defence based on the First Amendment is that of a district court of Florida in *Triangle Publications v. Knight-Ridder, Newspapers*.¹⁶¹ The defendant Knight-Ridder was a newspaper publisher who had developed a television programme listing similar to plaintiff's *TV Guide*. In one advertisement for the new listing, an actor holding a copy of the *TV Guide* emphasised the advantage for a purchaser of the defendant's listing of receiving both the listing and a newspaper. The Court first stated that where the First Amendment and copyright 'operate at cross-purposes', the 'primacy of the First Amendment mandates that the Copyright Act be deprived of effectuation'.¹⁶² The Court found that 'comparative advertising, when undertaken in the serious manner that defendant did herein, represents an important source of information for the education of consumers in a free enterprise system'. Considering the defendant's interest in being able to speak freely and the public's interest in being informed about new products, which outweighed the plaintiff's copyright interest, the court rejected the copyright infringement claim. The *Triangle* decision cannot be viewed as establishing a First Amendment privilege to copyright infringement, since the Court of Appeals affirmed the lower court's decision albeit on the basis of fair use.¹⁶³

Free speech concerns may also arise with respect to parodies, as they did to some extent in the *Campbell v. Acuff-Rose* case.¹⁶⁴ Petitioners, known as the rap group 2 Live Crew, had made a rap version of the song 'Oh, Pretty Woman', originally composed by Roy Orbison and William Dees and whose rights were owned by Acuff-Rose Music, Inc. Petitioners described the rap song as intended through comical lyrics, to satirise the original work. Prior to releasing the song on the market, 2 Live Crew had informed Acuff-Rose that all credits for ownership and authorship of the original song would be duly afforded and offered to pay royalties for the use of the copyrighted song. Acuff-Rose turned the offer down. A year later, it sued 2 Live Crew and its record company for copyright infringement. Writing the unanimous decision of the Supreme Court, Justice Souter accepted the defence of fair use, declaring that, like less ostensibly humorous forms of criticism, parody can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one. To meet the first fair use requirement, a parody must add something new, with a further purpose or different character, altering the first work with new expression, meaning, or message. This

¹⁶¹ 445 F. Supp. 875 (S.D. Fl. 1978).

¹⁶² *Id.*, at p. 882.

¹⁶³ Goldwag 1979, p. 327.

¹⁶⁴ *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994).

criterion asks in other words whether and to what extent the new work is 'transformative'. And although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Turning to the third factor of the fair use defence, the Supreme Court pointed out that it was consistent with earlier case law to hold that, when parody takes aim at a particular original work, it must be able to 'conjure up' at least enough of that original work to make the object of its critical wit recognisable.¹⁶⁵ In the case at hand, Justice Souter estimated that 2 Live Crew's parody of 'Oh, Pretty Woman' was a transformative work and was therefore covered by the exception of fair use.¹⁶⁶

For the most part, critics welcomed the Supreme Court's decision in *Campbell v. Acuff-Rose*, for it reversed previous rulings according to which non-transformative and commercial uses of copyrighted works were presumptively unfair. It also clarified that all four fair use factors should be weighed together in light of the purposes of copyright, thereby reversing the Supreme Court's earlier statement in *Harper & Row*, according to which the fourth factor 'is undoubtedly the single most important element of fair use'.¹⁶⁷ Despite this later correction concerning the respective weight of each factor, the Supreme Court's interpretation of the fair use doctrine in *Harper & Row* still serves as a valid precedent. For example, when examining the amount and substantiality of the portion used from the original work, the courts now enquire whether 'such use, focusing on the most expressive elements of the work, exceeds that necessary to disseminate the facts' and whether the portion copied constitutes the 'heart' of the copyrighted work.¹⁶⁸ In *Los Angeles Time and Washington Post Company v. Free Republic et al.* for example,¹⁶⁹ the defendant Free Republic operated a 'bulletin board'

¹⁶⁵ See: *Benny v. Loew's Inc.*, 356 U.S. 43 (1958); *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348 (S.D. Cal. 1955); *Berlin v. E.C. Publications, Inc.* 219 F. Supp. 911 (S.D.N.Y. 1963) *aff'd*, 329 F.2d 541 (2d Cir. 1964); *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y. 1980) *aff'd* 623 F.2d 252 (2d Cir. 1980); *Walt Disney Productions v. Air Pirates*, 345 F. Supp. 108 (N.D. Cal 1972) *aff'd in part & rev'd in part*, 581 F.2d 751 (9th Cir. 1978); *Hustler Magazine v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986); and *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1991).

¹⁶⁶ *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994), at p. 1181.

¹⁶⁷ *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), at p. 566.

¹⁶⁸ *Id.*, at p. 564. See: *Religious Technology Center (Church of Scientology) v. Netcom, et al.*, 923 F. Supp. 1231 (N.D. Cal. 1995)

¹⁶⁹ *Los Angeles Time and Washington Post Company v. Free Republic et al.*, United States District Court Central District of California, November 8, 1999, Judge M. Morrow, Doc. No. CV-98-7840-MMM.

website where members could post news articles to which they would add remarks or commentary. Other visitors to the site then read the articles and added their own comments. For the most part, Free Republic members posted the entire text of news articles taken from the websites of the *Los Angeles Times* and the *Washington Post*, who brought action for copyright infringement. Relying on the Supreme Court's decision in *Harper & Row*, the District Court of California rejected the defendant's fair use argument mainly on the basis of the third fair use factor, holding that:

‘...defendants have failed to show that copying entire news articles is essential to convey the opinions and criticisms of visitors to their site. As discussed above in connection with the third fair use factor, visitors' critiques could be attached to a summary of the article, or Free Republic could provide a link to the Times and Post websites where the article could be found. While defendants and users of freerepublic.com might find these options less ideal than being able to copy entire news articles verbatim, their speech is in no way restricted by denying them the ability to infringe on plaintiffs' exclusive rights in the copyrighted news articles.’

With these words, the District Court also rejected Free Republic's separate First Amendment defence. In doing so, the judge implicitly accepted the argument that if the use of copyrighted material does not meet the criteria of the fair use defence, there is no reason why it should be exempted under the First Amendment. In other words, the fair use defence was once again considered to offer a sufficient safety valve to accommodate the exclusive rights conferred by the American Copyright Act with freedom of expression guaranteed by the First Amendment.

2.2.1.2 *Right to privacy*

The conflict between copyright protection and the users' fundamental right to privacy emerged progressively over the last century to become one of the most complex and controversial issues of contemporary copyright law, which is embodied in the limitation for private use. Traditionally, copyright owners have never held absolute control over the consumption of their works. Everyone could always freely read, listen to or view a work for his or her own learning or enjoyment provided that the work had been previously made available to the public and that there be no motive for profit behind the

private use.¹⁷⁰ Thus, in theory, copyright never protected against acts of consumption or reception of information by individuals.¹⁷¹ The view that copyright protection does not extend to the private sphere of the individual was well accepted by most continental European copyright scholars during the first part of the twentieth century. Indeed, the private or otherwise personal use of copyrighted works without authorisation of the rights owner was always seen as enabling individuals to participate fully in the intellectual life and to develop their personality.¹⁷² As described below, however, the historical evolution of the copyright regime and the technological developments of the last fifty years have brought commentators to nuance their position twice with regard to the scope of copyright protection and the limitation for private use.

Analogue use

Eighteenth and nineteenth century copyright law was essentially based on the right to make and sell printed copies of a work. The predominance of the right to print and sell a work persisted in copyright law even until the adoption of the original text of the Berne Convention of 1886, which applied to editors and publishers instead of authors.¹⁷³ By its very nature, the protection granted to authors and editors did not extend into the user's private sphere.¹⁷⁴ At the turn of the twentieth century, the rights granted to authors had evolved into the two exclusive rights of communicating a work to the public and making reproductions. However, this change in the structure of the protection did not affect the general perception according to which the exploitation monopoly of an author only encompassed those methods with which the author could reach the public, i.e. by exhibition, reproduction, representation, or performance.¹⁷⁵ In other words, the monopoly of the author extended only to the commercial exploitation of a work. It was generally admitted in those days that copyright protection ceased where the private circle began. Logically therefore, private use was considered outside the scope of copyrights. As long as the act remained in the private sphere, the making of copies did not conflict *per se* with the moral or economic interests of the rights owner. Only when a work was used in a manner

¹⁷⁰ Guibault 1998, p. 27.

¹⁷¹ Fromm and Nordemann 1998, p. 176; Hugenholtz 1996a, p. 94; Patterson and Lindberg 1991, p. 193; and Spoor 1976, p. 113.

¹⁷² Lepaulle 1927, p. 7; and Leinemann 1998, p. 112.

¹⁷³ Waukermans 1910, p. 81.

¹⁷⁴ Renouard 1839, t. 2, p. 10.

¹⁷⁵ Lepaulle 1927, p. 123.

exclusively reserved to the rights owner, like the diffusion of exemplars to the public or the performance of a work in public, did such use affect the rights owner's exclusive right in his or her work.¹⁷⁶

The notion that copyright protection does not extend into the private sphere could also be inferred from the definition of a number of exclusive rights granted to authors under the early texts of the Berne Convention and under most national copyright acts of the time. In this regard, the Dutch Copyright Act 1912 also provides a clear example. Article 1 of the Act granted authors the exclusive right to communicate a work to the public and to reproduce it. Although the notion of communicating a work to the public was not defined in the Dutch Copyright Act of 1912, it was, according to authors, to be understood in its usual sense. The right to communicate a work to the public included, under Article 12 of the Act, the communication to the public, the recitation, or the performance in public of a work or a reproduction thereof and the distribution of a work or of a reproduction thereof, as long as the work had not appeared in print. The recitation, performance, or presentation of a work were expressly excluded from the scope of the right to communicate to the public, as long as they were occurred before relatives or friends or equivalent persons and as long as no form of payment was made for the event. The same applied to exhibitions.¹⁷⁷ With regard to the reproduction right, Spoor has observed that the private use of exemplars of works constituted an act that generally fell outside of the right of reproduction. In his opinion, any restriction imposed by the author in this respect would have been to no effect.¹⁷⁸ Similarly, the French Act of 11 March 1957 on the protection of literary and artistic works granted authors the exclusive right to perform and reproduce the work. Performance was defined as the communication of the work to the public by any means and reproduction as the material fixation of the work by any means allowing its indirect communication to the public.¹⁷⁹

The scope of copyright protection not only depends on the definition of the exclusive rights themselves, but also on the possible limitations on these rights. Some early commentators believed that a legal text confirming that private use was outside of the exploitation monopoly was pointless, since private use was the indispensable corollary to the bequest of the work to the public.¹⁸⁰ But the most common view held that the regulation of private use inside the copyright act was made necessary because changes in society had

¹⁷⁶ Kohler 1907, p. 178; van Isacker 1963, p. 367; Wistrand 1968, p. 312. See also BGH, 24 June 1955 - Aktz. : I ZR 88/54, in *GRUR* 11/1955, at p. 546.

¹⁷⁷ Snijder van Wissenkerke 1913, p. 187 and ff.

¹⁷⁸ Spoor 1976, p. 114.

¹⁷⁹ Lucas and Lucas 2001, p. 225.

¹⁸⁰ Del Bianco 1951, p. 127.

blurred the line between public acts and private acts.¹⁸¹ Early versions of the Dutch¹⁸² and German¹⁸³ copyright statutes also included an exemption for the reproduction of a work in a limited number of copies for the sole purpose of private practice, study or use of the person making the copies. It was always understood however that none of these reproductions must be put into circulation so as to reach the public in any way. This view eventually prevailed in French law as well, where the Act of 11 March 1957 introduced at Article 41 a specific provision regarding private use. Under this provision of the French Act, which has endured until today, the author may not prohibit performances that are private and performed free of charge exclusively within the family circle or reproductions strictly reserved for the private use of the person making the copies and not destined for collective use.¹⁸⁴ Such private uses have been tolerated in France subject to the following three strict conditions: the use must be restricted to personal or private purposes; there must be no motive for profit; and the copies must not be made by a remunerated third party.

By the mid-1950's, circumstances had changed to such an extent that commentators and courts came to reconsider their view on the scope of copyrights and on the issue of private use. Indeed, reprography of literary works¹⁸⁵ and home-taping of sound recordings were rapidly becoming wide spread within the population. In 1955, the German collecting society GEMA brought action against a producer of tape recorders on two grounds: (1) to enjoin the producer of tape recorders from selling recorders, unless they made customers aware of their obligations under copyright law and; (2) to obtain damages for past infringement.¹⁸⁶ The German Supreme Court granted GEMA's demand on all points except the claim for damages. The Court considered that, given the fact that the legislator could not have foreseen the problem of home taping in its 1901 Copyright Act, it was entitled to develop the law by interpretation. Accordingly, it held that in case of a conflict between the interest of the user of a work and those of a creator, the latter had to be favoured. The Court declared that 'there is no general principle in copyright law that maintains that the claims of the copyright holder should stop short of the private sphere of the individual'. It thereby granted authors the exclusive right to prohibit such private recordings, saying that the unenforceability of the

¹⁸¹ Wistrand 1968, p. 312.

¹⁸² See: Spoor 1976, pp. 21 and 29; Visser 1998 p. 59.

¹⁸³ See: BGH, 24 June 1955 - Aktz. : I ZR 88/54, in *GRUR* 11/1955, at p. 547.

¹⁸⁴ Lucas 1998, p. 203.

¹⁸⁵ See: BGH, 24 June 1955 - Aktz. : I ZR 88/54 in *GRUR* 11/1955, at p. 546.

¹⁸⁶ BGH, decision of 18 May 1955 – Aktz.: I ZR 8/54 (*Grundig Reporter*) in *GRUR* 10/1955, p. 492. See: Spoor 1976, p. 22.

rights was irrelevant to their legal recognition. Moreover, in the opinion of the Court, authors had a right to remuneration for the exploitation of their works even if that particular exploitation did not show any direct economic profit¹⁸⁷.

As described by Reinbothe, explicit concerns about the safeguard of the individual's fundamental right to privacy arose following the Supreme Court's decision, when rights owners expressed their intention to start monitoring the use of their works in the private sphere:

'GEMA attempted to enforce the rights of authors with respect to taping in the private sphere. But this attempt soon proved to be impracticable since the actual amount of private home taping could not be completely monitored. Moreover, legal difficulties arose due to the right of every citizen to keep the privacy of his home unmolested, a right which is protected by the Constitution in the Federal Republic of Germany'¹⁸⁸.

Indeed, in order to determine whether people were infringing copyrighted works through private copying, owners would have had to physically enter, search and possibly seize material in individuals' homes, which would have been 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 vendors of home-taping equipment to make their customers reveal their identity in order to enable the society to verify whether these customers were engaged in lawful activities¹⁸⁹. In the opinion of the Court, although home taping constituted an infringement of copyright such measures of control would have undeniably conflicted with the inviolability of the home guaranteed at Article 13 of the GG. The two decisions of German Supreme Court in *Grundig Reporter* and *Personalausweise* had a major impact on the preparatory works of a new German Copyright Act, which was adopted in 1965. This act introduced the first 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 equipment¹⁹⁰.

The emergence of reprography of literary works and home taping of sound recordings led commentators to distinguish early forms of private use from the current circumstances. They insisted that at the time of its

¹⁸⁷ Visser 1996, p. 49; Wistrand 1968, p. 368.

¹⁸⁸ Reinbothe 1981, p. 39.

¹⁸⁹ BGH, 29 May 1964 - Aktz. : Ib ZR 4/63 (*Personalausweise*), in *GRUR* 02/1965, p. 104. For a commentary on this decision, see: Koelman and Bygrave 2000, p. 101; and Visser 1996, p. 50.

¹⁹⁰ Möller 1987, p. 142.

introduction, private use referred to the hand copying or the typewriting of a manuscript, which had no or minimal effect on the rights holders' interests. This was clearly not the case anymore with reprography and home taping.¹⁹¹ The argument in favour of a limitation for private use was thus reformulated around the practical impossibility and the social undesirability for rights owners to exercise control over home-taping activities.¹⁹² In order to avoid intruding in the users' private sphere, the private use exemption was maintained everywhere, for acts accomplished by a physical person or in the immediate family circle for their own personal and non-profit enjoyment.¹⁹³ However to compensate rights owners for the revenue losses incurred through reprography and home-taping activities, most continental European countries eventually followed the German model and transformed the private use exemption into a right of remuneration with respect to these two types of reproduction activities.¹⁹⁴

Contrary to continental European copyright law, American copyright law recognises no separate exemption for the private use of copyrighted material. Depending on the circumstances of each case, private use may or may not fall under the doctrine of fair use. Until the Supreme Court's ruling in *Sony Corporation v. Universal City Studios, Inc.*,¹⁹⁵ the question of the use of works by individuals in the privacy of their homes had remained largely unexamined because of its perceived *de minimis* effect on rights owners' interests. The *Sony* case involved the act of reproduction of free broadcast programming by private individuals for time shifting purposes. The majority of the Supreme Court held that non-commercial home-use recording of material broadcast over the public airwaves did not constitute copyright infringement and that such recording constituted a fair use of the copyrighted works. The Supreme Court's findings rested on the following two conclusions. First, the defendant, Sony, demonstrated a strong likelihood that substantial numbers of copyright holders who license their works for broadcast on free television would not object to having their broadcasts time-shifted by private viewers. Second, the plaintiffs failed to demonstrate that time shifting would cause any likelihood of non-minimal harm to the potential market for, of the value of, their copyrighted works. Although the Court ruled on the very limited issue of the time shifting of material

¹⁹¹ Wistrand 1968, p. 318; Spoor 1976, p. 113; Ricketson 1987, p. 485.

¹⁹² Ginsburg and Gaubiac 1998, p. 149.

¹⁹³ French Intellectual Property Code, art. L. 122-5, 1° and 2°; Dutch Copyright Act, art. 16(b).

¹⁹⁴ Möller 1987, p. 146.

¹⁹⁵ *Sony Corporation of America v. Universal City Studios, Inc.*, 480 F. Supp. 429 (C.D. Cal. 1979), *rev'd & remanded*, 659 F. 2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984).

broadcast over the public airwaves, it was generally inferred that the same rule also applied to the home taping of sound recordings. The most direct consequence of the *Sony* decision was to leave rights owners uncompensated for the analogue home taping of audio and audiovisual works.¹⁹⁶

Because the Supreme Court focused mainly on the fourth factor of the fair use analysis, the fair use doctrine was interpreted later on essentially as a remedy to symptoms of market failure. Following the *Sony* decision, the use of copyrighted material under the fair use doctrine would be deemed fair only in cases where transaction costs were too high to allow rights owners and users to negotiate a licence, and only as long as such use did not cause important economic harm to the interests of the rights owners.¹⁹⁷ Nowhere in the decision was there any mention of a potential conflict between copyright protection and the users' fundamental right to privacy, or even of the difficulty of enforcing copyrights in this case. Judge Stevens, writing for the majority, merely stated in his final remarks that 'one may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible'.¹⁹⁸ As Weinreb points out, the millions of viewers who taped shows for later viewing would have regarded any prohibition as an interference with their property and privacy.¹⁹⁹ Nevertheless, some authors do tend to recognise a justification for the private use exemption that is more akin to the safeguard of the users' fundamental right to privacy. For example, Geller acknowledges the existence of a potential conflict between copyright protection and the users' right to privacy, when he declares that 'where users' rights of privacy might be prejudiced, neither authors nor their successors in interest should be allowed to exercise their exclusive rights of control'.²⁰⁰ Without quite naming it, the protection of the right to privacy plays the role of 'consumer convenience' for Ginsburg and Gaubiac:

'There is an additional rationale for private copying: where one has lawful access to the work, there may be an implied right to enjoy the work in a manner convenient to the consumer. One could therefore

¹⁹⁶ Visser 1997, p. 51.

¹⁹⁷ Patry and Perlmutter 1993, p. 667; Anderson, Brown and Cores 1993, p. 33; Sullivan 1993, p. 137; Leval 1990, p. 1105; and Gordon 1982, p. 1600.

¹⁹⁸ *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), at p. 455.

¹⁹⁹ Weinreb 1990, p. 1155.

²⁰⁰ Geller 1992, at p. 51.

contend, for example, that one who buys a video for home is entitled to make an extra copy for the vacation house. The owner of the video is not making extra copies for friends; he is simply 'place shifting' his enjoyment of the work. The convenience rationale may be a manifestation of a broader principle of user autonomy. According to this principle, end-users should enjoy works of authorship free of the author's surveillance. This enjoyment, however, need not also be free of some form of payment to copyright owners, for example, by means of levies on copying media or equipment'.²⁰¹

In practice, the absence in American law of any compensation to the rights owners for the loss of revenues incurred through analogue home taping activities represents perhaps the most noticeable distinction with continental European law. But the United States did innovate in 1992 with the enactment of the Audio Home Recording Act, which constitutes the first piece of legislation to provide for the payment of a levy on digital audio recording devices and medium.

Digital use

By the beginning of the 1990's, further technological developments had once again upset the delicate balance reached with regard to private use and have made this exemption as controversial and as complex as ever. Digital networked technology now offers users the possibility to reproduce a work at low cost in countless amounts of perfect copies and to transmit these to an unlimited number of people across the globe, thereby posing a threat to the economic interests of rights owners. The question has therefore been raised whether and to what extent a limitation for private use should survive in the digital networked environment. Two main arguments have been put forward for the abrogation of the private use exemption in the new environment. First, reproductions made under the private use exemption have gained economic significance for rights owners, who consider private uses as a primary form of exploitation of copyrighted material. Consequently, such reproductions should be licensed directly to end-users to the greatest extent possible.²⁰² In fact, the drafters' of EU legislation decided not to provide for a general private use exemption under the Computer Programs Directive and the Database Directive on the basis of this argument.

²⁰¹ Ginsburg and Gaubiac 1998, p. 150.

²⁰² Commissie Auteursrecht 1998, § 3.3.2.2.

As a concession to users of computer programs and electronic databases, both directives allow the lawful user to use the product 'in accordance with its intended purpose'.²⁰³ The Computer Programs Directive also permits the making of a single back-up copy of a lawfully acquired computer program.²⁰⁴

Second, encryption technology helps reduce the traditional symptoms of market failure encountered in the analogue world, by making it possible to license and enforce copyright even in cases of mass distribution of copyrighted works. In other words, rights owners have the means to monitor the use made of each work through tracking devices and to control such use through blocking and anti-copying measures.²⁰⁵ For some commentators, the argument of the practical impossibility and of the social undesirability for rights owners to exercise control over private uses has lost its relevance in the digital networked environment. They no longer see the threat of invasion into the user's private sphere as an issue.²⁰⁶ This might be true for anti-copying and blocking devices, the application of which does not require the collection and storage of personal data. However, monitoring techniques could certainly raise privacy issues. Such techniques imply that rights owners can track the use of their work and detect acts of infringement by placing an electronic module inside the work to record every use made by a given person, as well as the frequency and duration of such use.

The conflict between copyright protection and the end-users' fundamental right to privacy has taken a new dimension with the emergence of digital technology. While the enforcement of copyright through search and seizures traditionally involved the user's right to the privacy of her home, the enforcement of copyright through the new monitoring techniques now involve the user's right to informational privacy, that is, the collection, treatment and storage of the user's personal data. In fact, depending on their design, technological measures may at the same time process personal data about the consumption patterns of protected subject matter by individuals and allow for the tracking of on-line behaviour.²⁰⁷ Legal literature abounds with articles emphasising the importance of anonymity, autonomy, and privacy in cyberspace and describing the dangers posed by tracking and monitoring

²⁰³ Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, Official Journal L 122, 17/05/1991 p. 42, art. 5(1) [hereinafter 'Computer Programs Directive']; and Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, Official Journal L 077, 27/03/1996 p. 20, art. 6(1) [hereinafter 'Database Directive'].

²⁰⁴ Computer Programs Directive, art. 5(2); see: Koelman and Bygrave 2000, p. 105.

²⁰⁵ Koelman and Bygrave 2000, p. 108.

²⁰⁶ Sirinelli 1998, p. 25.

²⁰⁷ Koelman and Bygrave 2000, p. 104.

devices.²⁰⁸ Legislators and operators of electronic copyright management systems (ECMS) should be wary of the fact that the mere knowledge of being subjected to some form of monitoring or control while accessing and consuming a work may have a chilling effect on a number of potential users.²⁰⁹ Would extensive monitoring and tracking practices not seriously risk encroaching upon the users' fundamental right to privacy and thereby also his or her freedom of expression and information?

2.2.2 REGULATION OF INDUSTRY PRACTICE AND COMPETITION

Over the years, a number of limitations on copyrights have been adopted to reflect or regulate industry practice. Some of these limitations are designed to facilitate trade for certain users of copyrighted material, while others attempt to regulate competition within a given copyright sector. Examples of the first type of limitations are the exemptions allowing broadcasting organisations to make ephemeral recordings and allowing the reproduction of artistic works inside catalogues for public exhibitions, fairs or auctions. Examples of the second type of limitation are the compulsory licences for the broadcasting and the recording of musical works. Two further examples of limitations adopted to regulate industry practice and competition deal with press reviews and with the reproduction of computer programs.

2.2.2.1 *Press reviews*

Perhaps the oldest provision designed to reflect industry practice is the one that allows the making of press reviews. As laid down in Article 2(8) of the Berne Convention and as recognised explicitly or implicitly under every national copyright regime, copyright protection does not apply to news of the day or to miscellaneous facts having the character of mere items of press information. Anyone is thus free to reproduce news items and miscellaneous reports. However, most copyright systems also allow the reproduction of articles from newspapers and periodicals to take place under certain conditions without the prior authorisation of the rights owner. This measure is officially adopted in the interest of the free flow of information, but at some point in history, it also reflected industry practice.²¹⁰ As I explain below, this limitation serves today, depending on its formulation and judicial

²⁰⁸ See for example: Branscomb 1995, p. 1639; and Long 1994, p. 1177.

²⁰⁹ Koelman and Bygrave 2000, p. 104; Cohen 1996; and Prins and Schellekens 1996, p. 85.

²¹⁰ Melichar 1999, p. 775.

interpretation, to prevent acts of unfair competition between members of the news publishing industry.

Europe

Under the French CPI, once a work has been disclosed, the author may not prohibit the making of press reviews, provided that her name and the source are indicated.²¹¹ Contrary to Article 10*bis*(1) of the Berne Convention, according to which countries of the Union may ‘permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, *in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved*’ (emphasis added), Article L. 122-5, 3° (c) of the CPI does not provide for the possible reservation of rights by their owner. Furthermore, the Code gives no definition of the expression ‘press reviews’. Courts have interpreted it restrictively as a joint and comparative presentation of several commentaries from different journalists concerning a common topic or a single event.²¹² The topic or event dealt with in the press review must also be current, as suggested by the word ‘press’. In view of the strict interpretation given to this provision, the exemption for press reviews has remained of rather limited significance in jurisprudence and academic literature.

By contrast, the Dutch and German copyright acts contain a century old limitation for the making of press reviews the scope of which is much broader than the French provision. Under Article 15 of the Dutch Copyright Act, it is not an infringement of copyright to reproduce 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. In principle, such reproduction is only possible if it is made by a daily or weekly newspaper, radio or television broadcast; if the moral rights of the author are taken into account; if the source is clearly indicated, together with the indication of the author if it appears in the source; and if the copyright is not explicitly reserved.²¹³ In the case of periodicals, a generally worded reservation placed at the head of each issue shall also be deemed an explicit reservation of the copyright. However, no reservation can be made in

²¹¹ French CPI, art. L. 122-5, 3° (c).

²¹² Lucas and Lucas 2001, p. 287; Gautier 1999, p. 299; and Bertrand 1991, p. 203.

²¹³ Hugenholtz 1989, p. 84.

respect of news items and miscellaneous reports.²¹⁴ Paragraph 49(1) of the German Copyright Act is essentially to the same effect, except that the reproduction of articles in the form of a press review has been made conditional on the payment of an equitable remuneration to the rights owner.²¹⁵

Besides promoting the free flow of information, these provisions were deemed at the time of their adoption to reflect industry practice. At the turn of the twentieth century, this restriction was said to correspond to the wishes of the interested corporations and to be in the authors-journalists' own interests.²¹⁶ First, the reproduction of articles by other newspapers was seen as the best reward for the journalists' intellectual labour. By establishing and reinforcing the journalists' authority and merit in a given field, the further reproduction of articles was considered to serve their pecuniary interests as much as their moral interests. Second, it also contributed to the promotion of the interests of the newspapers to which they contributed and for which the reproduction of their articles, with mention of the source, of course, constituted an advertisement. Finally, it served the interests of the public, because the content a great number of newspapers, in particular local papers, having little financial resources, would have remained insignificant had they been unable to draw elements from bigger newspapers. Moreover, the ability reserved to the rights owner to prohibit the reproduction of her article by specific mention was deemed sufficient to safeguard her rights in all hypotheses, even in the very exceptional case where she would have had special reasons to wish that her article not be further reproduced. If, in order to reproduce a newspaper article, the prior authorisation from the rights owner had been required rather than be *presumed* in the absence of prohibition, it would in practice rarely have been requested. Even in the early twentieth century, it was thought that the increasing demand for current news in modern journalism would not have given news enterprises the time needed to obtain permission. Consequently, the reproduction would not have taken place to the detriment of the triple interest mentioned above.²¹⁷

The possibility for a newspaper to reproduce articles published in other newspapers or periodicals has always had important economic ramifications. Indeed, competition for the swift delivery of information on current events, or 'hot news', has always been fierce among enterprises the primary business of which is to gather and disseminate information. News agencies are thus

²¹⁴ Van Engelen 1994, p. 226.

²¹⁵ Fischer 1995, p. 119; Eidenmüller 1992, p. 322.

²¹⁶ Dernburg and Kohler 1910, p. 183; and Van Praag 1912, p. 87-88.

²¹⁷ Wauwermans 1910, p. 107.

particularly vulnerable to piracy. If second-comers can reproduce articles of newspapers and periodicals without authorisation or remuneration, the time-consuming and expensive activities of gathering and distributing information are likely to rapidly become unprofitable for any news enterprise. Consequently, the scope of the limitation permitting the unauthorised – and mostly free – reproduction of articles from newspapers and periodicals constitutes a determinative factor in the formation and development of the information market, to the same extent as the possibility for rights owners to expressly reserve their right with respect to published articles. In this sense, it is interesting to note that over the past century, international organisations and national legislators have periodically looked for legal solutions to prevent acts of unfair competition among newspaper publishers.²¹⁸ Since the issue fell outside the scope of copyright protection and since it would have put a restraint on the free flow of information, such a provision was never adopted, leaving the production and dissemination of information instead to the workings of the private market.²¹⁹ Thus, apart from reflecting the industry practice of the early twentieth century, commentators have generally seen in this provision a form of prevention of unfair competition among newspaper publishers and journalists.²²⁰

The interpretation given to the limitation therefore has a definite impact on the shape of the information market. In fact, the broad interpretation given to Article 15 of the Dutch Copyright Act has given rise to severe criticism. Some commentators even went so far as to suggest its abrogation,²²¹ or at least the introduction of a right of remuneration for rights owners.²²² For example, the term ‘news’ appearing in Article 15 of the Dutch Copyright Act has been construed as encompassing not only the general news items that daily newspapers bring to the attention of the public, but also specific creations, findings and opinions. Technical and scientific journals also fall under the expression ‘news reports, miscellaneous reports or articles’, since it is difficult to distinguish between a newspaper and a periodical on the one hand, and other types of writings that are published on a more or less regular basis, on the other hand. Whereas the exemption would normally allow only the use of articles or broadcast commentaries by the press or by broadcasting entities of the same nature, the Dutch Supreme Court has applied the provision to institutions and enterprises that offer

²¹⁸ Vecht 1992, p. 107; and Hugenholtz 1989, p. 87.

²¹⁹ Van Engelen 1994, p. 227.

²²⁰ Van Praag 1912, p. 90; Snijder van Wissenkerke 1913, p. 208; and Bussmann, Pietzcker and Kleine 1962, p. 379.

²²¹ Alberdingk Thijm 1999, p. 143.

²²² Commissie Auteursrecht 1998, p. 31; Van Engelen 1994, p. 227; and Vecht 1992, p. 109.

second-hand information on selected topics to their subscribers or employees in the form of collections of newspaper clippings (*knipselkranten*).²²³ As a consequence of this flexible interpretation of Article 15 of the Copyright Act, some commentators fear that the economic interests of newspaper publishers will increasingly be put at risk because it basically encourages second-comers to free ride on the creative efforts of others.²²⁴

In a recent decision, the Court of Rotterdam applied the exemption of Article 15 of the Copyright Act to press reviews that were made available over the Internet.²²⁵ In this case, several newspaper publishers brought action against the makers of a website, 'www.kranten.com', which presented a selection of news items and links to articles from the plaintiffs' newspapers. The defendant's web-page contained the names of the plaintiffs' national newspapers, accompanied by a list, updated daily, of titles of news items and articles that appeared on the websites of the respective newspapers. When clicking on the titles or on the lists, the user was directly linked to the corresponding news item or article on the newspaper's website, thereby bypassing the newspapers' respective homepages and advertisements. The plaintiffs argued that the defendant's activities constituted an infringement of their copyright in the articles and of their *sui generis* right in the database, as well as an act of unfair competition. The Court rejected all of these claims. Assuming that titles and lists were copyrightable subject matter, the Court held that the defendant, Eureka, qualified as a press organisation the press reviews of which were covered by the exemption of Article 15 of the act.

By contrast, Article 49(1) of the German Copyright Act has been interpreted somewhat more restrictively.²²⁶ Only single articles can be taken from a given newspaper or periodical and these may only be reproduced if they concern current economic, political, or religious topics. The reproduction of an article that is not 'current' or that concerns any other topic, such as science, technique, culture, or entertainment, is unacceptable. In addition, the article must be incorporated in a newspaper or periodical of a similar nature. In other words, contrary to the Netherlands where *knipselkranten* are allowed under Article 15 of the Act, Article 49(1) of the German Act provides that the incorporating publication should contain original contributions of its own and should not consist solely of reproduced articles taken from other newspapers

²²³ HR, 10 November 1995, No. 15.761 (*Knipselkranten*), in *IER* 1996, p. 20 with note by Hugenholtz, p. 28.

²²⁴ Alberdingk Thijm 1999, p. 145.

²²⁵ President Rechtbank Rotterdam, 22 August 2000 (*Kranten.com*), in *Informatierecht/AMI* 2000/10, p. 205 with note by Koelman.

²²⁶ Melichar 1999, p. 774 and ff.

and periodicals.²²⁷ In view of the strict interpretation traditionally given to these criteria, commentators generally hold that Article 49(1) of the Copyright Act does not cover the practice developed in the digital environment that consists of scanning the entire content of newspapers and periodicals and of distributing them as ‘electronic press reviews’.²²⁸ The Court of Appeal of Hamburg confirmed this view in a recent decision.²²⁹ The plaintiff, publisher of the newspaper *Berliner Zeitung*, brought action against the collective rights society VG-Wort, complaining that the society’s collection of remuneration for the compilation of electronic press reviews was unlawful. The complaint was based on the fact that the VG-Wort had concluded a contractual arrangement with a business corporation allowing it in return for the payment of a fee to scan, store, and distribute copyrighted articles to its employees in the context of an electronic news delivery service. The Court of Appeal admitted the plaintiff’s argument, ruling that the VG-Wort could not purport to collect the remuneration due under Article 49(1) of the Act for press reviews in electronic form, since the limitation only covered press reviews in paper format. The court reiterated that statutory limitations constitute a reflection of the balance reached by the legislator at the time the provision was adopted and that these limitations can sometimes become ‘outdated’ through the further development of technology, so that they no longer reflect the current social reality. The court further noted that limitations must be interpreted restrictively, leaving no room for interpretation by analogy. Following both a literal and a teleological interpretation of Article 49(1) of the Copyright Act, the Court concluded that the provision only covered press reviews in paper format, not in electronic form.

Admittedly, newspapers can always use the possibility offered under Article 49(1) of the Act to prohibit the reproduction of articles by ‘reserving all rights’ in them. However, such a reservation of right is not common in practice. Commentators generally hold that a separate reservation of right must be made for every single article in a newspaper and that a general reservation aimed at all articles in a newspaper is without effect.²³⁰ As a result, the reservation of right is not expected to play any significant role in the future, because of the expenditure associated with its use and of the ensuing reduction of the legibility of articles.²³¹ Adherents to the minority

²²⁷ Fischer 1995, p. 119; and see: OLG Düsseldorf, 10 July 1990, (*Pressespiegel*) in *GRUR* 1991/12, p. 908.

²²⁸ Katzenberger 1997, p. 434; Loewenheim 1995, p. 643; and Eidenmüller 1992, p. 324.

²²⁹ OLG Hamburg, 6 April 2000, (*elektronische Pressespiegel*), in *AfP* 2000/3, p. 299.

²³⁰ Melichar 1999, p. 778.

²³¹ Fischer 1995, p. 119

opinion argue, on the other hand, that a general reservation of right should be possible, since to hold otherwise would have the effect of reversing the general rule at the basis of the copyright system, according to which rights owners can, in principle, decide whether or not to allow third parties to reproduce their work. Through a general reservation of right, rights owners could easily put an end to the compilation of press reviews. In response to this argument, commentators explain that because Article 49 of the Act is included in the section pertaining to limitations, it is a norm established for the benefit of society (*Sozialbindungsnorm*). As such, the norm would have little effect, if its intended social purpose, for example the promotion of the free flow of information, could be so easily defeated through a general reservation of right applicable to all articles in the publication. Moreover, the wording of Article 49 itself suggests that a separate reservation must be made for each article.²³² In the *elektronischer Pressespiegel* case, the Court of Appeal of Hamburg essentially followed the majority opinion, ruling that a separate reservation of a right would have been more compatible with the general rule at the basis of the copyright system.

It is interesting to point out in this context that the District Court of Düsseldorf once ruled that the making of a commercial press review, which consisted solely of articles reproduced from other newspapers and periodicals and was therefore not covered by Article 49(1) of the Copyright Act, amounted to an act of unfair competition contrary to Article 1 of the *Gesetz gegen den unlauteren Wettbewerb* (UWG).²³³ As a rule, anyone is free to imitate or copy another person's work, unless that work is protected under a specific statute, such as the Copyright Act. The rules of unfair competition offer protection against unlawful imitation only insofar as the imitation or the copy does not conflict with Article 1 of the UWG.²³⁴ Considering that Article 49(1) of the Copyright Act expressly authorises the making of a commercial press review, there is, in principle, no violation of the rules on unfair competition. Moreover, the evidence of an unfair practice is not easy to establish when the press review reproduces articles taken from different publications. In practice, most press reviews show a sufficient degree of effort in the choice and arrangement of the articles not to give rise to a finding of unfair competition. However, unfair competition can be found to occur when, in order to save costs, a competitor copies another's work without making any improvement or modification to the original product. This was in fact the conclusion reached by the German Supreme Court in the

²³² Melichar 1999, p. 778; and Fischer 1995, p. 119.

²³³ LG Düsseldorf, of 24 February 1988 (12 O 59/88) (*Pressespiegel*), in *AfP* 1/88, p. 93.

²³⁴ Fischer 1995, p. 120; Loewenheim 1995, p. 643; and Hugenholz 1989, p. 56.

Informationsdienst case,²³⁵ in which a competitor's slavish reproduction, including content errors and spelling mistakes, of the information contained in another company's news bulletin was found to violate Article 1 of the UWG.²³⁶

United States

The U.S. Copyright Act contains no equivalent provision to those of the Dutch and German acts allowing for the making of press reviews. However, news reporting is recognised as one form of activity for which the unauthorised use of copyrighted material might in certain circumstances be excused under the fair use doctrine. In practice, very few cases concerning the use of protected material for purposes of news reporting have been successful since the Supreme Court's decision in *Harper & Row v. Nation Enterprise*.²³⁷ A recent example is the decision of the Court of Appeals for the Ninth Circuit in *Los Angeles News Service v. KCAL-TV Channel 9*.²³⁸ This case involved the unauthorised diffusion of a videotape of the beating of Reginald Denny in the aftermath of the Rodney King verdict. The four-minute videotape at issue was shot from a helicopter of the Los Angeles News Service (LANS), an independent news organisation that provides news stories, photographs, audiovisual works, and other services to the news media. LANS' videotape was copyrighted and licensed to the media. KCAL-TV used it, without a licence. In essence, the United States Court of Appeals for the Ninth Circuit held that the respondent's use of LANS' copyrighted videotape of the beating of Reginald Denny did not qualify as fair use. Although KCAL's purpose of reporting news weighed heavily in its favour, the court considered that, since both parties were engaged in news reporting, the defendant's use of the tape for free without a licence could destroy LANS' primary market. Similar cases involving the use of copyrighted material by the written press or by broadcasting stations have been tried by different circuit courts in recent years.²³⁹ Remarkably, the majority of them had the same outcome: the defence of fair use was rejected. There is therefore no ground on which to hold that the borrowing of articles

²³⁵ BGH, of 10 December 1987 (*Informationsdienst*), in *GRUR* 1988/04, p. 308.

²³⁶ Melichar 1999, p. 785; and Hugenholtz 1989, p. 92.

²³⁷ 471 U.S. 539 (1985); see: Patry 1995, p. 487; and Fraser 1998, p. 1.

²³⁸ No. 95-55261 (9th Cir. Mar. 11, 1997).

²³⁹ *Nihon Keizai Shinbun, Inc., v. Comline Business Data, Inc.*, No. 98-7842 (2d. Cir. Jan 22, 1999); *Infinity Broadcast, Corp. v. Kirkwood*, No. 97-7764 (2d. Cir. July 29, 1998); and *Los Angeles News Service v. Frank Tull*, 973 F.2d 791 (9th Cir. 1992); *Pacific & Southern v. Duncan*, 572 F. Supp. 1186 (N.D. Ga. 1983).

from newspapers and periodicals or of radio and television broadcasts constitutes an accepted industry practice in the United States.

On the contrary, the slavish copying of the information items or the news reports that another has gathered, prepared and presented to the public at great cost can be enjoined in some States under the general principles of the common law.²⁴⁰ The common law theory most often applied in these disputes has been the tort of misappropriation, theory derived from the common law rules on unfair competition and developed in 1918 by the Supreme Court in *International News Service v. Associated Press*.²⁴¹ This case involved two wire services, those of Associated Press (AP) and those of International News Service (INS) that transmitted news stories by wire to member newspapers.²⁴² It was undisputed that INS had copied news stories from bulletin boards and from early editions of AP's newspapers and had sold this, either integrally or after rewriting it, to its customers. Although the Supreme Court ultimately held that news items were not copyrightable, it nevertheless enjoined the practice because International News Service had misappropriated a valuable aspect of Associated Press' product:

'In doing this defendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organisation and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant's'.²⁴³

The doctrine of misappropriation has been applied repeatedly over the last century, every time the advance of technology has provided new ways for entrepreneurs to use the transmissions of others for their own profit.²⁴⁴ In recent years, the doctrine of misappropriation has resurfaced in the context of

²⁴⁰ Keller 1998, p. 401.

²⁴¹ 248 U.S. 215 (1918).

²⁴² Hugenholtz 1989, p. 90.

²⁴³ 248 U.S. 215 (1918), at p. 239-40.

²⁴⁴ *Rudolph Mayer Pictures v. Pathe News*, 255 N.Y.S. 1016 (App. Div. 1932); *Madison Square Garden Corp. v. Universal Pictures Co.*, 7 N.Y.S.2d 845 (App. Div. 1938); *Twentieth Century Sporting Club, Inc. v. Transradio Press Service, Inc.*, 300 N.Y.S. 159 (Sup. Ct. 1937); *Mutual Broadcasting System v. Muzak Corp.*, 30 N.Y.S.2d 419 (Sup. Ct. N.Y. County 1941); *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F.Supp. 490 (W.D. Pa. 1938); *National Exhibition Co. v. Fass*, 143 N.Y.S.2d 767 (Sup. Ct. 1955); and *Metropolitan Opera Association v. Wagner-Nichols Recorder Corp.*, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *aff'd*, 107 N.Y.S.2d 795 (App. Div. 1951) (per curiam).

information transmitted via a paging device or made available on the Internet. In *National Basketball Association v. Motorola, Inc.*, Motorola sold a handheld paging device, which displayed updated information on professional basketball games in progress.²⁴⁵ NBA sued Motorola for misappropriation of proprietary information. In first instance, the motion was dismissed. On appeal, the Court of Appeals for the Second Circuit confirmed the judgment acknowledging the existence of a narrow 'hot news' exception, but found that the transmission of real-time NBA game scores and information tabulated from television and radio broadcasts of games in progress did not constitute a misappropriation of 'hot news'. According to the Court of Appeals, a 'hot news' misappropriation claim would be limited to cases where: (1) a plaintiff generates or gathers information at a cost; (2) the information is time-sensitive; (3) a defendant's use of the information constitutes free-riding on the plaintiff's efforts; (4) the defendant is in direct competition with a product or service offered by the plaintiffs; and (5) the ability of other parties to free-ride on the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened. Another dispute involving an alleged misappropriation of information has since then been settled between *The Washington Post*, CNN, Dow Jones, Time, Inc., *Times Mirror* and Reuters on the one hand, and Total News, on the other hand. Total News, a website operator, agreed to refrain from any direct or indirect framing of the plaintiff's websites, while the plaintiffs agreed to let Total News continue, subject to the payment of royalties, linking their sites through hypertext links activated by a non-graphic, text-only reference to the applicable site only.²⁴⁶

2.2.2.2 Reproductions of computer programs

As a matter of principle, ideas and processes are not protected by copyright. To make a copy of the work for the purpose of discovering the ideas behind the computer program with a view to building on them should therefore not constitute an infringement of copyright.²⁴⁷ However, copyright

²⁴⁵ 105 F.3d 841 (2d Cir. 1997).

²⁴⁶ *The Washington Post Co et al v. Total News Inc.*, DC SNY, No. 97 civ. 1190 (PKL), 6 June 1997. See also: *Los Angeles Times v. Free Republic*, Civ. No. 98-7840 (C.D. Cal., Nov. 8, 1999), in which Los Angeles Times and Washington Post filed suit alleging copyright infringement against Web site that posts full reproductions of their articles without their permission and invites users to comment. Stories are reprinted with disclaimer that they are copyrighted material. The Court rejected First Amendment and fair use defence, refusing defendant's motion to dismiss.

²⁴⁷ Huydecoper 1991, p. 58.

protection has been extended in Europe, and elsewhere, to cover ‘the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole.’²⁴⁸ This exclusive right makes it possible for the rights owner to control access to the non-protected elements, such as the ideas and the principles behind interfaces, access which cannot be achieved without reproduction and translation of the entire program. Thus, in the absence of an express provision giving users the possibility to reverse engineer computer programs, rights owners would enjoy a *de facto* copyright protection on non-copyrightable subject matter, which would in turn create barriers to free competition in the software industry. Interfaces and other technical parameters of market-leading producers can establish themselves in the market as a *de facto* standard, which competing producers, if they wish to remain competitive, must use to offer substitute products. Entire categories of products may depend in this way on the market power of one manufacturer. Interoperability between computer components is thus essential for the maintenance of free competition in the software industry, where interoperability can be defined as the possibility to connect all components of a computer system, including those of different manufacturers, so that they can work together. Competitors are then dependent on the information given by this leading manufacturer or on the discovery of the source code through ‘black box’ analysis, reverse engineering or decompilation.²⁴⁹

Europe

The European Commission innovated in 1991 with the adoption of the Computer Programs Directive. The Commission realised at a very early stage the economic significance of granting access to computer interfaces and of ensuring the interoperability of computer components for international standardisation and for the competitive process inside the computer industry. The preservation of free competition within the software industry was thus a major factor in the adoption of a provision allowing the decompilation of computer programs for purposes of interoperability. After considerable debate, Member States reached a compromise and agreed to the inclusion of two exemptions permitting users to reproduce a computer program in order to determine the ideas and principles, which underlie any element of a program. Article 5(3) of the Directive allows the person having the right to use the

²⁴⁸ Computer Programs Directive, art. 4(a).

²⁴⁹ Loewenheim 1999, p. 1117; Dommering 1990, p. 106.

computer program to proceed, without the prior authorisation of the rights owner, to a 'black box' analysis of the program.²⁵⁰

Under Article 6, entitled 'decompilation', the licensee or another person with the right to use a copy of a program has the right to reproduce the code and translate it without the authorisation of the rights owner, where these acts are indispensable for obtaining the information necessary to achieve the interoperability of an independently created computer program with other programs, provided that a number of additional conditions are met. Two conditions must be met for a decompilation to be lawful. First, the decompilation must be confined to the parts of the original program, which are necessary to achieve interoperability. The second condition is that the information necessary to achieve interoperability must not have been readily available previously.²⁵¹ In this sense, Recital 27 specifies that the provisions of the Directive are without prejudice to the application of the competition rules under Articles 85 (new Article 81) and 86 (new Article 82) of the Treaty of Rome, if a dominant supplier refuses to make information available, which is necessary for interoperability. Thus, the user is expected, before proceeding to the decompilation of a computer program, to look for the information necessary to achieve interoperability inside the documentation provided by the original manufacturer. On the other hand, market-leading manufacturers may not unreasonably withhold information necessary to achieve interoperability without the risk of running afoul of the rules of competition law.

United States

The reverse engineering provisions of the Directive are essentially consistent with the case law developed in the United States on this issue. In *Atari Games Corp. v. Nintendo of America*,²⁵² and *Sega Enterprises, Ltd. v. Accolade, Inc.*,²⁵³ two Federal Courts of Appeals held that the act of engaging in reverse engineering by the rightful owner of a copy of a computer program may fall under the fair use doctrine. The courts ruled that a user may

²⁵⁰ Computer Programs Directive, art. 5(3) which reads as follows: 'The person having a right to use a copy of a computer program shall be entitled, without the authorization of the rightholder, to 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'.

²⁵¹ Lehmann 1993, p. 161 and ff.

²⁵² 975 F.2d 832 (Fed. Cir. 1992).

²⁵³ 977 F.2d 1510 (9th Cir. 1992).

undertake necessary efforts, including the disassembly or decompilation of the program, to gain an understanding of the unprotected functional elements of the program, such as the ideas, processes or methods of operation contained in the program, for the purposes such as interoperability.²⁵⁴ Both cases involved the reproduction of video game cartridges for purposes of interoperability with another manufacturer's video game consoles. In *Sega* for instance, the Ninth Circuit Court noted that the defendant had decompiled the plaintiff's software solely to discover the functional requirements for the compatibility of Accolade's video game cartridges with Sega's video game console and not to avoid the costs of developing its own video game. The Court observed that, in this case, there was no viable alternative to decompilation. It concluded that 'where disassembly is the only way to gain access to the ideas and functional elements embodied in a copyrighted computer program and where there is a legitimate reason for seeking such access, disassembly is a fair use of the copyrighted work, as a matter of law'.²⁵⁵

Like the requirement set by the European Computer Programs Directive, both U.S. Federal Court decisions require such reverse engineering to be necessary in order to gain access to unprotected elements of the program. Users are thus encouraged, before proceeding to the decompilation of a computer program, to use other methods to discover the necessary information for interoperability and to limit the decompilation only to the parts of the computer program that are necessary to achieve interoperability. Furthermore, the importance for the competitive process of accessing the unprotected elements of a computer program for the purposes of achieving interoperability has recently been recognised in the Digital Millennium Copyright Act. An express provision allows the circumvention of a technological measure that effectively controls access to a particular portion of a program for the sole purpose of identifying and analysing those elements of the program that are necessary to achieve interoperability of an independently created computer program with other programs, and that have not previously been made readily available to the person engaging in the circumvention.²⁵⁶

²⁵⁴ McManis 1993, p. 45.

²⁵⁵ 977 F.2d 1510 (9th Cir. 1992), at p. 1527-28; see also: Patry 1995, p. 470.

²⁵⁶ Pub. L. 105-304, 28 October 1998, 112 Stat. 2863, art. 1201 (f) (1).

2.2.3 DISSEMINATION OF KNOWLEDGE

Two types of limitations share the common objective of encouraging dissemination of knowledge and information among the members of society at large. This is the case of the limitations adopted in favour of educational institutions and those adopted in favour of public libraries and archives. These limitations serve as a tool in carrying out a government's information policy and in enhancing democracy within society. They therefore reflect the government's belief that society as a whole derives greater benefit from allowing certain uses to take place without the rights owners' authorisation, than from maintaining strict control over protected works. The fact that these objectives justify the use of copyrighted material without the rights owners' authorisation does not however necessarily imply that such use should occur without the payment of a fair compensation to the rights owner. The choice between recognising an exemption and establishing a statutory licence is also part of each legislator's balancing process between the interests of rights owners and those of the users.

2.2.3.1 *Educational institutions*

Educators always strive to adapt their teaching methods to new learning environments. To catch the students' attention and to improve their learning skills, educators rely heavily on contemporary books, photographs, videos, slides, sound recordings, broadcasting programs and other media.²⁵⁷ In practice, schools make millions of photocopies of copyrighted material in each country every year. Moreover, the performance or display of videos and sound recordings are particularly suitable for teaching in a classroom environment. Any use that is made without the prior authorisation of the rights owner constitutes an infringement of copyright, unless the law provides for a limitation on copyright to the benefit of educational institutions.²⁵⁸ While the use of contemporary educational material certainly contributes to the intellectual development of students, it is surprising to note that limitations adopted for the benefit of educational institutions vary widely from one country to the next.

²⁵⁷ Educational Multimedia Fair Use Guidelines Development Committee Fair Use Guidelines For Educational Multimedia, Washington D.C., July 17, 1996, § 1.2.

²⁵⁸ Neumann 1994, p. 23.

Europe

In France, the use of copyrighted material by educational institutions is limited to the right to make analysis and short quotations which are justified by the 'educational character' of the work to which they are incorporated. With the introduction in 1995 of a system of mandatory collective administration of the reprography right, schools and other educational institutions were finally allowed, under this general reprography regime and against payment of an equitable remuneration to the rights owners, to make reproductions of works for classroom use. Before then, illegal photocopying in schools and other educational institutions had reached an unprecedented level, thereby affecting the interests of rights owners. Besides the right to make short quotations and to make reproductions by means of reprography, there is no other specific limitation in the French Intellectual Property Code for the benefit of educational institutions. It is in fact the official position of the French legislator and that of most legal authors that it would go against the French *droit d'auteur* tradition to adopt limitations in favour of educational institutions.²⁵⁹ Consequently, performances, exhibitions, displays, and broadcasts of works within educational institutions for the most part occur in France pursuant to the terms of contractual agreements between rights owners and public authorities.²⁶⁰

By contrast, the German and the Dutch copyright acts contain a number of specific limitations for teaching purposes, which apply in addition to the possibility to make reproductions of works under a reprography regime. Under these specific limitations, parts of works or short works may thus be reproduced and assembled inside anthologies, and sound and audiovisual recordings and programmes may be performed as an illustration for the purposes of teaching.²⁶¹ Specific limitations for educational purposes have, in fact, a long tradition in Dutch and German legislation.²⁶² Adopted at the turn of the twentieth century in the form of exemptions, both copyright acts were amended during the 1970's, in order to subject most educational uses of copyrighted material to the payment of equitable remuneration to the rights owners.²⁶³ The transformation of these remuneration-free exemptions into statutory licences was motivated, just as for home taping, by the unforeseen impact of the new reproduction technologies on the rights owner's

²⁵⁹ Lucas 1998, p. 219.

²⁶⁰ Neumann 1994, p. 197.

²⁶¹ In Germany: Copyright Act, art. 46 'Collections for church, school or educational use', and art. 47 'School broadcasts'; in the Netherlands: Copyright Act, art. 16.

²⁶² See: Kohler 1907, p. 189;

²⁶³ Spoor and Verkade 1993, p. 225; and Neumann 1994, p. 285.

interests. In reality, the German legislator came to re-evaluate his perception of the balance between the rights owner's interest and the public interest in this matter, following the decision of the German Constitutional Court in the '*Kirchen- und Schulgebrauch*' ('School book') case.²⁶⁴ In view of the scale at which works were being reproduced inside educational institutions, the Court considered that the public interest in providing students with access to copyrighted material did not justify such a serious encroachment upon the interests of rights owners and that the latter should be entitled to equitable remuneration.

Under the new Directive on Copyright in the Information Society, Member States may provide for limitations relating to the use of copyrighted material for the 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.²⁶⁵ Recital 42 of the Directive specifies that when applying the limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect. However, the possibility for educational institutions to make reproductions of works under a reprography regime only applies to analogue means of reproduction. Under Article 5(2)(a) of the Directive on Copyright in the Information Society for example, Member States may only allow 'reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation'.

United States

Here again, the law of the United States differs sharply from that of most continental European countries. In the United States, educational institutions can make unauthorised use of copyrighted material according to wide ranging limitations, none of which are subject to the payment of equitable remuneration to rights owners.²⁶⁶ The broadest limitation in favour of educational institutions is undeniably that of section 107 of the Act, which

²⁶⁴ Decision of the German Constitutional Court, 7 July 1971 – Aktz.: 1 BvR 765/66, in *GRUR* 08/1972, p. 481.

²⁶⁵ Directive on Copyright in the Information Society, art. 5(3)a).

²⁶⁶ U.S. Copyright Act of 1976, art. 107 and 110, allowing performances and displays of works in certain face-to-face teaching activities.

lists teaching (including multiple copies for classroom use), scholarship, and research among the activities for which the unauthorised use of copyrighted material might in certain circumstances be excused under the fair use doctrine. The fair use doctrine was codified in the U.S. Copyright Act of 1976 after a decade-long process, during which the most contentious issue was educational photocopying. Some authors have held that the inclusion of classroom copying within the scope of the fair use doctrine only brought confusion to the concept of fair use and that educational use should have been provided for under a separate limitation.²⁶⁷

To help to clarify the boundaries of the fair use doctrine in the field of education however, interested parties – authors and publishers on the one hand, and educators on the other – were invited, before the final Bill was presented to Congress, to work out a compromise among themselves. That compromise was reported in the House Report as the ‘Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions’.²⁶⁸ These Guidelines provide specific examples of what constitutes fair use of published works. They allow, under certain conditions, single copying for a teacher's use and multiple copies for classroom use, but specifically prohibit other uses. In addition to the Classroom Copying Guidelines, the House Report contained the ‘Guidelines for Educational Uses of Music’, to cover the reproduction of recorded and printed music.²⁶⁹ In effect, these guidelines are said to have succeeded in providing educators with some certainty as to what was acceptable under the fair use doctrine, while preventing copying where permission could reasonably be requested and where the market for or the value of the work is likely to be affected, as in cumulative copying or reproductions in anthologies.²⁷⁰ Despite the positive results achieved in 1976 between the interested parties, the efforts of the Conference on Fair Use (CONFU) to develop guidelines concerning the use of copyrighted works in the electronic environment have been met with mixed results.²⁷¹ The Conference dealt with such issues as digital images, distance learning, educational multimedia, electronic reserve systems, and inter-library loan and document delivery. At the conclusion of three years of

²⁶⁷ Seltzer 1978, p. 59; Klingsporn 1999, p. 108.

²⁶⁸ House Committee Report on the 1976 Copyright Bill (House Committee on the Judiciary, House Report No. 94-1476 to accompany S. 22, 94th Cong., 2d Sess., September 3, 1976, pp. 65-74.

²⁶⁹ Klingsporn 1999, p. 104.

²⁷⁰ Patry 1995, p. 356.

²⁷¹ See: United States Patents and Trademark Office, The Conference on Fair Use, Final Report to the Commissioner on the Conclusion of the Conference on Fair Use, Washington D.C., Nov. 1998, p. 10.

intense discussions, no definite guidelines could be adopted on any of the issues examined. However, the proposed guidelines did lead to further study by the U.S. Government and they have had an impact on the world of education, since a number of organisations have officially endorsed them or unofficially rely on them for guidance.²⁷²

2.2.3.2 *Public libraries and archives*

Typical functions of any library are the collection, preservation, archiving, and dissemination of information. The preservation and archiving of copyrighted works often involves the making of reproductions from original works, either because they have been damaged, lost, or stolen.²⁷³ The dissemination of information takes place in a number of ways, either by lending exemplars of works; by permitting the public consultation of works on the premises of the library or the consultation of electronic material at a distance; by allowing patrons to make their own reproductions of works for personal purposes using freely accessible machines (photocopy, microfiches or printer); or finally by transmitting works at the request of individual patrons in the context of a document delivery service or an interlibrary loan service.²⁷⁴ Limitations adopted for the benefit of libraries are thus meant to allow these to perform their general tasks and to encourage the dissemination of knowledge and information among members of society at large, in furtherance of the common good. However, just as in the case of limitations in favour of educational institutions, the need to adopt specific measures to meet this particular common good objective is evaluated differently from one country to the next.²⁷⁵ Moreover, since libraries come in different shapes and sizes each pursuing different types of objectives, the public interest dimension of libraries has been interpreted differently depending on whether they are publicly or privately funded, commercial or non-profit, accessible to the general public or only to a restricted group. Consequently, limitations on copyrights are more readily recognised in favour of non-profit publicly funded and generally accessible libraries that allegedly pursue greater public interest objectives than other types of libraries.

²⁷² See: United States Copyright Office, Report on Copyright and Digital Distance Education, Washington D.C., May 1999, p.

²⁷³ Institute for Information Law 1998, p. 1.

²⁷⁴ Krikke 2000, p. 21; Visser 1998, p. 45; and Hugenholtz 1982.

²⁷⁵ Lucas 1998, p. 220; Visser 1996, p. 52.

Europe

In continental Europe, no specific limitations have been introduced to allow libraries and archives to fulfil their tasks. Some of the libraries' activities are covered by limitations of a more general application, including the private use exemption, the reprography regime and, at least in Germany and the Netherlands, the public lending of works against payment of an equitable remuneration. Reproductions of works in analogue format made by a library for its own preservation and archiving purposes would typically fall under the general reprography regime in France, Germany and the Netherlands. Either under the private use exemption or under the reprography regime, the right to make reproductions of works without prior authorisation from the rights owner is not unlimited and must take place within the general limits set by the law. In principle, only small portions of books and other writings and only individual articles from periodicals can be reproduced. The reproduction of entire books or periodicals for preservation purposes would therefore not be allowed under the French and German reprography regimes.²⁷⁶ Once the currently pending legislative modifications to the Dutch reprography regime are adopted,²⁷⁷ it will be possible to reproduce entire books, provided that no exemplar of the work is commercially available at a reasonable price and provided that the rights owner receives equitable remuneration. Another condition for the lawfulness of copies made by a library for its own preservation or archival purposes is that such copies must not be distributed to the public. This was essentially the conclusion reached by the German Supreme Court in the *CB-Infobank* cases²⁷⁸, according to which reproductions made by a research service for purposes of archiving are not admissible under the personal or internal use exemption when the copies are transmitted to third parties.

With respect to interlibrary loan services, the activities of public non-profit libraries are regulated in the Netherlands under an administrative decree, the *Reprobesluit*, which sets specific criteria for the reproduction and the distribution of copies of copyrighted works. Reproductions made by other types of libraries at the individual request of their patrons, for example in the context of interlibrary loan services or document delivery services, are

²⁷⁶ Krikke 2000, p. 57.

²⁷⁷ Proposed Amendment to the Copyright Act 1912 concerning reprographic reproductions, Second Chamber, Session 2000-2001, 27 617, No. 1-2, art. 16h.

²⁷⁸ BGH, 16 January 1997, I ZR 9/95 (*CB- Infobank I*), in *GRUR* 1997/6, p. 459; and BGH, 16 January 1997, I ZR 38/96 (*CB- Infobank II*), in *GRUR* 1997/6, p. 464.

generally covered by the private use exemption just as are the reproductions made by the patrons themselves for purposes of research and study on freely accessible machines located on the premises of the library. In Germany, the lawfulness of a document delivery service under the private use exemption was examined in a recent decision of the Supreme Court.²⁷⁹ The case involved the document delivery service of the Technical Information Library of Hannover (TIB). The TIB is one of the biggest services of this type in Germany. Via the Internet, it offers a worldwide document delivery service, whereby people can consult its on-line catalogue and send an email to order a copy of a work from its collection. The copy is then sent by mail or by fax to the person who made the request. The Supreme Court pointed out that a modern and highly developed industrial nation, like Germany, depends on science and research and therefore needs a fully developed, rapid, and economical information system. On the basis of the legislative history of Article 53 of the Copyright Act, the Court noted that the legislator did not intend to subject the document delivery services of publicly accessible institutions to the prior authorisation of rights holders. In the Court's opinion however, the level of remuneration to be paid to rights owners for such document delivery services could be adjusted to take account of the new reality.²⁸⁰

With the digitisation of works, several of the libraries' main activities have given rise to an intensification of use of works by the public, either off- or on-line, on the premises of the library or at a distance. Many of the new activities are perceived as posing a threat to the rights owners' interests.²⁸¹ The Directive on Copyright in the Information Society therefore provides that the limitations adopted for the benefit of certain non-profit making establishments, such as publicly accessible libraries and equivalent institutions should not cover uses made in the context of on-line delivery of protected works.²⁸² The applicability of limitations for the reproduction and the making available by libraries of new types of works, like CD-ROMs, computer programs and electronic databases, has also become rather uncertain. For example, it is unclear to what extent the provisions of the Computer Programs Directive and the Database Directive allow libraries to make reproductions of digital works in their collection for the purposes of preservation and archiving.²⁸³ Can libraries lend these new types of works to

²⁷⁹ BGH, 25 February 1999 - I ZR 118/96 (*Kopienversanddienst*), in *GRUR* 1999/08-09, p. 707. See also: Krikke 1999, p. 125; and Hugenholtz and Visser 1995.

²⁸⁰ Krikke 2000, p. 91.

²⁸¹ Hugenholtz 1996a, p. 19; and Melichar 1995, p. 756.

²⁸² Directive on Copyright in the Information Society, Recital 40.

²⁸³ Instituut voor Informatierecht 1998, p. 25-26.

the public? Can libraries and archives transpose works from one format to another, for example from one digital format to another, when conservation of the initial format is no longer assured because of obsolescence. One would be allowed to think so, under the conditions of Article 5(2)c) of the Directive on Copyright in the Information Society, which allows Member States to adopt limitations in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage. In view of the general uncertainty of the law, contractual arrangements between publishers and libraries have come to play an important role in determining the permitted scope of action of libraries with respect to digital material.²⁸⁴

United States

Contrary to continental European law, Section 108 of the United States Copyright Act contains excessively detailed exemptions that cover most of the libraries' and archives' main activities. Just like the limitations in favour of educational institutions, however, the limitations adopted for the benefit of libraries and archives were the result of a compromise reached between interested parties just before the enactment of the U.S. Copyright Act of 1976. Under very strict conditions, libraries and archives may make reproductions of certain types of works²⁸⁵ for the purposes of preservation and security and for the purpose of replacement of a copy that is damaged, deteriorating, lost or stolen. Libraries are also allowed to make, at the individual request of patrons, reproductions of a small portion of a work or of an article taken from a periodical from its own collection or in the framework of an interlibrary loan service. However, these exemptions apply exclusively to libraries and archives 'without any purpose of direct or indirect commercial advantage'. Thus, libraries or archives in a profit-making organisation are precluded from providing employees with copies of copyrighted material, unless such copying qualifies as a fair use, or the organisation has obtained the necessary copyright licences.²⁸⁶

²⁸⁴ Krikke 2000, p. 156.

²⁸⁵ U.S. Copyright Act of 1976, art. 108(h) which reads as follows: 'The rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news (...).'

²⁸⁶ U.S. Copyright Office, Circular 21 – Reproduction of copyrighted works by educators and librarians, Washington D.C., 1995, p. 13. See also: *American Geophysical Union, et al v. Texaco Inc.*, 37 F.3d 881 (2nd Cir. 1994).

According to Section 108 of the Act, the reproduction and distribution of works within the framework of an interlibrary loan service is restricted to the isolated and unrelated reproduction or distribution of a single copy of the same material on separate occasions. None of these exemptions must lead to the systematic, related or concerted reproduction and distribution of multiple copies of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one individual or for separate use by the individual members of a group. The Act specifies that systematic reproduction and distribution occur when a library makes copies of such materials available to other libraries or to groups of users under formal or informal arrangements the purpose or effect of which is to substitute for a subscription to or purchase of a work. Guidelines were later developed to clarify the extent of the photocopying permissible within the framework of interlibrary arrangements.²⁸⁷ Recent amendments have been brought to the U.S. Copyright Act to accommodate digital technologies and evolving preservation practices.²⁸⁸

One of the most controversial issues in American law with respect to the library privilege has been the relationship between the library exemption and the fair use doctrine. Subsection 108(f)(4) provides that 'nothing in this section in any way affects the right of fair use as provided by section 107 (...).' When this provision was first introduced, the position of the libraries was that this language permitted a librarian who had first made copies pursuant to Section 108 to then make one or more additional copies under the fair use provisions of Section 107. But the more reasonable interpretation to give Subsection 108(f)(4) is that Section 108 authorises photocopying that would not otherwise be permitted under the fair use doctrine. However, if for one reason or another, certain copying by a library does not qualify for the Section 108 exemption – for example because the collections are not open to the public – the library's photocopying would be evaluated under the same criteria of Section 107 as other asserted fair uses.²⁸⁹ In practice, Subsection 108(f)(4) of the Act put an end to a line of jurisprudence developed prior to 1976 under the fair use doctrine and which recognised rather extensive photocopying privileges for libraries.²⁹⁰ The introduction of a specific library exemption reflects the United States Congress' conception of the public interest with respect to the functions of libraries and sets the boundaries within which these institutions are free to use copyrighted material.

²⁸⁷ H. Rep. No. 1733, 94th Cong., 2d Sess. 72-73 (1976). See: Patry 1995, p. 372.

²⁸⁸ Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998), art. 404.

²⁸⁹ Patry 1995, p. 371.

²⁹⁰ *Williams & Wilkins Company v. The United States*, 487 F.2d 1345.

2.2.4 MARKET FAILURE CONSIDERATIONS

The market failure argument is for the most part an American doctrine. It is predicated on the American copyright system's strong utilitarian underpinnings, which makes it barely applicable to the continental European author's rights systems, grounded as they are in the natural rights theory. Indeed, whereas the American system aims to maximise the *collective social welfare* by encouraging both the creation and the dissemination of copyrighted works, the continental European systems are by contrast primarily concerned with protecting the *individual author's* moral rights and granting a reward for her intellectual labour. Considering that the continental European system puts greater emphasis on the author's individual interest than on public interest, the application to that system of the basic assumptions of collective social welfare maximisation made under the economic analysis would be, in my opinion, like fitting the proverbial square peg into a round hole. In fact, although a few European commentators did venture into the field of economic analysis of intellectual property law,²⁹¹ continental European legislators and courts have so far never expressly relied on this method of analysis to interpret, apply or modify the rules on copyright law.

Numerous articles have been written in the United States over the last two decades examining the fair use doctrine from an economic analysis perspective.²⁹² For the most part, commentators have concentrated their attention on the high transaction costs that are associated with the negotiation of licences between rights owners and users and with the enforcement of one's copyright. High transaction costs are not the only form of market failure that needs to be addressed under the copyright regime, thereby justifying the adoption of limitations on copyright. More importantly perhaps, the market for copyrighted works is characterised by the public goods nature of the protected works, i.e., by their non-excludability and non-rivalry. In the following pages, I give a brief overview of the main arguments put forward under the economic analysis, first regarding transaction costs and second, regarding the problem of non-rivalry. In a third

²⁹¹ See for example: Quaedvlieg 1992, p. 379; Strowel 1993, p. 196; and Lehmann 1985, p. 531.

²⁹² See for example: Gordon 1982, p. 1600; Adelstein and Peretz 1985, p. 209; Landes and Posner 1989, p. 325; Mackaay 1990, p. 867; Patry and Perlmutter 1993, p. 690; Sullivan 1993, p. 105; Anderson, Brown and Cores 1993, p. 33; Hardy 1995, § 17; O'Rourke 1997, p. 53; Merges 1997, p. 118; Elkin-Koren 1997, p. 104; Goldstein 1997, p. 867; Cohen 1998b, pp. 468-480; Bell 1998, p. 560; Fisher 1998, p. 1234; Benkler 1999, p. 424; and Ginsburg 2000, p. 10.

section, I consider briefly how the development of digital technology can impact on the workings of the fair use doctrine from the point of view of the market failure problematic.

2.2.4.1 *Transaction costs*

Transaction costs are traditionally defined as those costs incurred before, during and after a transaction is completed. Such costs include the expense of searching for a trading partner, specifying the product to be traded, negotiating the contract, and enforcing it. The theory developed by Chicago School of Economics postulates that, in the absence of any transaction costs in the market, intellectual property owners would normally license their rights to those who would make the most optimal use of their work. In some circumstances, direct negotiation can be very difficult to carry out between rights owners and potential users, especially in cases of mass uses of creative works.²⁹³ When high transaction costs make bargaining between individual copyright owners and potential users of copyrighted material impossible or prohibitively costly, or when copyright owners are unable in practice to enforce their rights effectively against unauthorised uses, market failure is said to occur. 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.²⁹⁴

Admittedly, the recognition of a fair use defence to a copyright infringement claim constitutes one method to deal with high transaction costs in the market for copyrighted works. In her seminal article on 'Fair Use as Market Failure', Gordon maintained that a use should be held fair 'where (1) defendant could not appropriately purchase the desired use through the market, (2) transferring control over the use to defendant would serve the public interest, and (3) the copyright owner's incentives would not be substantially impaired by allowing the user to proceed.'²⁹⁵ This argument is also reinforced by the wording itself of Section 107 of the Copyright Act, which makes fair use dependent in part on findings about market impact.²⁹⁶ In fact, some courts have expressly followed this approach to the fair use defence, and most notably with respect to the reprographic reproduction of

²⁹³ Strowel 1993, p. 645.

²⁹⁴ Adelstein and Peretz 1985, p. 211.

²⁹⁵ Gordon 1982, p. 1601.

²⁹⁶ Cohen 1998b, p. 472.

works for research and classroom use.²⁹⁷ In *American Geophysical Union, et al v. Texaco Inc.* for example, Texaco had developed the practice of making systematic copies of scientific articles made available to scientists, instead of paying licence fees or of acquiring additional subscriptions. The Court of first instance suggested that the availability of means for paying rights holders for the use of their works would reduce or even eliminate the need to refer to the fair use defence. In the Court's opinion, the absence of a mechanism to compensate authors would justify a fair use defence, whereas such a defence would hardly be admissible in the presence of such a mechanism:

'Despite Texaco's claims to the contrary, it is not unsound to conclude that the right to seek payment for a particular use tends to become legally cognizable under the fourth fair use factor when the means for paying for such a use is made easier. This notion is not inherently troubling: it is sensible that a particular unauthorized use should be considered 'more fair' when there is no ready market or means to pay for the use, while such an unauthorized use should be considered 'less fair' when there is a ready market or means to pay for the use'.²⁹⁸

The Court of Appeals confirmed the trial court's decision and found for the plaintiff mainly on the basis of the first and fourth fair use factors. On the purpose and character of defendant's use, the Court ruled in favour of the plaintiff, 'primarily because the dominant purpose of the use was a systematic institutional policy of multiplying the available number of copies of pertinent copyrighted articles by circulating the journals among employed scientists for them to make copies, thereby serving the same purpose for which additional subscriptions are normally sold, or (...), for which photocopying licenses may be obtained'.²⁹⁹ On the effect upon the potential market or value of the work, the Court considered that plaintiff had demonstrated a substantial harm to the value of their copyrights through Texaco's copying 'primarily because of lost licensing revenue, and to a minor extent because of lost subscription revenue'. In its concluding remarks, the Court of Appeals added that if Texaco wished to continue its copying

²⁹⁷ *American Geophysical Union, et al v. Texaco Inc.*, 37 F.3d 881 (2d Cir. 1994) *aff'd* 60 F.3d 913 (2d Cir. 1995); *Princeton University Press v. Michigan Document Services, Inc.*, 1996 U.S. LEXIS 7474 (6th Cir. 1996).

²⁹⁸ *American Geophysical Union, et al v. Texaco Inc.*, 37 F.3d 881 (2d Cir. 1994).

²⁹⁹ *American Geophysical Union, et al v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1995).

activities, it could either use the licensing schemes of the Copyright Clearance Center or purchase additional subscriptions to the periodical.

By contrast, confronted with the inevitably high transaction costs in the market for copyrighted works, continental European legislators have implemented a number of limitations on copyright but with the very different purpose of compensating rights holders for the uncontrollable uses made of their works. These limitations take either the form of a statutory licence, according to which rights owners are granted a right to equitable remuneration in exchange for the unrestricted use of their work, or of a mandatory collective administration of rights.³⁰⁰ This latter type of limitation has been adopted under the consideration that, in the circumstances, rights owners are better off with an effective right without individual exercise than with an individual right without real scope.³⁰¹ While reducing transaction costs between rights owners and users, the mandatory administration of right affects the owners' rights to a lesser degree than a statutory licence, since the right to authorise or prohibit a use is maintained and only its exercise is regulated. The limitation on the satellite broadcasting and cable retransmission rights constitutes one example of a limitation designed to reduce transaction costs. Admittedly, the laws of the Member States had to be harmonised on this subject, considering that the differences existing between the national rules of copyright constituted a direct obstacle in the free circulation of programmes within the Community. Were it not for the considerable number of television programme producers, both domestic and foreign, direct licensing would be possible between rights owners and cable operators and the mandatory collective administration of rights would not have been necessary.

Other limitations that have the effect of reducing transaction costs may find some additional basis either in the protection of fundamental rights like the home taping regime, or in the pursuance of public policy objectives, like the public lending regime and, in certain respects, the reprography regime. In this sense, the reprography regime is possibly the limitation on copyrights that finds the most diverse grounds of justification. The protection of the user's fundamental right to privacy and the accommodation of public interest objectives, like the free flow of information, certainly account for some aspects of the reprography regime. The main preoccupation behind its adoption is to compensate revenue losses incurred through uncontrollable reproductions of works by means of reprography. Not only have potential users multiplied in

³⁰⁰ Council Directive 93/83/EEC of 27 September 1993 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, O.J. No. L 248, 06/10/1993, p. 15-21; and French CPI, art. L. 122-10 (with respect to reproductions by means of reprography).

³⁰¹ Lucas 1996, p. 77.

the last few decades to include schools, libraries, government institutions and businesses of all sorts, but modern reproduction technologies have also brought significant changes to the exploitation of copyrighted material. Isolated reproductions of works have given way to mass uses of works, mostly through institutional photocopying activities.³⁰²

So, while the reproduction of copyrighted works made by an individual strictly for personal and non-commercial purposes would be exempted under the law, those reproductions that are made for professional or commercial purposes inside businesses, governmental bodies or copy-shops would in principle require the authorisation of the rights owner.³⁰³ In reality however, the costs involved in looking for each rights owner to obtain permission before making a reproduction are judged so great that users just go ahead and make the reproduction without prior authorisation, infringement or no infringement.³⁰⁴ Consequently, continental European copyright law generally recognises a limitation on the right to make reproductions by means of reprography, which makes up for the impracticality of exercising and enforcing this exclusive right in an efficient manner. Remuneration is paid to rights owners on the importation, manufacture, and distribution of reprographic equipment and on the amount of copies made by the institutional user to compensate revenue losses incurred through reprographic activities. In this sense, the choice of the French legislator to impose the mandatory collective administration of the right of reprography is perhaps the clearest indication that the revenue losses incurred because of the impossibility to negotiate licences were the main consideration behind the implementation of the reprography regime. By regrouping rights owners in one organisation, the negotiation of licences for reprographic use is made easier, thereby eliminating the main source of revenue loss.

2.2.4.2 *Non-rivalry*

However, the reduction of high transaction costs in markets for copyrighted works cannot account for all types of fair uses regularly admitted

³⁰² Geller 1992, p. 29.

³⁰³ Until the introduction of the reprography regime, most continental European courts held that the making of reproductions inside businesses, copy-shops and the like constituted an infringement of copyright. See in Germany: Decision of the German Supreme Court, of 24 June 1955 (*Photocopy*) in *GRUR* 1955, p. 544; Decision of the German Supreme Court, of 9 June 1983 (*Copy-shops*) in *GRUR* 1984, p. 54; in France: *Affaire du C.N.R.S.*, Trib. Gr. Inst. Paris (3d ch. 1^{ste} sect.), *RIDA* 1974, p. 121; *Affaire Rannou-Graphie*, Cass. 1er civ., 7 March 1984 in *RIDA* 1984/121, p. 151.

³⁰⁴ Van Lingem 1998, p. 145.

in jurisprudence or for the existence of other limitations allowed under the United States Copyright Act. The fact that a copyrighted work is non-excludable and non-rival might offer a more comprehensive explanation for the need to recognise a fair use defence and to implement limitations on copyright generally. The role of the non-rival character of copyrighted works in shaping the limitations on copyright is most often overlooked in the commentaries and would certainly deserve greater attention than is afforded here.³⁰⁵ Indeed, in comparison to high transaction costs or problems of non-excludability, non-rival goods pose a distinct and more complicated set of economic problems that are not widely appreciated. Part of the difficulty arises from the obscurity of the concept of rivalry itself. Let me recall that a good is said to be non-rival when the consumption by one citizen does not affect the consumption level of any other citizen, i.e., when the consumption of additional units of the good occurs at zero or at a very low marginal social cost. Copyright laws were thus created, at least in part, to address a market failure arising from the public good characteristics of creative works of authorship,³⁰⁶ and more specifically to cure the problem of under-production. The grant of an exclusive property right (i.e., copyright) on a work gives creators an incentive to create in the future by allowing them to appropriate the fruits of their intellectual labour, thereby increasing the collective welfare of society. In doing so, however, the legislator has had to forego some of the benefits of allowing copyrighted works to be consumed at the socially optimal demand price of a non-rival good, i.e., zero.

By definition, it is impossible to over-use a non-rival good. There is no economic waste when someone shares with the world the knowledge contained in a lawfully acquired book or a video, since the optimal demand price is zero.³⁰⁷ In fact, if users – including producers who use the information as an input – are charged a positive price, they will tend to under-utilise available information. Economists therefore generally agree that too much protection will result not only in a decline of consumer welfare per existing work, but also in a decline in the production of new works, because of the under-utilisation of information inputs by producers.³⁰⁸ It can reasonably be argued that limitations on copyright are the result of the legislator's arbitration between granting an incentive to create to past authors on the one hand, and allowing the dissemination of works among consumers and the creators of new works on the other hand. With the adoption of

³⁰⁵ See: Benkler 1999b, p. 3.

³⁰⁶ Cohen 1998b, p. 471.

³⁰⁷ Romer 1996, p. 12718.

³⁰⁸ Benkler 1999b, p. 3.

limitations on copyright, like the fair use doctrine and other exemptions provided for under the Copyright Act, the legislator has brought the marginal cost-price relationship for these specific uses of lawfully acquired works more in line with their socially optimal level of zero.³⁰⁹

Although I certainly do not seek to unravel every aspect of this complex matter, I believe that the acknowledgement of the non-rival nature of creative works might provide a more satisfactory explanation for the existence of *all* limitations on copyright, including those recognised in circumstances where no transaction costs impede the market. This is the case, for example, for the admission of a fair use defence for reproductions made for purposes of parody, criticism, and news reports, and of the limitations adopted for the benefit of educational institutions and libraries. Recognising that the market for such uses is not characterised by high transaction costs *per se*, authors have at times tried to justify them in terms of redistribution of wealth.³¹⁰ Contrary to the redistribution of wealth argument, the non-rival good argument does not assume a direct, linear relationship between market value and incentives, and thus does not make maximisation of creative works' monetary value the sole measure of copyright's efficiency at inducing progress. Nor does it assume that rights owners have the right to pursue and control any monetary return that the work may be made to generate.³¹¹

Other authors, like Cohen, have explained copyright law's fair use doctrine and other limitations by the fact that they encourage the production of 'positive externalities' or 'positive network effects'.³¹² The explanation based on information's positive externalities comes very close to the non-rival good argument. As Cohen explains, 'a positive externality that corresponds to a social benefit – as opposed to an uncompensated benefit to a distinct third party or parties – is simply a public good by another name'.³¹³ The main distinction between the non-rival argument set out above and the 'positive externalities' argument would seem to lie in the fact that the public good involved under the latter argument is not the creative work itself, but rather the privilege granted to users under copyright law.³¹⁴ It is not so much

³⁰⁹ Benkler 1999a, p. 424.

³¹⁰ Merges 1997, p. 134-35; Hardy 1995, § 17.

³¹¹ Cohen 1998b, p. 505.

³¹² *Id.*, p. 542-43, where network effects are said to arise when consumers derive increased utility from a good as other consumers purchase the same or compatible goods.

³¹³ *Id.*, p. 550

³¹⁴ *Ibid.*, where the author writes: 'The same public good analysis that is conventionally applied to creative and informational works applies equally to the access and reuse privileges afforded by the public law of copyright. These privileges are non-excludable;

the public good nature of the privilege to make a fair use that justifies its existence. Rather, it is the public good nature of the creative work and the fact that the collective welfare of society increases when the knowledge contained in a book or a video can be shared with the world. In fact, at least two different kinds of social benefit can flow from the unhindered use of copyrighted material:

‘First, society--and all of the individuals who comprise it--realizes benefits from the content of certain works. Creative and informational works educate and inform the public, shape individual and community perceptions of the world, and set the parameters of public debate. (...) Second, social benefit accrues from the rights to access and use unprotected, public domain elements of existing works, and to re-use and transform existing works in certain settings and circumstances. These rights and practices lead to the development of creative and scholarly talents and, ultimately, to the creation of new works--from which society may benefit further.’³¹⁵

Of course, any change in the copyright entitlement structure or in the way entitlements can legally be transferred or enforced has an effect on the social benefits that can be expected from the use of copyrighted material.

2.2.4.3 *Market failure and digital technology*

The digital networked environment substantially enhances licensing capabilities. By allowing individuals to communicate directly with each other, the Internet offers the perfect preconditions for the development of contractual relationships between rights owners and users of protected works.³¹⁶ Moreover, while encryption technology enables rights owners to control the physical access to their works, other technological devices provide the means for monitoring and enforcing contractual provisions. On-line distribution allows owners to fully control access to their works and facilitates the collection of fees on a pay-per-use basis.³¹⁷ In other words, the digital networked environment has both the potential to significantly reduce the transaction costs that exist in the analogue world between rights owners

if the law and the "state of the copying art" afford them to one, they afford them to all. They are non-rivalrous; one consumer's exercise of his or her right to reverse engineer software or parody a creative work does not prevent others from doing so.’

³¹⁵ Id., p. 547-48.

³¹⁶ Hugenholtz 1999, p. 79.

³¹⁷ Elkin-Koren 1997, p. 98.

and users and to increase the excludable character of protected works. As a result of these technological changes, a number of commentators and courts have suggested that the scope of fair use in the digital environment should be narrowed wherever new technologies or licensing mechanisms enable markets to form.³¹⁸

It has thus been argued that copyrighted works could best be offered on-line under a price discrimination scheme, which might vary according to the type of on-line uses or according to the category of users of copyrighted material.³¹⁹ This argument rests on the belief that, by engaging in price discrimination, rights owners would enlarge their profits substantially, thereby increasing their incentives to create. The Chicago School of Economics and its related schools of thought postulate that price discrimination has the positive effect of making the product available to a much larger set of consumers, who then benefit from the author's creation.³²⁰ The positive effect would come about because rights owners would charge private individuals lower rates in exchange for subjecting them to use restrictions and higher rates for greater freedom of use.³²¹ According to this line of reasoning, price discrimination would lead to substantial improvements in distributive justice over the copyright regime alone.³²²

However, the greater excludability of a public good does not in itself guarantee greater social benefit. In the case of public goods, individual profit maximisation is not necessarily equal to collective social welfare maximisation. As Romer explains, the exercise of stronger property rights on a public good may lead to a problem of under-utilisation of that good:

‘for a rival good like a pasture, increased excludability, induced by stronger property rights, leads to greater economic efficiency. Stronger property rights induce higher prices, and higher prices solve both the problem of overuse and the problem of underprovision. However, for a nonrival good, stronger property rights may not move the economy in the right direction. When there are no property rights, the price for a good is zero. This leads to the appropriate utilization of an existing nonrival good but offers no incentives for the discovery or

³¹⁸ Ginsburg 2000, p. 10; Fisher 1998, p. 1234; Bell 1998, p. 560; Goldstein 1997, p. 867; O'Rourke 1997; Merges 1997, p. 118; Elkin-Koren 1997, p. 98; Hardy 1995, § 17; and White Paper 1995, p. 82.

³¹⁹ See for example: Ginsburg 2000, p. 10; Fisher 1998, p. 1234; Bell 1998, p. 560; Goldstein 1997, p. 867; O'Rourke 1997; Merges 1997, p. 118; and Hardy 1995, § 17.

³²⁰ Gordon 1998, p. 1368.

³²¹ Cohen 1998b, p. 475.

³²² Ginsburg 2000, p. 13; and Fisher 1998, p. 1238-39.

production of new nonrival goods. Higher prices ameliorate underprovision of the good (raising the quantity supplied) but exacerbate its underutilization (diminishing the quantity demanded).³²³

To allow rights owners to charge a positive price for public goods like copyrighted works could have significant harmful economic and public policy consequences, since it might prevent individuals from using creative and informational works either for self-fulfilment or as input for the production of new creative works. Authors like Benkler and Cohen, convincingly demonstrate that only the more important information producers would stand to gain from such a price discrimination scheme, to the disadvantage of the more amateur and non-commercial users of creative works.³²⁴ Moreover, the implementation of an effective price discrimination scheme is dependent on the rights owner's capacity to enforce her rights either through electronic measures or contractual arrangements. Contractual arrangements are deemed economically efficient under the theory developed by the Chicago School of Economics only if the parties contract in a perfectly competitive market with perfect information and with equal bargaining power, circumstances which do not readily occur in practice.³²⁵

2.2.5 CONCLUSION

In summary, limitations on copyright are generally adopted on the basis of one or more of the following four essential rationales: safeguarding the user's fundamental rights, regulating competition and industry practice, promoting the dissemination of knowledge and alleviating symptoms of market failure. The study of the justifications behind the limitations on copyright reveals a number of significant differences in the motivations that have led to the adoption of limitations under the continental European authors' rights and the American copyright systems over the years. These discrepancies may be explained to a large extent by the distinct foundations and objectives of the two copyright traditions, where the former follows a naturalist approach and the latter, a utilitarian approach. By putting the emphasis either on the protection the author's rights or on the social benefit gained from making certain unauthorised uses of copyrighted material, the philosophical underpinnings of each regime in fact constitute a determinative

³²³ Romer 1996, p. 12718.

³²⁴ Benkler 1999a, p. 408; and Cohen 1998b, p. 551.

³²⁵ See development in section 3.2.1.2 *infra*.

factor in the definition of the rationale, scope, and form of a particular limitation.

In both continental Europe and the United States, such limitations as the right to make quotations, news reports and parodies, and the fair use doctrine, are generally seen as the principal means to reconcile the owner's copyright protection with the user's freedom of expression. These limitations represent the legislator's recognition that the copying of an author's expression in the form of a quotation or a fair use may be essential to convey effectively the idea expressed in the original work. Continental European author's rights law would seem to differ in one important respect from American copyright law, i.e., in the courts' assessment of the need for a separate freedom of expression defence to a copyright infringement action. Perhaps because continental European copyright acts provide for an exhaustive list of strictly worded and interpreted limitations, continental European courts would seem more willing than their American counterparts to entertain the idea that freedom of expression might in certain circumstances constitute a proper defence to a copyright infringement action. Contrary to the open-ended fair use doctrine, which is believed to address the user's freedom of speech adequately, the wording of the continental European statutory limitations may in some cases prove too narrow to allow a user to convey the idea expressed in an original work effectively. Of course, the European courts' willingness to consider a freedom of expression defence by no means guarantees that the defence will be admitted: the exercise of the exclusive right by the copyright owner must in each case pass the proportionality test of the constitutional provision.

The private use exemption seems to rest on different grounds, whether it is envisaged from a continental European or an American perspective. Under continental European law, the fact that copyright protection does not extend into the user's private sphere is a well-anchored notion. To avoid an intrusion into the users' private sphere, the private use exemption is recognised under French, Dutch, and German law, for acts accomplished by a physical person or in the immediate family circle for the members' own personal and non-profit enjoyment. In the United States by contrast, the private use of a work may or may not fall under the doctrine of fair use. The Supreme Court's ruling in the *Sony* case held that non-commercial home-use recording of material broadcast over the public airwaves did not constitute copyright infringement and that such recording constituted a fair use of the copyrighted works. It was generally inferred as a result that the same rule also applied to the home taping of sound recordings. Nowhere in the decision or in later commentaries was there mention of a potential conflict between copyright protection and the users' fundamental right to privacy, or even of the

difficulty of enforcing copyrights in this case. The private use exemption under American copyright law has been recognised as a fair use essentially because, at the time of the judgement, such use did not affect 'the potential value or market for the copyrighted work'.

The limitations adopted to regulate industry practice and competition display generally less striking differences between legal systems than other types of limitations. Arguably, the making of press reviews is permitted only under continental European copyright law, and not under American copyright law where the fair use defence has generally been rejected in similar circumstances. The continental European statutory provisions allowing the reproduction of articles taken from newspapers and periodicals have a long history and their adoption often dates back to the turn of the twentieth century. Although they could be said to reflect industry practice at the time of their adoption, recent case law and commentaries in France and Germany tend to view the limitation on press reviews as an outdated provision, which should be interpreted restrictively. By contrast, both continental European and American copyright law allow reproductions of computer programs for back-up purposes and for purposes of interoperability. This comes as no surprise given that legislative measures on the protection of computer programs are a relatively recent development and can still be considered to reflect the practice of this global industry.

Finally, the fact that the fair use doctrine provides no compensation to rights owners for the uses that are found to be fair constitutes another significant difference with continental European law in the manner of implementing copyright policy objectives. The obligation to pay rights owners an equitable remuneration for certain uses made of their works is one of the key instruments through which legislators achieve copyright law's purpose of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity. In this sense, the home taping and the reprography regimes are perhaps the most important divergences in copyright policy between continental European law and American law. Where continental European countries have estimated that rights owners should receive an equitable remuneration for the unauthorised home taping and reprographic activities of users, the American Congress has decided not to intervene, with the exception of digital home recording, and to leave the issue to the courts under the uncompensated doctrine of fair use. The discrepancies in copyright policy are not only apparent from the fair use doctrine, but also from some of the specific limitations introduced in the United States Copyright of 1976. For example, the choice of the American Congress to recognise, under Sections 108 and 110 of the Act, limitations in favour of educational institutions, non-profit organisations and libraries in the

form of an exemption instead of a statutory licence gives a clear indication of where Congress draws the line between the interests of rights owners and those of users. By contrast, continental European copyright acts are usually more favourable to the rights owners, permitting certain uses by schools and libraries to take place only against payment of an equitable remuneration to the rights holder.

2.3 Legal nature of the limitations

Even in countries like France, where the author's right is at the heart of the copyright system, one speaks of the user's *right* to quote and of the user's *right* to make parodies. Such qualification flows most probably from the strong justification found for these limitations in freedom of expression.³²⁶ Similarly, the doctrine of fair use is, on occasion, referred to as a *right* of the user, particularly in relation to First Amendment issues.³²⁷ The European Computer Programs Directive would also seem to have created a *right* of users to make back-up copies and to proceed to the decompilation of computer programs, by prohibiting any contractual agreement that purports to restrict the user's actions with respect to these specific acts. By contrast, limitations adopted for the benefit of libraries and schools are often referred to as a *privilege* granted to these institutions in furtherance of the public interest.³²⁸

Do these references to *rights* or *privileges* indicate the existence of a fundamental distinction in nature between the various limitations or do they merely reflect a difference in terminology? Are limitations based on the defence of fundamental rights more likely to constitute a user's *right* than other less fundamental limitations? Are such 'less fundamental' limitations then to be considered only *privileges* of the users? Does the payment of an equitable remuneration to the rights owner automatically imply that statutory licences fundamentally differ in nature from exemptions? In the following pages, I attempt to identify the legal nature of the limitations on copyright, and more particularly, to determine the type of entitlement and claim that a user may hold under the law with respect to a copyrighted work. First, I study the notion of subjective right in continental European law and of 'right' in American legal theory, to see whether limitations on copyright can qualify as such. I will conclude that the limitations recognised by positive law grant

³²⁶ Lucas 1998, p. 178.

³²⁷ Rosenfield 1975, p. 794; and Patterson and Lindberg 1991, p. 197.

³²⁸ See: Krikke 2000.

in fact no such right to the user. As the following subsection shows however, the limitations may qualify as ‘objective rights’ or ‘privileges’ recognised in favour of the user. The analysis would not be complete however, if I did not enquire about the influence that the type and the justification exercise over the nature of the limitations.

2.3.1 SUBJECTIVE RIGHT

In continental Europe, Hirsch Ballin and Lucas are two of the rare copyright scholars who have specifically addressed the thorny issue of the nature of the limitations on author’s rights. In his book, Lucas simply affirms that ‘exceptions enumerated by the legislator in no way give rise to **rights** to the benefit of the user’ (emphasis in original).³²⁹ For his part, Hirsch Ballin postulates that the author’s exclusive rights constitute subjective property rights, which entail a close relationship between the rights holder and the object of the right, as well as a power of control over the use and enforcement of the right.³³⁰ According to Hirsch Ballin, the close relationship arises between an author and her work through the act of creation and materialises in the form of a right *erga omnes* over the fruits of her intellectual labour. The author’s power of control over her work is recognised and guaranteed by the rules of positive law. The public’s ‘so-called right’ to use or not to use a work can, in the eyes of Hirsch Ballin, in no way compare in nature with the author’s subjective right.³³¹ He observes that since no law, no jurisprudence and no doctrine have conferred a ‘right’ on the community with respect to an author’s work, the community has, at most, an interest in or perhaps a mere freedom to use a protected work. Hirsch Ballin does not pursue his analysis further, thereby leaving unanswered the question of the true nature of the several limitations on copyright, and failing to explain what difference he sees between an interest and a freedom, and on what grounds such a distinction can be made.

Whether the user’s interest³³² might amount to a subjective right or not really depends on the definition of a subjective right. The notion of subjective rights is a vast concept, which admits different definitions all emphasising distinct elements of the notion. In France, Dabin defines subjective rights as ‘the prerogative, conferred to one person by objective law

³²⁹ Lucas 1998, p. 171.

³³⁰ Hirsch Ballin 1955, p. 281.

³³¹ Hirsch-Ballin 1956, p. 26.

³³² ‘Interest’ is used here in a neutral sense, by opposition to ‘right’, ‘freedom’ or ‘privilege’, and has in this section the general meaning of an ‘advantage or profit’, in The Oxford English Reference Dictionary, Oxford, Oxford University Press, 1996, p. 733.

and guaranteed by legal means, to freely dispose of a good which is deemed to belong to her, either as her property or as her due'.³³³ Under this definition, a subjective right is composed of two main elements, first the requirement of a close relationship (or *appartenance*) between the subject and the object of the right, and second, the power of control (or *maîtrise*) of the subject over the object of the right. Accordingly, a subjective right's main prerogative is the exclusive power of the subject to freely dispose of the object of the right. Under the subject's general power of free disposal falls the power to make use of the object, to exploit it, to modify it, to transform it, to destroy it, or to leave it untouched – in other words, subjects normally have, by virtue of their subjective right on an object, the right to the object's *usus, fructus* and *abusus*.³³⁴

The requirement of close relationship is also explained at times in terms of 'interest', which the subject holds with respect to the object of the right and which positive law recognises. The notion of interest is at the heart of the definition under Dutch and German law, where a subjective right is to be generally understood as 'a particular prerogative recognised by positive law, which is conferred to a person to serve her interests'.³³⁵ There are essentially two kinds of subjective rights: absolute rights, which are recognised by positive law and are opposable to all others; and relative rights, which derive from the provisions of a contract and are opposable only to the parties to that contract.³³⁶ Whether a subjective right is absolute or relative, the grant of a right as such only makes sense in relation to others. An object is said to belong to someone or to be due to someone only inasmuch as it serves to exclude others from ownership of the same object. There is, on a desert island, no need to allocate exclusive rights on objects since there is no competition among individuals for the use of any of these objects. As a result of the close relationship and of the power of control that exist between the subject and the object of the right, the subject has the exclusive power to require others to do or to refrain from doing something with respect to the object of that right. The grant to a person of a subjective right imposes on others a corresponding duty to respect the right.³³⁷ Others are therefore under an obligation not to violate the relationship of closeness and control that exist between the subject and the object of the right. When such a violation

³³³ Dabin 1952, p. 105.

³³⁴ Dabin 1952, p. 90.

³³⁵ Houwing 1939, p. 45-46; Meijers 1948, p. 79; and Reh binder 1991, p. 101.

³³⁶ Reh binder 1991, p. 102; and Asser- Mijnsen and De Haan 1992, t. III-I, p. 18.

³³⁷ Kelsen 1988, p. 108; Dabin 1952, p. 94; Eggens 1960, p. 188; and Reh binder 1991, p. 102.

occurs, the subject has a right of action to demand the enforcement of her right and the cessation of the acts of infringement.

Combining all definitions, I retain the following four elements as the main characteristics of subjective rights: 1) a close relationship— or interest — between the subject and the object, which is recognised by positive law; 2) the subject's exclusive power of control over the object, to which a number of prerogatives are attached; 3) the existence of a correlating duty on the public to respect the subjective right; and 4) the recognition of a right of action to guarantee the enforcement of the subjective right.³³⁸ While the emphasis placed on each of these elements might vary according to the philosophical conception envisaged, everyone agrees that property rights constitute the quintessence of subjective rights, because they encompass all four main characteristics. In light of this, could the user's interest, as recognised under copyright law, of using a protected work for certain purposes, qualify as a subjective right?

Let me take, for the purposes of my discussion, the example of the limitation allowing users to make quotations of copyrighted works. As Hirsch Ballin had come to conclude, I must admit that the user's 'interest' can hardly fall under Dabin's definition of a subjective right, since such an 'interest' lacks most of the characteristics normally found under that definition. Even if one could demonstrate that users entertain a close relationship with the subject matter being quoted, users still lack the power of control over that subject matter, so as to allow them to dispose of it freely. Contrary to the author's right, which is conferred upon *one* author — or more, in the case of joint authorship — as a legal consequence of the creation of a particular work, the authorisation to make quotations of copyrighted works is granted to *all* users with respect to *any* work.³³⁹ Thus, contrary to the general characteristics of a subjective right, the authorisation to make quotations is neither exclusive to one user nor to one work. Moreover, only a few of the prerogatives which normally derive from the recognition of a subjective right, are present in the context of the authorisation to make quotations of a work. Since users have no power of control over the protected work, there derives no corresponding obligation of respect of the user's 'interest' on the part of all others. In light of these observations, the user's 'interest' in making quotations of protected works cannot in my opinion be qualified as a subjective right.

Although the concept of subjective right is unknown to the American common law system, a study of the notion of 'right' leads in that country to

³³⁸ Dabin 1952, p. 104.

³³⁹ Dabin 1960, p. 30.

similar conclusions about the nature of copyright limitations as in continental Europe. Like the concept of subjective right in continental European legal theory, the notion of ‘right’ can receive different definitions in common law, which all emphasise distinct elements of the concept. Modern American legal theory is indebted to Hohfeld for his pioneering work in the legal analysis of the concept of a right.³⁴⁰ While Hohfeld’s model was later criticised as being incomplete,³⁴¹ it still serves as a basis for most writings on modern American legal theory. Observing that the term ‘rights’ tends to be used indiscriminately to cover what in a given case might be a privilege, a power or an immunity rather than a right in the strictest sense, Hohfeld’s model has the merit of presenting all the various relations between individuals as ‘opposites’ and ‘correlatives’.

What Hohfeld calls a *right* remarkably resembles a subjective right in continental European legal theory, since it is also based on the distinction between ‘rights’ and ‘duties’. For every right, there is a correlative legal duty: when *P has a right to do A, others have a duty to let P do A*. The existence of a duty gives P a certain claim against others and this constitutes a *claim-right* in Hohfeld’s model. This *claim-right* may be further supported by the propositions about P’s right to set proceedings in motion to vindicate and enforce her right not to be prevented from using A, and about the public authorities’ duty to respond to those proceedings. The *claim-right* may involve anything from a purely negative duty not to impede P’s action to a positive requirement to do what one can to make it possible for P to do A. The class of *claim-right* therefore includes rights to active assistance as well as rights to negative freedom.³⁴² The difference between a ‘right’ and a ‘duty’ would seem to be that while legal rights are permissive, legal duties are mandatory; one may exercise one’s rights if one wishes, but one must fulfil one’s duties whether or not one wishes to do so.³⁴³

Like in continental European law, which distinguishes absolute rights from relative rights, American legal theorists also make a distinction between rights *in personam* and rights *in rem*. A right *in personam* is correlative to a duty incumbent on a specific individual, like an obligation arising out of a contract. A right *in rem*, by contrast, is correlative to a duty in principle incumbent on everyone, like property rights. One of the reasons why Hohfeld’s analysis might be judged incomplete is that it certainly clarifies the legal relations between individuals with respect to a person’s *claim-right* on

³⁴⁰ Hohfeld 1966, p. 35 and ff.

³⁴¹ Wellman 1997, p. 66; Donnelly 1994, p. 97; and Waldron 1984, p. 9.

³⁴² Waldron 1984, p. 6.

³⁴³ Wellman 1997, p. 67.

an object, but it says nothing about the content of such a right or about the manner in which it comes into being. For the purposes of my discussion however, it may not be necessary to go into such detail. Purely on the basis of the ‘rights’ and ‘duties’ analysis, the limitations on copyright do not amount to *claim-rights* under Hohfeld’s model for essentially the same reasons that they do not constitute subjective rights under continental European law. Users have no right *in rem*, although they may obtain from the copyright holder a right *in personam*, with respect to the acts covered by the limitations on copyright, since the law imposes no correlative duty on everyone to respect that right.

2.3.2 OBJECTIVE RIGHT OR PRIVILEGE

If the users’ ‘interest’ cannot qualify as a subjective right, what type of ‘interest’ do they have? That users have an actual ‘interest’ – understood in the general sense of the word – in making use of protected works is undeniable. In fact, the continental European private law system is founded on the protection of private interests, only some of which are elevated to the rank of subjective rights. The question is whether the limitations on copyright might constitute such protected interests and if so, what level of protection can be expected. It is now well admitted in continental European legal theory, that positive law ensures the protection of ‘legitimate interests’ of private individuals (*rechtlich geschütztes Interesse*).³⁴⁴ The general protection accorded to these ‘legitimate interests’ gives rise to what I will refer to in the following pages as an ‘objective right’, which is created by the reflex effect of the law also known as the *Reflexwirkung* theory.³⁴⁵ Because it is not always clear whether a particular provision of positive law aims primarily at serving the public interest or at satisfying private interests, it can be difficult to distinguish between the formal grant of a subjective right and the existence of an objective right through the reflex effect of the law. The nature of a particular right ultimately depends on the language and purpose of the provision of positive law.

Positive law essentially consists of two sets of norms: the imperative rules, which command or prohibit, and the permissive rules.³⁴⁶ An objective right can derive from an imperative rule that satisfies individual interests in practice, but whose primary objective is not to protect such interests but

³⁴⁴ Dabin 1960, p. 27; Roubier 1963, p. 53-54; Ghestin and Goubeaux 1990, p. 141; Reh binder 1991, p. 97.

³⁴⁵ The *Reflexwirkung* theory was developed by Jellinek at the turn of the 20th century. See: Jellinek 1919, p. 70.

³⁴⁶ Houwing 1939, p. 19.

rather to regulate particular behaviour. On the other hand, an objective right may also arise when a legal norm renders the satisfaction of an interest possible, perhaps also recommendable, but not necessarily mandatory. Among other forms of ‘objective right’ derived from the reflex effect of the law, Jellinek gave the example of everyone’s faculty to use public property or public establishments. For instance, people do not have a ‘subjective right’ to visit the museums in Berlin or Paris; instead, the collections must be made available to the public. In the public interest, the State prevents no one from entering such premises on given days and times and to admire the works of art that they contain.³⁴⁷ Another example is when the State grants, under specific conditions laid down in the law, a licence to interested persons to exercise a particular form of activity, such as the operation of a dance hall or of a broadcasting enterprise. People who comply with the criteria have an objective right to the licence, which they lose as soon as the conditions are no longer met.

The distinction between subjective rights and these protected ‘legitimate interests’ revolves therefore around the notion of ‘duty’ (*Pflicht*). The fulfilment of duties can bring different consequences for individuals, depending on whether the measure benefits one person, a few people or everyone, either directly or indirectly. When legal rules impose a particular action or prohibition in the general interest, the result of this action or of this restraint may directly benefit all individuals, without expanding each and every person’s legal sphere. While a subjective right always implies the existence of a duty for everyone to respect that right, the creation of a duty under positive law does not always imply the grant of a right, at least not of a subjective right.³⁴⁸ In this context, holders of ‘objective rights’ can expect from others that they adjust their behaviour in such a way as to respect the rules that protect those interests and not to unlawfully harm them.

Whereas objective rights exist only through the reflex effect of the law and are not attributed to specific individuals, holders of such rights have a more limited right of action for the protection of their ‘legitimate interest’. Contrary to subjective rights, objective rights do not entail the grant of an individualised right to legal redress. Compliance with duties that procure only an indirect benefit to everyone or to just a few can only be enforced by the State. In this case, the holder of an objective right may only claim the application of the legal norm to her benefit, through the internal mechanisms of the law. By contrast, the person who suffers damages from the unlawful

³⁴⁷ Jellinek 1919, p. 75.

³⁴⁸ Reh binder 1991, p. 96; Bühler 1914, p. 229; see also: Somlo 1927, p. 430 and f. In the Netherlands, see: Houwing 1939, p. 19 and f.; and Meijers 1948, p. 37 and f.

violation of a protective law, like traffic regulations – or of any measure the respect of which procures a direct benefit to everyone – may claim compensation from the person who violated the norm.³⁴⁹ This principle is also recognised at Article 823 of the *Bürgerliches Gesetzbuch* (BGB), which specifies that ‘anyone who intentionally or carelessly infringes upon the life, the body, the health, the liberty, the property or *any other right* of another person, is liable to pay compensation to this person for the damages incurred’ (emphasis added). Actions in damages must be based on the general rule of law that protects the relevant interest. The personal interest of the holder of an objective right may be raised only in support of an action’s admissibility, not as an independent ground for action.³⁵⁰

Consequently, positive law recognises the existence of different sorts of ‘legitimate interests’ in the field of copyright, to each of which it gives different levels of protection, depending on their respective importance. By granting copyright owners a number of exclusive prerogatives with respect to their works, the legislator recognises in the form of a subjective property right the ‘legitimate interest’ of each rights owner in her own works. The rights owners’ ‘legitimate interests’ are not absolute and those of users must also be taken into account. It can thus be reasonably argued that the limitations on copyright have been adopted as an express recognition of the ‘legitimate interests’ of users. In other words, by excluding the acts covered by the limitations from the scope of the copyright protection, positive law effectively frees users in acknowledgement of their ‘legitimate interests’ of the duty to respect the owner’s rights in the particular circumstances enumerated in the copyright act. The exclusion of certain acts from the rights owners’ power of control directly benefits all users of protected works, who obtain as a result an objective right to accomplish the acts specified in the copyright act.

In American common law, the next step in Hohfeld’s analysis of the legal relationships between individuals is the study of a *privilege*. A privilege is the opposite of a duty and the correlative of a ‘no-right’. A privilege may thus be understood in Hohfeldian terms simply as the absence of a duty: *P has a privilege to use A* is the equivalent of saying that *P has no duty not to use A*.³⁵¹ Hohfeld explains the two opposites of a ‘privilege’ and a ‘duty’ with the aid of the following example:

³⁴⁹ Reh binder 1991, p. 97.

³⁵⁰ Gervais 1961, vol. 1, p. 246-247.

³⁵¹ Waldron 1993, p. 859.

‘whereas X has a *right* or *claim* that Y, the other man, should stay off the land, he himself has the *privilege* of entering on the land; or, in equivalent words, X does not have a duty to stay off. The privilege of entering is the negation of a duty to stay off. As indicated by this case, some caution is necessary at this point; for, always, when it is said that a given privilege is the mere negation of a *duty*, what is meant, of course, is a duty having a content or tenor precisely *opposite* to that of the privilege in question. Thus, if, for some special reason, X has contracted with Y to go on the former’s own land, it is obvious that X has, as regards Y, both the privilege of entering and the *duty of entering*. The privilege is perfectly consistent with this sort of duty, - for the latter is of the *same* content or tenor as the privilege; - but it still holds good that, as regards Y, X’s privilege of entering is the precise negation of a duty *to stay off*.’³⁵² (emphasis in original)

Continuing with Hohfeld’s example, the correlative of X’s right that Y shall not enter the land is Y’s duty not to enter; but the correlative of X’s privilege of entering herself is manifestly Y’s ‘no-right’ that X shall not enter. The fact that the correlative of a privilege is a ‘no-right’ also implies, under Hohfeld’s model, that if X exercises her privilege of entering the land then no right of Y is violated. On the other hand, if for some reason, X is prevented from exercising her privilege, then no right of X is violated either. Hohfeld highlights this difference with the following example: suppose that X, being the owner of the land, contracts with Y that she (X) will never enter the land. With A, B, C, or D no such contract is made. One of the relations existing between X and Y is, as a result, fundamentally different from the relation between X and A. As regards Y, X has no privilege of entering the land; but as regards either A or any of the others, X has such a privilege. It is to be observed that X’s right, as owner of the land, that Y respect her duty not to enter the land persists even though X’s own privilege of doing so has been contractually extinguished.³⁵³ X’s privilege also implies that the government shall neither prevent X from doing something nor punish him for doing it.³⁵⁴

The *privilege* in Hohfeld’s theory would thus be the practical equivalent of continental European law’s notion of objective right. The fair use doctrine, the exemptions for the benefit of libraries and educational institutions as well as the multiple statutory licences, provided under the U.S. Copyright Act, would all qualify as a *privilege*. In fact, the usual analysis of

³⁵² Hohfeld 1966, p. 39.

³⁵³ Id., p. 42.

³⁵⁴ Benkler 1999, p. 392.

the fair use doctrine is that it is ‘a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent notwithstanding the monopoly granted to the owner’.³⁵⁵ This is in Hohfeld’s model the equivalent of saying that users do not have a duty to ‘stay off the land’, that is, a duty to refrain from using the protected works. Furthermore, the ‘no-right’ correlative of the user’s ‘privilege’ would imply with regard to the limitations on copyright that rights owners have ‘no-right’ to prevent users from making use of the protected works in the particular circumstances defined in the Copyright Act.

2.3.3 INFLUENCE OF THE FORM ON THE LIMITATION’S NATURE

As I have demonstrated in section 2.2 above, the decision to provide the rights owner with an equitable remuneration for the use of her copyrighted material is the result of a balancing process between the rights owner's interest on the one hand and the user's ‘legitimate interest’ or the ‘public policy objectives’ on the other hand. In some cases, the possibility to make an unauthorised use of copyrighted material is deemed so important to the individual user or to society as a whole that it should not be subject to the payment of remuneration. This is the case for the right to make quotations and parodies or to use government information. In other cases however, although there might be a legitimate interest in permitting certain unauthorised uses of copyright material, this interest is not strong enough to justify depriving the rights owner of an equitable remuneration. Of course, the potential impact of a particular limitation on the rights owner's economic interests constitutes an important factor in the legislator's decision. Does the user’s ‘interest’ in the use of a work really differ if the use occurs under an exemption or under a statutory licence? More specifically, does the objective right recognised in relation to the use of a work under an exemption change in nature if the use is subject to the payment of equitable remuneration to the rights owner?

In both cases, the user has an objective right or privilege protected by positive law. The only difference between the exemption – or the fair use defence – and the statutory licence are the conditions of exercise. Either under an exemption or a statutory licence, the freedom to use a work is always subject to conditions: quotations must pursue a purpose, be compatible with fair practice and indicate the name of the author and the source; ephemeral recordings made by a broadcasting organisation must be

³⁵⁵ Ball 1944, p. 260, cited in *Rosemont Enterprises, Inc. V. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied* 385 U.S. 1009 (1967).

realised with its own facilities and must be deleted after a certain period of time; and the private copying of sound or audio-visual works is conditional on the payment of a fee on blank audio or video supports. The obligation for users to pay equitable remuneration to the rights owners is in my opinion simply an additional condition to obey in order to be able to use the protected work without prior authorisation. Hence, the type of condition attached to each limitation, such as paying a fee, indicating the name of the author or complying with fair practice, should in principle have little or no effect on the nature of the user's right. In fact, Recital 36 of the new Directive on Copyright in the Information Society, which states that 'the Member States may provide for fair compensation for rightholders also when applying the optional provisions on exceptions which do not require such compensation', would seem to support this argument.

Moreover, the consequence of a failure to comply with the condition of exercise of a limitation is in principle the same whether the use occurs under an exemption or a statutory licence. In France, it is generally admitted that the failure to abide by the conditions laid down in the CPI regarding the exercise of limitations constitutes an infringement of copyright.³⁵⁶ Similarly, following the recent modifications of the Dutch Copyright Act, it is the legislator's intent that the failure to pay the remuneration owed to rights owners for the making of reproductions by means of reprography resurrects the rights owner's exclusive right and gives rise to an infringement of copyright.³⁵⁷ The same is also true with respect to press reviews. It has long been admitted that the reproduction of articles taken from newspapers or periodicals constitutes an infringement if the name of the author and the source are not indicated.³⁵⁸ In Germany, the consequences of the failure to comply with the statutory requirements underlying the exercise of a limitation are essentially the same under an exemption or a statutory licence, but interestingly, these differ from French or Dutch law. In cases where the user fails to pay the remuneration due under a statutory licence or fails to pay on time, the rights owners may claim damages but the action itself of the user is not unlawful.³⁵⁹ In the same way, a contravention of the obligation to mention the source of the work and the name of the author does not make unlawful the otherwise legitimate use of a work in the context of a statutory

³⁵⁶ Gautier 1999, p. 296.

³⁵⁷ Dutch Copyright Act, art. 16h. See: Explanatory Memorandum concerning the Amendment to the Copyright Act of 1912 regarding reprographic reproductions, Second Chamber, Session 2000-2001, 27 617, No. 3, p. 19.

³⁵⁸ Snijder van Wissenkerke 1913, p. 205.

³⁵⁹ Melichar 1999, p. 746.

limitation on copyright.³⁶⁰ In such circumstances, however, the author could have a right to obtain damages.

Furthermore, in my opinion, the structure of the limitations lends no support to the idea that an exemption differs in nature from a statutory licence. The language of the various copyright acts gives no indication that legislators intended to confer distinct types of objective rights or privileges on users depending on the limitation concerned. The wording employed in a given statute to grant permission to use protected works is, for the most part, consistent across the provisions. Variations of language between limitations of a same statute are usually haphazard and incidental, and they certainly do not seem to reflect a systematic effort to distinguish between exemptions and statutory licences. Under most copyright acts for example, the limitations for home taping and reprography are based on the same provisions as the exemption for private use. The essential distinction between the exemption and the statutory licence consists in this case of the added obligation for users to pay an equitable remuneration to rights owners.

In this sense, the German act gives a patent example of the fact that the legislator did not intend to distinguish between exemptions and statutory licences. Compared to the French and Dutch copyright acts, the German act contains several limitations other than private and internal use, according to which a particular use may take place either as an exemption or as a statutory licence, depending on the circumstances. Hence, a number of limitations allow uses to take place on a remuneration-free basis, subject to the occurrence of a particular factual situation that triggers the obligation to pay an equitable remuneration. The exemption for school broadcasts falls under this category, where no remuneration must be paid unless the broadcasts are kept longer than the permissible one-year delay. The reverse situation also arises where an equitable remuneration must in principle be paid to the rights owners except in certain well-defined circumstances. For instance, the reproduction and distribution of radio commentaries and newspaper articles is subject to the payment of remuneration except in the case of press reviews. The same goes for the public rendition of protected works, where the usual obligation to pay remuneration does not apply to organisations devoted to youth or social welfare, to elderly houses, to penitentiaries, or to schools. In other words, with respect to a single limitation, the conceptual line between an exemption and a statutory licence is sometimes difficult to draw, and the requirement of paying an equitable remuneration is simply one condition among others with which users must comply.

³⁶⁰ Dietz 1999b, p. 1006; OLG Hamburg, 5 June 1969 (*Heintje*), in *GRUR* 1970/01, p. 38; and OLG Hamburg, 27 September 1973 (*Gartentor*), in *GRUR* 1974/03, p. 165.

The confusion about the nature of the user's claim under a statutory licence originates most likely from the ongoing discussion among copyright scholars about the nature of the rights holder's own entitlement under such a regime. The debate is polarised between those authors who argue that the right to remuneration granted under a statutory licence constitutes a weaker right, more akin to a creditor's claim than to an exclusive exploitation right, and those who maintain that the author's claim in this context forms an independent right having characteristics of its own.³⁶¹ A solution to this debate may lie in an analysis of the legal relationship between rights owners and users under the exemption and the statutory licence regimes. In my view, the nature of the entitlement is not necessarily reciprocal between rights owners and users. From the rights owner's point of view, the exclusion of certain acts from the rights owner's power of control remains the same under a statutory licence and an exemption. If the legislator adopts the same formulation for both types of limitations, according to which 'it is not an infringement to...', then the rights owner has no claim to enforce her right against the user, who in turn has no duty of respect towards the rights owner in this case. Melichar suggests however that, under a statutory licence regime, rights owners and users are bound by a legal obligation (*Schuldverhältnis*), whose main component is the payment of remuneration.³⁶² From the rights owner's perspective, the statutory licence does differ from the exemption, insofar as the latter entails no such monetary obligation.

From the user's point of view, on the other hand, the objective right to use a protected work is in all cases circumscribed by the conditions established in the act, which can include the payment of remuneration or not. I believe that the general nature of the user's right remains essentially unaffected by the obligation to pay remuneration. Not only did the legislator carve out the acts covered by both forms of limitations from the scope of right of the owner, whereby users obtain an objective right to use the material by reflex effect of the law, but the legislator has also given no indication suggesting that the two types of limitations should be treated differently. More importantly perhaps, the legal obligation to pay remuneration under a statutory licence has been placed, depending on the limitation concerned, either on the user herself or on some intermediary, such as the library (on behalf of its patrons) or the manufacturer, the importer or the distributor of reprographic equipment. Consequently, the fulfilment of the obligation of payment does not systematically fall on the shoulders of the person who

³⁶¹ See: Rossbach 1990, p. 79 and ff.; and Melichar 1999, p. 744.

³⁶² Melichar 1999, p. 743.

actually benefits from the objective right or privilege.³⁶³ Thus, the existence of an obligation to pay remuneration should not change the nature of the user's objective right or privilege in making unauthorised uses of copyrighted material.

It has been argued that the remuneration due to the rights owner is the price or the compensation for the authorisation that the author is *presumed to have given* following an express intervention from the legislator.³⁶⁴ This argument is unconvincing. Had the legislator intended to permit certain unauthorised uses of copyrighted material in the form of a refutable presumption, it would have been made clear in the act, through such words as: 'the private use of a work is presumed authorised by the rights owner as long as...'. Instead, the exemptions and statutory licences contained in the French CPI, the Dutch and the German copyright acts all state that 'it is not an infringement to...', a formulation which certainly does not suggest that the use allowed under a limitation occurs under the presumed authorisation of the rights owner. In reality, the argument of a presumption of licence could prove more relevant in the case of the limitations on the exclusive rights that are imposed in the form of a mandatory collective administration of rights. Although there is little practical difference for rights owners between a statutory licence and the mandatory collective administration of rights, the nuance does exist. In the case of the mandatory collective administration of right, the rights owner in theory retains her exclusive right to authorise or prohibit the use of her work and compensation takes place in the form of royalties negotiated between the appointed collective society and the users. In other words, under this form of limitation, the rights owner may still validly enforce her right against the user, albeit through the intermediary of a collective society, and the user must continue to respect this right by conforming to the conditions of use set by the collective society. From the user's perspective, one could therefore argue that her use of protected works occurs under a presumption of licence when the rights owner is compelled by law to resort to the mandatory collective administration of her rights.

2.3.4 INFLUENCE OF THE JUSTIFICATION ON THE LIMITATION'S NATURE

Before turning to the nature of a user's right under a private agreement dealing with the use of copyrighted material, it is worth examining the nature of the user's claim in her relationship with the State. While the form given to a particular limitation has little impact on the limitation's nature, I do believe

³⁶³ Ibid.

³⁶⁴ Kéréver 1983, p. 369.

that the justification behind its adoption might play some role in the issue. The existence of an objective right or a privilege of the user not only rests on the reflex effect of the copyright act, but also finds support in the general rule of law that protects each particular interest. In other words, they reflect the legislator's recognition of the user's 'legitimate interests' in continental European law, or of the 'public policy objectives' in American law. Admittedly, the value attached to the 'legitimate interests' of users or 'public policy objectives' varies in importance from one interest to another. The weight given to the objective rights that derive from the various limitations on copyright is thus bound to differ according to the value awarded to each 'legitimate interest' under positive law.³⁶⁵ As shown in the previous subsection, some of the 'legitimate interests' embodied in the limitations on copyright are based on fundamental rights and freedoms, others on industry practice and competition law, others on the general interest of disseminating knowledge and others on market failure considerations.

Europe

With respect to the limitations based on fundamental rights and freedoms, one can very well argue that the 'legitimate interests' of the user are judged so important under positive law that the legislator not only has the power to accommodate these interests, but also has the obligation to do so. This obligation of the legislator to protect everyone's fundamental rights and freedoms derives from the constitutional texts themselves. In France, the *Déclaration des droits de l'homme et du citoyen de 1789* reserved to the law (la loi), as an expression of the common will, the regulation of individual freedoms.³⁶⁶ The Constitution of 1946 expressly confirmed the power of the legislator to regulate the fundamental right to strike of the worker. Moreover, Article 34 of the Constitution of 1958 states that: 'the law fixes the rules concerning the civic rights and the fundamental guarantees granted to citizens for the exercise of public freedoms'. The *Conseil Constitutionnel* has confirmed the legislator's duty to implement such rules as are necessary for the exercise of the fundamental freedom of thought and opinion laid down in Article 11 of the French Declaration of 1789 and paragraph 4 of the Preamble to the Constitution of 1946.³⁶⁷ On the basis of this decision and of a subsequent one,³⁶⁸ the legislator received the mandate to adopt measures to ensure greater diversity in the media and to avoid concentrations of press ownership.

³⁶⁵ Hugenholtz 1989, p. 152.

³⁶⁶ Robert and Duffar 1999, p. 112.

³⁶⁷ Decision No. 84-181 DC of 10 October 1984.

³⁶⁸ Decision No. 86-210 DC of 29 July 1986.

In the Netherlands, it is generally accepted that the State has four sorts of obligations with respect to fundamental rights: ‘to respect’, ‘to protect’, ‘to ensure’ and ‘to promote’ fundamental rights.³⁶⁹ Classic rights, such as freedom of expression and the right to privacy, primarily entail an obligation of respect on the part of the State, whereby the public administration has a duty to refrain from intervening in the communication and distribution of information. These constitutional rights do entail other types of obligations for the State. For instance, the legislator has received an explicit mandate to implement rules for the protection of privacy, under Article 10(2) of the *Grondwet* which states that: ‘Rules to protect privacy shall be laid down by Act of Parliament in connection with the recording and dissemination of personal data’. With respect to freedom of the press, it is generally accepted that, like in France, the public authorities have the obligation (also known as *Zorgplicht*) to encourage or ‘promote’ a diversity of opinions and expressions in the media and to prevent concentrations of press ownership.³⁷⁰ Dutch courts have also recognised the State's duty to provide, under certain circumstances, the physical means necessary to allow the individual to exercise her right to communicate.³⁷¹

In Germany, a similar obligation can be derived from the joint interpretation of Article 1(2) and (3) of the *Grundgesetz* (GG), which proclaim the inviolability and inalienability of human rights and their binding character on the legislature, the executive, and the judiciary. In addition, Article 20(3) GG provides that ‘legislation is subject to the constitutional order; the executive and the judiciary are bound by the law.’ These provisions have thus been interpreted as imposing on the State not only a negative obligation to refrain from interfering with the exercise of fundamental rights (*Abwehrrecht*), but also a positive obligation to ensure that the values embodied in the fundamental rights are protected and carried out under private law (*Schutzpflicht*).³⁷² At the European level, a similar obligation arises under Article 1 of the European Convention on Human Rights (ECHR), which states that the ‘Contracting Parties shall secure to

³⁶⁹ Rapport 2000, p. 52; and van Baarda 1992, p. 65.

³⁷⁰ De Meij, Hins, Nieuwenhuis and Schuijt 2000, p. 293 and ff. The State's obligation to foster plurality in the media and to prevent the concentration of the press can also be derived from the text of Article 10 of the ECHR and from the jurisprudence of the European Court on Human Rights. See: Burkens and Kummeling 1993, p. 267; and *Geïllustreerde Pers v. The Netherlands*, European Commission on Human Rights, decision of 6 July 1976, NJ 1978, No. 237, where the Commission spoke of a duty for the State to act against excessive press concentration.

³⁷¹ Boukema 1966, p. 141.

³⁷² Isensee 1992, p. 146.

everyone within their jurisdiction the rights and freedoms defined in (...) this Convention'. The Contracting Parties to the Convention therefore have a duty to take positive action to ensure that the rights guaranteed under the Convention can be exercised effectively.³⁷³

To some extent, the fact that the State has a positive obligation to concretise the individual's freedom of expression for example in matters concerning the media and the press could lend support to the argument that the State would have a comparable duty to concretise the user's fundamental freedoms, when devising the contours of the copyright regime. Limitations on copyright that serve to protect the users' fundamental rights and freedoms, such as the authorisation to make quotations, parodies, news reports, private uses or to access public information, are thus an integral part of the copyright system, since they implement the State's obligation as regards the protection of the user's fundamental rights and freedoms. This might explain why common language often refers to the authorisation to make quotations and parodies as a *right*, which would appear to take their human rights dimension into account.

Except perhaps with regard to the regulation of competition, which has a public order dimension³⁷⁴, the intervention of the State to protect the 'legitimate interests' behind other types of limitations is more arbitrary and often depends on national public policy. Limitations adopted to regulate competition would normally entail the existence of a significant 'legitimate interests' of both users and society as a whole. This is the case for the provisions of the Computer Programs Directive. As mentioned earlier in this book, the Directive contains four limitations on the exclusive rights, two of which purport to regulate competition in the software industry. In light of this, it is interesting to note that Lucas, who dismisses the idea that users might have a *right* to use protected material under the provisions of the copyright act, does open the door to one exception: that of the right to make back-up copies of protected computer programs.³⁷⁵ The wording of the provision and the fact that contractual clauses to the contrary are null and void would indicate, in his opinion, that the user enjoys a right with respect to the lawfully acquired copy of the computer program. I believe, however, that if the user does have such a right in that case, it arises more as a prerogative of the user as *owner of the physical* copy of the computer program, rather than as a reflection of a 'legitimate interest' in making use of the work. It is also interesting to note that Lucas does not extend his comment to the other

³⁷³ Voorhoof 1995, p. 54.

³⁷⁴ See *infra* at section 3.1.2.1 on economic public order.

³⁷⁵ Lucas 1998, p. 171.

two mandatory limitations under the Directive, which relate this time to the use of the computer program through 'black box' analysis or through decompilation as a means to maintain free competition. There, the user's 'legitimate interest' in making use of the work takes on a public order dimension, which could more readily imply the grant of a *right*, an objective right that is, to the 'person having the right to use a copy of a computer program'.³⁷⁶

Essentially therefore, users of protected works have an objective right to accomplish the acts permitted under the copyright act. Since the user's objective right derives from the reflex effect of the law, its scope is strictly limited to the wording of the copyright act. It is not transferable and confers no independent right of action to enforce it. Nevertheless, legal theory admits the principle that all 'legitimate interests' recognised by positive law should be taken into account whenever a conflict arises between the enforcement of exclusive rights by their owners and the exercise of a limitation by users.³⁷⁷ Admittedly, the outcome of this judicial balancing process is likely to vary from one limitation to the other, according to the value awarded to the 'legitimate interest' behind each one of them. As a result, limitations based on the user's constitutional rights should in principle weigh more heavily than those based for example on industry practice or public interest in the dissemination of knowledge. So the likelihood that a user's objective right will be given more weight than the rights owner's subjective right in cases where positive law does not give strong recognition to the user's 'legitimate interest' is rather faint. This is particularly so with respect to limitations meant for the most part to reduce transaction costs between parties, such as the statutory licence for cable retransmission and the reprography regime. One could argue that these limitations do not primarily reflect the 'legitimate interests' of users, but rather that they serve mainly those of the rights owners by increasing economic efficiency in the exercise of exclusive rights. Can we still talk in this case of an objective right of users? Yes, probably, through the strict application of the law, but an objective right for which the user has a relatively weak 'legitimate interest'. In other words, a user's objective right to use protected works is only as strong as the 'legitimate interest' behind it.

³⁷⁶ Computer Programs Directive, art. 5(3) and 6.

³⁷⁷ Gervais 1961, p. 249, where the author writes: 'the lower interest must not be entirely sacrificed to the satisfaction of the higher interest, and the owner of the higher interest must take into account this interest, lower but protected, in the unilateral solution which the prominence of his interest allows him to adopt.'

United States

In U.S. law, to hold that users have a ‘privilege’ to accomplish specific acts under the fair use doctrine and under the other limitations included in the U.S. Copyright Act gives no indication of the extent of that privilege. The purpose and foundations of the fair use defence therefore play a definite role in determining its nature. As J. Leval points out, ‘the American copyright system is not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public.’³⁷⁸ The doctrine of fair use limits the scope of exclusive rights in furtherance of copyright’s utilitarian objectives: it is the result of the weighing process between the creator’s individual interest and the public interest.³⁷⁹ The doctrine of fair use is an affirmative defence to a copyright infringement action, which permits courts to avoid the rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.³⁸⁰ In view of the utilitarian foundations of the American copyright regime, the claims of fair use are therefore to be assessed in each case by examining whether the public good is best served by enforcing the intellectual property right or by encouraging the progressive effects of the free flow of ideas.

A survey of the American copyright case law shows that the fulfilment of copyright law’s utilitarian objectives is a predominating factor in the evaluation of the fair use doctrine. It turns out that the privilege of fair use is admitted only in cases where ‘important public policy objectives’ are at stake, such as cases showing First Amendment concerns. In this regard, Waldron notes that ‘though the person constrained by copyright is often seen through the lens of free speech values as the valiant defender of dissident or satirical ideas, those free speech values themselves – when they crop up in copyright doctrine – tend to get stated in social terms’.³⁸¹ Hence, a user’s privilege under the fair use doctrine would seem to be only as strong as the ‘public policy objectives’ that her privileged use might help to fulfil. For example, the U.S. Supreme Court reminded everyone in *Campbell v. Acuff Rose* that:

³⁷⁸ Leval 1990, p. 1107.

³⁷⁹ See: Rosenfield 1975, p. 794; and Patterson and Lindberg 1991, p. 197.

³⁸⁰ Nimmer, D. 1999, p. 13-149.

³⁸¹ Waldron 1993, p. 857.

‘From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, ‘[t]o promote the Progress of Science and useful Arts. . .’³⁸²

With respect to parodies, the Court added that:

‘Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one. We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under 107.’³⁸³

To a certain extent the examination under U.S. Copyright law of the fair use’s contribution to the fulfilment of the public policy objectives is not so different from the inquiry under continental European law about the ‘legitimate interest’ behind the user’s objective right. Of course, the first one is considered *en masse* while the second is considered on an individual basis. In both cases however, the user’s objective right or privilege is not blindly applied as the result of the reflex effect of the law. Both must be evaluated in their particular context and conflicts between the interests of rights owners and those of users must be resolved accordingly.

2.3.5 CONCLUSION

The study of the legal nature of the limitations on copyright explains to some extent the discrepancy of terminology sometimes found in literature to refer to the various limitations on copyright. More importantly, it also reveals that limitations on copyright are an integral part of the copyright system, for they are the recognition in positive law of the users’ ‘legitimate interests’ in making certain unauthorised uses of copyrighted material. Users obtain an ‘objective right’ or a ‘privilege’ in making these uses through the reflex effect of the law. More specifically, users are relieved from the duty to respect the copyright holder’s right with regard to the acts specified in the copyright act. However, a user’s objective right or privilege to use protected works grants no individualised right of redress and is therefore only as strong as the ‘legitimate interest’ or the ‘public policy objective’ behind it. Even those limitations that are founded on the constitutionally protected rights and

³⁸² *Campbell v. Acuff Rose*, 510 U.S. 569, 574 (1994).

³⁸³ *Id.*, p. 579.

freedoms of users must be weighed against the rights owner's interests. The justifications behind the adoption of the limitations therefore play an important role in the weighing process of the legislator and the courts, either as 'legitimate interests' or as elements of the 'public policy objectives'. Precisely because some 'legitimate interests' weigh heavier than others or contribute more directly to copyright law's utilitarian objectives, certain contractual agreements that purport to restrict the application of a specific limitation on copyright may warrant greater attention under the private law of contracts.

Chapter 3

Freedom of contract

The second chapter of this book showed that the copyright regime establishes a delicate balance of interests between rights owners and users in furtherance of the regime's general objectives. On the one hand, copyright law grants every rights owner a subjective right in her original work. To the exclusion of all others, rights owners have thus the power to exercise, with respect to their works, all the prerogatives defined by law. Copyright law also recognises the legitimate interests of users in making certain unauthorised uses of protected works, through the establishment of limitations on the owner's copyright. As a consequence, users have a general duty to respect the rights owner's subjective rights, except in cases where positive law removes this duty by defining limitations on copyright. Just like the owner's subjective rights, these limitations form an integral part of the copyright regime, since they contribute to the achievement of a balance between the respective rights and duties of owners and users under copyright law. In principle, any use of copyrighted material carried out in compliance with the provisions of copyright law preserves the balance established by the legislator.

To what extent are the parties to a copyright licence obliged to respect the legislator's balance of interests? For years, rights owners and users have been negotiating licences for the production and distribution of copyrighted works. On occasion, these contractual arrangements have purported to restrict the user's actions with respect to protected material, sometimes even beyond the bounds normally set by copyright law. More recently, the balance set by the copyright regime has come under greater strain than before in view of the increased use of standard form contracts that aim to regulate the end-users' permitted actions with respect to copyrighted material. Besides the provisions of copyright law, end-users of copyrighted material must often comply with contractual restrictions imposed by the rights owners. Leaving parties to negotiate the terms and conditions of use of protected material is not unusual nor is it in principle a bad thing. Nevertheless, the legitimacy of a restrictive copyright contract may depend

on numerous factors, such as the conditions of formation of the contract, the respective interests of the parties involved in the transaction, the laws applicable and the general copyright policy.

The present chapter studies the general principle of freedom of contract, its significance, and its limits. Despite the fact that the principle is constantly reaffirmed, complete freedom of contract is essentially a thing of the past. Over the years, the intervention of the legislator in the private arena of contractual relations has been deemed necessary, either with respect to the formation of the contract or with respect to its content, to protect the general interest or the weaker party to a contract. In many circumstances therefore, parties to a contract merely enjoy a 'regulated' freedom to choose their contracting partner or to determine the content of their agreement. This chapter studies the foundations and inherent limits to the principle of freedom of contract and reviews the most important areas of legislative intervention in the parties' freedom of contract as well as the justifications therefore.

3.1 Principle of freedom of contract

In addition to the rights and duties recognised by legislation, contracts form modern society's main source of obligations between individuals, together with rules on civil liability.¹ Contracts are concluded in countless areas of human activity and in a variety of ways, going for example from the simple purchase of a book or a CD, to the hiring of a computer analyst to write a program. In French civil law, a contract is understood as an 'agreement through which one or more persons commit themselves towards one or more other persons, to give, to do or not to do something'.² The French definition of a contract closely corresponds to that provided under the Dutch Civil Code (NBW)³ or given in German legal literature⁴. Although American case law often defines a contract as a promise or series of promises that the law enforces,⁵ the Uniform Commercial Code (UCC) characterises a contract as the 'total obligation which results from the parties' agreement'.⁶

¹ For a complete overview of the sources of contract law in Europe and the United States, see: Hartkamp et al. 1998.

² French Civil Code, art. 1101.

³ NBW, art. 3:33 and 6:213.

⁴ Palandt 2000, § 145, p. 140.

⁵ Restatement (Second) of Contracts, art. 1.

⁶ UCC, § 1-201(11). Under United States law, contract law is primarily common law, embodied in court decisions. However, courts can rely for guidance on the Restatement (Second) of Contracts, which was written under the auspices of the American Law

This definition, by putting the emphasis on the obligation flowing from the parties' agreement, corresponds rather closely to the European definitions of a contract. In other words, legislation recognises that contractual obligations arise when two basic conditions are met, i.e., when two or more individuals manifest a common intention of binding themselves to an agreement, and when this agreement is concluded to produce a legal effect. Implicit from these definitions is the principle that everyone is free to bind herself to a legal obligation. In the following pages, I study the foundations of the principle of freedom of contract by examining the workings of the classic contract model. The basic assumptions behind the principle of freedom of contract have been challenged over time, especially under the standard-form contract model, thereby reflecting profound socio-economic changes.

3.1.1 CLASSIC CONTRACT MODEL

For the purpose of this section, the classic contract model typically consists in a binding, bilateral agreement reached at the close of a free and voluntary negotiation process conducted in good faith between equal and perfectly informed contracting parties. The development of the modern rules on contract has followed a slightly different path in continental Europe and the United States. Nineteenth century continental European contract law emerged under the influence of liberal thought and the principle of autonomy of the will. According to the principle of autonomy of the will (*l'autonomie de la volonté* or *freie Willensbestimmung*), the actual assent to the agreement on the part of both parties is necessary and without it, there can be no contract. By contrast, American contract law evolved mostly around the notions of promise, reliance – i.e., the protection of the parties' expectation – and consideration, where the contract's 'consideration' is the counterpart to the promise in an exchange.⁷ Nevertheless, that is not to say that the principle of autonomy of the will, or the parties' intention, does not play a role in the formation of contracts under American law. After decades of doctrinal struggle on the question of whether a court must look at the actual or apparent intention of the parties, the majority position holds that a contract

Institute with the objective of reducing the mass of case law to a body of readily accessible rules on contract law. In addition to many legislative enactments adopted on the subject by each State legislature, the Uniform Commercial Code jointly written by the American Law Institute and the National Conference of Commissioners on Uniform State Laws forms the most significant single piece of legislation in the field of contracts. See: Farnsworth 1999, p. 26 and ff.; and Hyland 1998, p. 59.

⁷ Farnsworth 1999, p. 45.

is formed when one party's actions manifested to the other party an intention to agree and the second party had reason to so believe.⁸

Whether one looks at the actual or subjective intentions of the parties, the fact is that obligations between individuals arise only because parties have manifested their actual or apparent intention to be bound by them and to give them legal effect.⁹ From the principle of the parties' private autonomy in the formation of contracts, three correlative principles have been inferred: the freedom of contract, the binding character of a contract and its relative effect. Turning first to the second principle, contracts are declared binding under positive law essentially in order to protect a party's expectation that the other party will perform her end of the bargain properly.¹⁰ Legal theorists justify the binding character of contracts as the most effective way of protecting reliance in a society based on economic exchanges.¹¹ Without the confidence of seeing agreements honoured, or without the assurance that promises will be kept, no society could ever reach any significant level of economic development. Unless agreements can be relied upon, they are of little use.¹² In addition to the need to ensure stability and legal certainty in contractual relationships, there is also a moral dimension behind the binding character of contracts, in the sense that it is usually considered morally good to honour one's promises.

The principle of the relative effect of a contract is expressly or implicitly recognised in every jurisdiction, such as in Article 145 of the German Civil Code (BGB) and Article 1165 of the French civil code, which states that 'agreements have effect only between the contracting parties'. On the basis of the autonomy of the will, third parties are not affected by the provisions of a contract to which they are not bound. They have no duties under the contract nor can they derive benefit from it, unless specified in the law. This concept is known in American common law as the principle of privity of contracts. The rights created under a contract are therefore 'relative rights' or 'rights *in personam*', in the sense that they are enforceable only against the other party to the contract, unlike 'absolute rights' or 'rights *in rem*' such as copyrights, which are opposable to everyone.¹³

⁸ Id., p. 116.

⁹ Ghestin 1993, p. 27; Asser-Hartkamp 1997, p. 11; Kötz and Flessner 1997, p. 3; Atiyah 1986, p. 13; and Barnett 1995, p. 203.

¹⁰ See: French Civil Code, art. 1134; NBW, art. 6:248; and BGB, art. 145.

¹¹ Farnsworth 1999, p. 17.

¹² Id., p. 17; Asser-Hartkamp 1997, p. 35.

¹³ For an in-depth analysis of the principle of the relativity of contracts, see: Du Perron 1999.

The principle of freedom of contract can be described as everyone's liberty to decide whether or not to enter into a binding agreement, to choose her contracting partner, and to determine the content of the legal obligation.¹⁴ From a utilitarian perspective, freedom of contract maximises the welfare of the parties and therefore the good of society as a whole.¹⁵ It is considered to be the cornerstone of an open, market-oriented and competitive international economic order, in that it allows everyone to decide freely to whom they will offer their goods and services and by whom they wish to be supplied.¹⁶ This conception of the freedom of contract has its origins in the writings of Adam Smith, for whom the freedom to make enforceable bargains would encourage individual entrepreneurial activity.

From a naturalist perspective, freedom of contract, or the freedom of every individual to regulate her own affairs, constitutes one of the key manifestations of the individual's free will. Freedom of contract is deemed so essential for the self-fulfilment of each individual that it is sometimes regarded as a fundamental right.¹⁷ However, freedom of contract remains at best a non-written fundamental right, one that does not appear in national constitutions or in international treaties on human rights.¹⁸ Nevertheless, support for this view can be drawn from the text of several provisions of positive law, such as Articles 8 and 19(3) of the Dutch *Grondwet* (Gw) and Article one of the Protocol to the ECHR. The fundamental rights protected therein (namely the right to free association, the right to choose a profession and 'the peaceful enjoyment of his possessions') all imply the right to contract freely in order to make these rights a reality.¹⁹ In Germany, the courts have recognised that freedom of contract is protected under Article 2 (1) of the *Grundgesetz*, as part of the right to the free development of one's personality.²⁰ The right to voluntarily bind oneself to obligations may also be inferred in Germany from other constitutionally protected rights, such as freedom of expression and the press, the freedom of religion and the freedom of the art.²¹ In the United States, freedom of contract is also seen as a paramount value. Article I section 10 of the Constitution forbids the States,

¹⁴ Kamphuisen 1957, p. 1; Ghestin 1993, p. 35.

¹⁵ Farnsworth 1999, p. 20.

¹⁶ UNIDROIT Principles of International Commercial Contracts (1994), Comment 1 to art. 1.1.

¹⁷ Alkema 1999, p. 34.

¹⁸ Asser-Hartkamp 1997, p. 35; Molfessis 1997, p. 159.

¹⁹ Hartlief 1999a, p. 9.

²⁰ Palandt 2000, § 145, p. 141; and BverGE 89, 214 decision of 19 October 1993, 1 BvR 567, 1944/89.

²¹ Rüfner 1992, p. 556.

without the consent of the American Congress, to pass any ‘Law impairing the Obligations of Contracts’.²² Furthermore, the Fourteenth Amendment, which provides that ‘no state shall make or enforce any law which shall abridge the privileges or immunities of citizens’, has at times been interpreted as protecting the freedom of contract.²³

Considering that modern rules on contract rest on the principle of private autonomy, these rules have been created as a means to offer the proper conditions for a market in which free economic exchanges could take place. As a result, parties to a contract are given the freedom to determine the content of their contractual obligations. This element of the freedom of contract has several implications for the role of contract law as well as for the interpretation of the contract itself. Since the parties’ actual or apparent intention is prevalent, the bulk of the general rules of contract law are subject to contrary provision by the parties. Generally speaking, the rules of law that the parties can vary by express provision or usage are known as default rules, while the rules of law that are beyond the parties’ power to modify are known as mandatory. Most rules of contract law are in fact default rules, in that their application depends on the intention of the parties or on their neglect to rule otherwise.²⁴

Classic contract law essentially serves a triple function: the first one is to establish what constitutes a valid contract under positive law. The second function of contract law is to provide default rules of law, which are meant to fill the gaps left in the contract by the parties. The third function is to supply rules of interpretation to determine the parties’ intention under the contract. In this respect, freedom of contract rests on the premise that equal parties will negotiate according to the principles of good faith and fair dealing. Since parties to a freely negotiated contract have manifested their will to be bound by the specific terms and conditions included in their agreement, courts are generally asked to give legal force to the obligations that are contained in the contract. On the other hand, courts must refrain in principle from enforcing

²² See: Alkema 1999, p. 34; and Asser-Hartkamp 1997, p. 42.

²³ *Allgeyer v. Louisiana*, 165 U.S. 578 (1879), at p. 589: ‘The liberty mentioned in that Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned’.

²⁴ Farnsworth 1999, § 1.10, p. 36 and f.; Trebilcock 1993, p. 17.

obligations that the parties have not chosen.²⁵ In a system where unrestricted freedom of contract prevails, the role of the courts in trying to determine the legal effect of a contract is confined to the discovery of the parties' intention. According to Articles 133 BGB and 1156 of the French Civil Code, the real intention of the parties must be ascertained without clinging to the literal meaning of the statement. As a rule, when the clauses of the contract are clear and unambiguous, judges must refrain from substituting their own interpretation for the will of the parties. Only when the parties have expressed themselves in an inaccurate or confusing manner, must judges look for the common intention of the parties in accordance with existing rules of interpretation and the dictates of good faith and good business practices.²⁶

Whereas parties are presumed not to contract against their own interests, the courts have traditionally refused to leave room, in their determination of the parties' legal obligation under a contract, for any inquiry into the fairness of the exchange.²⁷ The court's refusal to intervene with respect to the fairness of the agreement's terms is known as the *iustum pretium* doctrine. To suggest that contracts might be revised concerning the fairness of the legal obligation would constitute a serious encroachment onto the freedom of contract and would endanger the certainty of the legal system, since parties would no longer be able to rely on the given word.²⁸ Another justification given for the refusal to look at the fairness of a contractual bargain rests on the mechanism of self-correction in a free and competitive market. If goods are overpriced, other entrepreneurs will receive the signal and respond themselves to the incentive to enter the market, with the desirable result that supply increases and prices fall. If contracts were invalidated just because the price was too high, this mechanism would be disturbed and its signalling function weakened.²⁹

While the substantive fairness of a contract does not give rise to any specific inquiry under the classic contract model, the manifestation of assent may justify some scrutiny, if circumstances are such that one of the parties was incapable at the time of the conclusion of the contract to express a clear and well-informed intention to be bound by its terms. A contract may therefore be declared invalid if one of the parties does not have the legal

²⁵ Beekhuis 1953, p. 5.

²⁶ See: Kötz and Flessner 1997, p. 111 and f.; Principles of European Contract Law, art. 2:102; BGB, art. 157; and French Civil Code, art. 1156-64. These principles of interpretation also hold true in the United States see: Restatement (Second) of Contracts, §§ 201 and f.; and Farnsworth 1999, §7.7, p. 477.

²⁷ Hartlief 1999a, p. 10; Atiyah 1986, p. 329; and Hirsch 1979, p. 94.

²⁸ Hartlief 1999b, p. 246.

²⁹ Kötz and Flessner 1997, p. 135.

capacity to contract, either because of immaturity or of mental incompetence.³⁰ Moreover, it is generally admitted that no valid consent exists where a person gives her assent only by mistake or where consent is extorted by fraud or duress. Such consent would be neither free nor voluntary and the contract would therefore be invalid. A party may therefore be relieved from the obligations of a contract in a number of circumstances. The most common circumstances leading to the rescission of a contract are mistake,³¹ fraud,³² and duress.³³ The disadvantageous character of a contract is insufficient in itself to justify judicial review; only when the disadvantage is marked by a lack of consent can it be disputed, not because of the disadvantage, but because of its involuntary nature.³⁴

3.1.2 STANDARD FORM CONTRACT MODEL

Although most of the principles relating to the freedom of contract are still reflected in today's legislation, civil and common lawyers alike agree that freedom of contract reached its golden age during the 19th century, at a time when individualism and the liberal thoughts of *laissez faire, laissez aller* dominated society.³⁵ Lawmakers of that period accorded much importance to the principle of the autonomy of the will and saw the contract as the cornerstone of the entire legal system and of all economic relations. This view coincided with the economic and social reality of the beginning of the 19th century. In those days, industry and commerce were conducted strictly on a small scale, within guilds of craftsmen or families; the employer had a personal relationship with his employees, and the clientele were concentrated in a zone small enough to allow producers to know their customers personally. Agreements could thus be concluded between parties of equal bargaining power after a process of free negotiation.³⁶ This type of contractual relationship has persisted until today not only with respect to 'classic' real estate transactions between individuals, but also for example

³⁰ French Civil Code, art. 1124; NBW, art. 3:34; and BGB, art. 104 and f.

³¹ UNIDROIT Principles, art. 3.5; Principles of European Contract Law, art. 4:103; NBW, art. 6:228; BGB, art. 119; and Restatement (Second) of Contracts, art. 152.

³² UNIDROIT Principles, art. 3.8; Principles of European Contract Law, art. 4:107; NBW, art. 3:13; BGB, art. 120; and Restatement (Second) of Contracts, art. 161.

³³ UNIDROIT Principles, art. 3.9; Principles of European Contract Law, art. 4:108; NBW, art. 3:44; BGB, art. 123; and Restatement (Second) of Contracts, art. 175.

³⁴ Hartlief 1999a, p. 10.

³⁵ See in general: Havighurst 1961, p. 95; Atiyah 1979; Ghestin 1993, p. 44; Beekhuis 1953, p. 7.

³⁶ Farnsworth 1999, § 4.26, p. 296; Berlioz 1973, p. 15; and Beekhuis 1953, p. 6.

with respect to the more complex transactions between industrial and financial groups, where each clause of a contract is subject to extensive discussion.³⁷ However, as a result of the economic, social, and political evolution of contemporary society, only few contractual relations still correspond to the classic contract model today.³⁸

In fact, the classic contract model and the principle of freedom of contract have been confronted with the fundamental economic and social changes brought by the industrial revolution. The industrialisation process led to the creation of large corporations, which gained control over capital and production modes, and to the mass production and distribution of goods and services. The concentration of resources in the hands of entrepreneurs accentuated the inequality of bargaining power between contracting parties, where workers, farmers, tenants and consumers most often represented the weaker party.³⁹ The importance of each individual's freedom of contract was eventually diminished to the benefit of corporations. The development of mass production and distribution also brought a movement of standardisation, where the uniformity of contractual terms was seen as the best method to increase economic efficiency.

Today, the typical agreement used in routine transactions consists of a standard printed form that has been prepared by one party and is agreed to by the other with little or no opportunity for negotiation. Since the preparation of thousands of individualised contracts for similar economic transactions would be highly impractical, standard conditions are drafted generally by the merchant so as to cover all eventualities regarding warranties, liability, and applicable law. These conditions are subsequently used in all contractual relations concerning the same goods and services, regardless of the other contracting partner.⁴⁰ Besides determining the date of delivery or the price to be paid, customers have in that case little or no say about the actual content of the obligations.⁴¹ Standard terms are said to contribute positively to the rationalisation and the development of mass transactions, by saving firms and their customers the cost and trouble of negotiating the terms of each contract individually. Being perceived as better suited to the rapid pace of today's commercial exchanges, standard form contracts have generally been admitted

³⁷ Ghestin 1993, p. 44.

³⁸ On the sociological dimension of standard form contracts, see: Gras 1984.

³⁹ Asser-Hartkamp 1997, p. 39; Savatier 1964, p. 34.

⁴⁰ Berlioz 1973, p. 19.

⁴¹ Hackl 1980, p. 17.

as a valid form of contract.⁴² On the utility of standard form contracts, the Comments to the Restatement (Second) of Contracts declares:

‘Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than to details of individual transactions. (...) Sales personnel and customers are freed from attention to numberless variations and can focus on meaningful choice among a limited number of significant features: transaction-type, style, quantity, price or the like. Operations are simplified and costs reduced, to the advantage of all concerned’.⁴³

However, the validity of a standard form contract may depend on the time at which and the manner in which the standard form is presented to the other party. Standard form contracts presented to the consumer on a take-it-or-leave-it basis are often referred to in terms of ‘adhesion’ contracts. Adhesion contracts are known to contain unilateral terms, which often derogate from the default rules of contract law usually in a way that favours the merchant. These unilateral terms are often hidden in complex language, making them unintelligible or unreadable, so that they become unnoticeable to the other party.⁴⁴ Not only are the terms unnoticeable in the contract, but little or no effort is made to bring those terms to the consumer’s attention, with the result that the consumer rarely even reads or understands them at the time of conclusion of the contract. Adhesion contracts therefore receive particular attention from the legislator and the courts as to their fairness and as to their mode of acceptance by the other party.⁴⁵ Whereas all contractual obligations are consensual by nature, no party can be bound by contract terms that were never disclosed, made available to or assented to, by that party. Assent need not be in words, but may be manifested by conduct.⁴⁶

⁴² NBW, art. 6:231 and ff.; German Act Concerning the Regulation of General Terms and Conditions of Trade, of 9 December 1976, Federal Gazette, Part I, p. 3317 [hereinafter AGB-Gesetz], as subsequently modified; and Restatement (Second) of Contracts, § 211.

⁴³ American Law Institute, Restatement (Second) of Contracts, St. Paul, 1981, vol. 2, § 211, comm. a, p. 120.

⁴⁴ Ghestin 1993, p. 367.

⁴⁵ See for example: Directive on Unfair Terms in Consumer Contracts, 93/13/EEC, of 5 April 1993, O.J. L 95/29.

⁴⁶ Principles of European Contract Law, art. 2:104; Uniform Commercial Code, § 204; Restatement (Second) of Contracts, § 19.

3.1.3 CONCLUSION

Despite the economic, social, and political evolution of contemporary society, which has led to the growing use of the standardised contracts, the principle of freedom of contract remains a cornerstone of the western legal system. Even today, freedom of contract is still considered as an important means to enhance social welfare and individual self-fulfilment. Since parties do not always enjoy equal bargaining power, the unrestricted exercise of one party's freedom of contract may lead to distortions in the economic market. Furthermore, there is always the danger that the more powerful party will take unfair advantage of the adhering party's lack of experience or lack of information. Aside from the question of fairness to the weaker party, the generalised use of standard form contracts in certain areas of economic transactions tends to undermine the principle of the relative effect of contracts. By binding countless individuals to the same non-negotiated provisions, merchants tend to impose their own private order. As Kessler pointed out, 'freedom of contract enables enterprisers to legislate by contract and, what is even more important, to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms'.⁴⁷ As further discussed in the following subsection of this book, a number of limits have been put on freedom of contract to restore some balance between parties.

3.2 Limits on freedom of contract

The fact that freedom of contract constitutes a fundamental principle in our legal system does not make this freedom unlimited. The doctrine of good faith in continental European civil law, like the doctrine of unconscionability in American common law, constitutes an important limit on freedom of contract. Apart from these general rules of law, the number of specific enactments, through which the freedom of each individual to regulate her private relationships has been restricted, has risen to the level of a swelling stream.⁴⁸ The justifications behind the restrictions on freedom of contract are very diverse and evolve with the social and economic environment. I will focus in the following pages on the limits set by the norms of public order, by constitutional rights and by the notions of abuse and misuse of rights.

⁴⁷ Kessler 1970, p. 640.

⁴⁸ Asser-Hartkamp 1997, p. 39.

3.2.1 NORMS OF PUBLIC ORDER

Even at the height of the individualistic and *laissez faire* movements, freedom of contract was limited in continental European law by provisions on public order and good morals and this is still the case today. In fact, norms of public order and good morals remain the most important limit on freedom of contract to this day. Contracts whose cause, object or effect contravenes the norms of good morals and public order have thus always been declared illegal and void.⁴⁹ However, contracts that were regarded in those days as offensive or as going against public order may now be perfectly acceptable, for example in matters of family life and sexual morality. These norms have traditionally been concerned with the respect of state organisation and public powers, for example through tax and criminal laws. While public order is sometimes confused with good morals as one limit to freedom of contract,⁵⁰ the notion of good morals usually receives much narrower acceptance, as one relating mainly to family life, the institution of marriage and sexual morality. Public order is by contrast a broad concept, which is generally understood as encompassing more than the mere aspects of state organisation and public powers (otherwise known as *ordre public* or *openbare orde*).⁵¹ It therefore includes all the mandatory norms inspired by public interest that are in force in a given legal system, whether statutory, jurisprudential or customary.⁵²

In the United States, the concept of public order has traditionally received a narrow interpretation, thereby referring primarily to national safety, prevention of crime and the like. Closer to the continental European notion of public order is the concept of public policy,⁵³ which has been referred to, for example, as upholding the sanctity of marriage, justifying religious tolerance, maintaining the integrity of political life, refusing to enforce agreements in restraint of trade. The concept of public policy has been codified in Article 178(1) of the Restatement (Second) of Contracts, which provides that:

‘A promise of other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the

⁴⁹ French Civil Code, art. 6; NBW, art. 3:40; and BGB, art. 138.

⁵⁰ See for example art. 138 of the BGB, which refers to ‘good morals’ (*sittenwidrige Rechtsgeschäfte*) but which has been interpreted in the sense of ‘fair dealing’ and ‘good faith’. Palandt 2000, p. 117 and f.

⁵¹ See: Note from Crijns to ARRvS, decision of 10 October 1978 (*Antenneverbod Leerdam*), AA 1979-8, pp. 477-485.

⁵² Hoogevorst 1999, p. 137 and f.; Kötz and Flessner 1997, p. 155; Ghestin 1993, p. 86.

⁵³ See: Walker 1980, p. 1015.

interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms'.⁵⁴

The notion of public order or public policy has evolved over the last century; it no longer is restricted to the mere aspects of state organisation and public powers, and has been expanded to encompass more economic and social preoccupations. Freedom of contract is thus limited by norms of economic public order, which regulate economic behaviour to prevent acts in restraint of trade, the abuse of a dominant position and the formation of monopolies and cartels. Apart from the norms designed to preserve the freedom of competition, the disparities of bargaining power between contracting parties and the unfairness of some standard form contracts have been at the origin of an important body of protective measures. These measures constitute norms of 'protective public order',⁵⁵ since they protect groups of individuals in their social relations with others, like workers, tenants or consumers.⁵⁶ Admittedly, the boundary between norms of economic and protective public order is not always apparent, where, for example, a measure that fixes the minimum wage or the maximum length of a working day not only protects workers but has also a definite impact on the economic order. Be that as it may, provisions that are designed primarily to protect particular classes of individuals in their social relationships are analysed here as norms of protective public order, even if they have an effect on the economy. Leaving aside the norms put in place for the good administration of the state, I will focus in the following pages on the norms established for the furtherance of free competition (economic public order) and for the protection of weaker parties to transactions (protective public order).

⁵⁴ Compare with UCITA, February 9, 2000, § 105(b): 'If a term of a contract violates a *fundamental* public policy, the court may refuse to enforce the contract, enforce the remainder of the contract without the impermissible term, or limit the application of the impermissible term so as to avoid a result contrary to public policy, in each case to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of the term'. (Emphasis added)

⁵⁵ The expression 'protective public order' is inspired from French legal literature, which refers to this body of law in terms of '*ordre public de protection*'. See: Ghestin 1993, p. 115.

⁵⁶ Ghestin 1993, p. 108; Farjat 1963, p. 32.

3.2.1.1 *Economic public order*

The role of the State in the functioning of the economic market has changed drastically over a century. Most European civil codes were drafted during the first half of the 19th century, at a time when economic liberal thought prevailed and with it, the belief that the natural ordering of the market and free competition would lead to contractual justice and contribute to the general welfare of society by allowing the supply of goods to adapt to the demand. Underlying this view was also the conviction that freedom of contract – or freedom to make enforceable bargains – would encourage individual entrepreneurial activity, by facilitating economic exchanges to the benefit of society as a whole. The reality soon proved otherwise. By the end of the 19th century, the strong exploited the weak and the general interest was often sacrificed to individual interests. An unbridled freedom of contract led in fact to the establishment of a private market ordering through the conclusion of agreements restricting trade, the creation of monopolies and cases of abuse of dominant position. As a result, the disparities of economic power were amplified and the natural rule of supply and demand was distorted.⁵⁷

In this context, some form of legislative action was necessary to restore the economic order and to preserve the freedom of competition. By the end of the 19th century, the American Congress intervened in the workings of the economic order with the adoption of the Sherman Act.⁵⁸ Eventually, most legal systems followed the American example and adopted legislative provisions to promote the economic process. Among other things, these provisions put certain restrictions on the freedom of contract. In Europe, alongside national statutes relating to anti-competitive practices,⁵⁹ the institutions of the European Community have developed a comprehensive body of rules on competition and of principles concerning the free movement of goods and services inside the Internal Market. In this section, I present an overview of the main rules on competition law in force at the European Community level and in the United States, and more particularly as they are applied to copyright licensing practices.

⁵⁷ Atiyah 1979, p. 693; Ghestin 1993, p. 108; Nirk 1981, p. 341.

⁵⁸ July 2, 1890, ch. 647, Sec. 1, 26 Stat. 209, as later on codified at U.S.C. Title 15, §§ 1-7.

⁵⁹ In France: Order n° 86-1243 of 1 December 1986 concerning the freedom of prices and of competition, O.J. of 9 December 1986; in Germany: Act against restrictive practices, *BGBI.*, Part I, 1998, No 59, p. 2547 of 2 September 1998; in the Netherlands: Act of 22 May 1997 containing new rules concerning economic competition, *Staatscourant* No 242 of 22 May 1997.

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Generally speaking, the purpose of competition or antitrust law is to foster competition in the public interest, not to protect others from competition, in their private interest. In furtherance of the competitive process, the rules on competition impose, among other measures, restrictions on the freedom of contract so as to prevent the use of contracts to build economic power and to abuse it.⁶⁰ Article 81 (ex-Article 85) of the Treaty establishing the European Community (EC Treaty) limits the freedom of contract by prohibiting ‘agreements between undertakings (...), which may affect trade and which have as their object or effect the prevention, restriction or distortion of competition’. Any such agreement is automatically void, unless the prohibition is exempted on the grounds that the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit.⁶¹ Several so-called ‘Block Exemptions’ have been adopted on the basis of Article 81(3) of the Treaty, for example with respect to particular types of agreements that contribute to the promotion of technical or economic progress. None has been adopted in relation to licences for the exploitation or the use of copyrighted material however.⁶² Among the agreements alleged to affect trade are those that purport to fix prices, to restrict production, innovation or investment, to impose market-sharing conditions, to establish a price discrimination scheme and to tie the supply or sale of products to the purchase of another product. Insofar as they affect trade, mergers, joint ventures and abuses of a dominant position in a given market may also constitute prohibited behaviours.

To amount to an abuse of dominant position under Article 82 (ex-Article 86) of the EC Treaty,⁶³ three cumulative conditions must be met.

⁶⁰ Havighurst 1961, p. 122; Slot and Wissink 1999, p. 284.

⁶¹ See for example: *Re Film Purchases by German TV Stations*, Commission of the European Community, 15 September 1989, in *GRUR Int.* 1991/03, p. 216. In this case, the German television network ARD had obtained the exclusive broadcasting rights to MGM and United Artists' library of feature films and television products. The Commission found that, because of its duration and of the scope of exclusivity granted, the licence imposed a restriction on competition. Nevertheless, the Commission did grant an exemption because the arrangement resulted in considerable benefits, by offering more films than otherwise to the German public.

⁶² See for example: Commission Regulation (EC) No 240/96 of 31 January 1996 on the application of Article 85 (3) of the Treaty to certain categories of technology transfer agreements (Text with EEA relevance), O.J. No. L/031, 09/02/1996, p. 2-13.

⁶³ Article 82 of the Treaty establishing the European Community states that: ‘Any abuse by one or more undertakings of a dominant position within the common market or in a

First, the undertaking must occupy a dominant position in the Community market or a substantial part thereof. Second, the undertaking must abuse its dominant position. Third, the abuse must affect trade within the Member States. A dominant position has been defined by the European Court as ‘a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers’.⁶⁴ Proof of a dominant position depends on the facts of each case, and more particularly, on how the relevant product and geographic market for the product is defined and on the importance of the undertaking’s share of that market. To determine whether an undertaking occupies a dominant position, one has to look at the presence or the possible entry of competing products into the market that could be substituted for the protected product.⁶⁵ If no substitute product exists and if newcomers are prevented from entering the market to the detriment of consumers, then the undertaking may be said to occupy a dominant position in the market. However, to amount to a violation of the rules on competition, the dominant position must be characterised by abuse and must affect trade between Member States.

The relationship between the European Community rules on competition and copyright has for a long time been determined by the distinction that the European Court of Justice made between the existence and the exercise of intellectual property rights.⁶⁶ The European Court first made this distinction in the *Consten Grundig v. Commission* case,⁶⁷ in which the Court had to decide whether the application of the rules on competition could be circumvented by reliance on national trademark laws.⁶⁸ The Court essentially held that the injunction to refrain from ‘using the rights under national trademark law in order to set an obstacle in the way of parallel imports [did] not affect the grant of those rights but only [limited] their exercise to the extent necessary to give effect to the prohibition under Article 85 (1)’ (now Article 81). In later cases, the European Court went on to develop the existence/exercise doctrine on the basis of Article 30 of the

substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States’.

⁶⁴ Case 27/76 *United Brands v. Commission*, [1978] E.C.R. 207, at § 65.

⁶⁵ Govaere 1996, p. 112.

⁶⁶ Moritz 1995, p. 361.

⁶⁷ Joined Cases 56 and 58/64, *Etablissements Consten SARL and Grundig0Verkaufs-GmbH v. Commission*, Judgement of July 13, 1966, [1966] ECR 299, at p. 345.

⁶⁸ Govaere 1996, p. 62.

Treaty of Rome relating to the free movement of goods.⁶⁹ Article 30 states that 'the provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of (...) the protection of industrial and commercial property.'⁷⁰ The Court has summarised the existence/exercise doctrine as follows:

'Whilst the Treaty does not affect the existence of rights recognized by the laws of a Member State in matters of industrial and commercial property, yet the exercise of those rights may nevertheless, depending on the circumstances, be restricted by the prohibitions contained in the Treaty.'⁷¹

Since rights tend to be defined mostly in terms of the ways in which they can be exercised, the existence/exercise doctrine has been much criticised over the years as unworkable.⁷² The application of this doctrine has led the European Court to enquire about the 'specific subject-matter' of the intellectual property rights involved, a concept that has in fact proven to be just as vague as the one that it attempts to elucidate.⁷³

Although it could never offer clear and precise criteria to distinguish a normal exercise of copyright from an abusive one, the European Court of Justice has given several examples of practices that could be held to violate Article 82 of the EC Treaty. For example, the licensing practices of certain copyright collecting societies with their members and with users of their repertoire have been challenged as anti-competitive on several occasions.⁷⁴ Recognising that collecting societies may enjoy a *de facto* monopoly position in the market, the European Court has generally held that where the activities of collecting societies are necessary to fulfil their typical functions,

⁶⁹ See for example: Case 24/67, *Parke, Davis & Co. v. Probel, Reese, Beintema-Interpharm and Centrafarm*, Judgement of February 29, 1968, [1968] ECR 55.

⁷⁰ Art. 28 and 29 of the EC Treaty respectively state that: '28. Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States'; and '29. Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.'

⁷¹ Case 102/77 *Hoffman-La Roche v. Centrafarm*, [1978] ECR 1139.

⁷² Vinje 1992, p. 399.

⁷³ Case 15/74 *Centrafarm BV and Adriaan De Peijper v. Sterling Drug Inc.*, Judgement of October 31, 1974, [1974] ECR 1147; *Centrafarm BV v. Winthrop*, Judgement of October 31, 1974, [1974] ECR 1183; Case 238/87 *AB Volvo v. Erik Veng (UK) Ltd.*, [1988] ECR 6211; and Case 53/87 *Maxicar v. Régie nationale des usines Renault*, [1989] ECR 6039.

⁷⁴ See: Case 402/85, *Basset v. SACEM*, [1987] E.C.R. 1747; Case 22/79 *Greenwich Film Productions v. SACEM*, [1979] E.C.R. 3275; Case 127/73 *Belgische Radio en Televisie v. SABAM*, [1974] E.C.R. 313; see: Ehlermann and Kaufmann 1996, p. 37.

competition concerns need not arise. However, where these activities are not necessary for the proper protection and promotion of their members' interests and merely amount to a restriction of the commercial freedom of users, the general principles of competition law should apply. Hence, in a group of actions involving the activities of the French copyright collecting society SACEM, the European Court found that the society's refusal to grant discothèques a partial licence to their repertoire, that is, a licence which would simply cover the foreign repertoire likely to be preferred by the discothèques' patrons, would not be a restriction of competition unless providing access to part only of the repertoire could safeguard the interests of composers without increasing the costs of managing and monitoring the use of such copyrighted works.⁷⁵ Regarding the appreciably higher royalty rates that SACEM charged for its services compared to those charged in other Member States, the Court ruled that such a difference may indicate an abuse of dominant position and that the burden is then on the society to justify the objective fairness of its higher rates. The final determination on the facts of each case was referred to the national courts.⁷⁶

Probably the most significant decision rendered by the European Court in recent years concerning the relationship between competition law and the contractual licensing of copyrighted material is the *Magill* decision.⁷⁷ In this case, Magill TV Guide Ltd. attempted to publish a comprehensive weekly television guide, but was prevented from doing so by the constant refusal of the broadcasting organisations ITP, RTE and BBC, to licence their advanced television programming information. On appeal, the European Court of Justice had to decide whether and to what extent a copyright owner in advance television listings could rely on her copyright to exclude potential competitors from the derivative market of weekly TV guides, without infringing Article 82 (previously Article 86) of the EC Treaty. The market was defined as the publishing of weekly television guides containing weekly listings of all broadcasters in the area. Regarding the existence of a dominant position on the part of the broadcasters, the Court reiterated that mere ownership of an intellectual property right does not confer a dominant position. The Court found, however, that the broadcasters had, as a result of

⁷⁵ Case 395/87 *Ministère Public v. Jean-Louis Tournier*, [1989] E.C.R. 2521; Case 110/88 *SACEM v. Lucazeau*, Case 241/88 *SACEM v. Debelle*, Case 242/88 *SACEM v. Soumagnac*, all at: [1989] E.C.R. 2811.

⁷⁶ Goyder 1998, p. 366. See also: Duijvenvoorde 1996, p. 441.

⁷⁷ *Radio Telefis Eireann v. E.C. Commission*, Court of First Instance of the European Communities, July 10 1991, [1993] 24 *IIC* 83, confirmed by *RTE and ITP v. Commission*, European Court of Justice, 6 April 1995, joint cases C-241/91 and C-242/91, [1996] 27 *IIC* 78 [hereinafter '*Magill*' decision].

their programming activities, a *de facto* monopoly on the basic information needed to compile listings for television programmes, i.e., the channel, day, time and title of the programmes.⁷⁸

With regard to the question of abuse, the Court declared that the exercise of an exclusive right granted under the national copyright acts may, 'in exceptional circumstances', involve abusive conduct. In light of the circumstances of the case, the Court found that the broadcasters had abused their dominant position. The Court's findings rested on four determinative factors: first, despite the 'specific, constant and regular potential demand on the part of consumers', there was 'no actual or potential substitute for a weekly television guide offering information on the programmes for the week ahead'. Second, being the sole sources of the basic information indispensable for compiling weekly television guides, the broadcasters gave viewers no choice but to buy the weekly guides for each station and draw from each of them the information they needed to make comparisons. Third, they provided no justification for their refusal to license, either in respect of their activity of television broadcasting or in that of publishing television magazines. Finally, by their conduct, the broadcasters reserved for themselves the secondary market of weekly television guides by excluding all competition on the market, since they denied potential competitors access to the necessary basic information. To put an end to the abuse, the Court confirmed the imposition by the European Commission of a compulsory licence on the programme scheduling information.⁷⁹

Although the outcome of the *Magill* decision was generally welcomed, commentators found it difficult to reconcile the decision with the Court's earlier ruling in *Volvo v. Veng*⁸⁰, where the Court had held that:

'It must also be emphasised that the right of the proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without its consent, products incorporating the design constitutes the very subject-matter of his exclusive right. It follows that an obligation imposed upon the proprietor of a protected design to grant third parties, even in return for a reasonable royalty, a licence for the supply of products incorporating the design would lead to the proprietor thereof being deprived of the substance of his

⁷⁸ Id. § 47. See: Vinje 1995, p. 299;

⁷⁹ Duijvenvoorde 1996, p. 447.

⁸⁰ Case 238/87, *Volvo v. Veng*, [1988] E.C.R. 6211.

exclusive right, and that a refusal to grant such a licence cannot in itself constitute an abuse of a dominant position'.⁸¹

In an attempt to harmonise the two decisions, some commentators have suggested that Article 82 of the EC Treaty was applied to the *Magill* case not so much because the exercise of copyright was held to be abusive, but rather because the programme listings concerned were not regarded as meriting copyright protection at all.⁸² In fact, television listings, which consist of the channel, the date, the time, and the title of the programme, would have received no protection under most continental European copyright acts. It would therefore have been sufficient, if having regard to the idea/expression dichotomy, the Irish courts had initially disposed of the case by noting that copyright does not protect ideas but only grants the right to prohibit the unauthorised reproduction of the form in which these ideas are expressed.

Since then, the Court of First Instance and the Court of Justice have had the opportunity to consider the *Magill* decision on two occasions. In *Tiercé Ladbroke v. Commission*,⁸³ Ladbroke complained that the owners of rights in televised pictures and sound commentaries on French horse races had refused to grant a licence for the retransmission of these pictures in his betting shops in Belgium. It was submitted in evidence that the rights owners were present neither in the main betting market nor the market for sound and pictures in Belgium. The Court of First Instance noted that the rights owners had until that time never granted any licence for the territory of Belgium and that their refusal to grant a licence to the applicant did not therefore entail discrimination between operators on the Belgian market. The Court added that the mere fact that a party is prepared to pay a reasonable royalty does not mean that the refusal to license is arbitrary and, in the absence of discrimination, the refusal did not amount to sufficient evidence of abuse. Moreover, the Court considered that, contrary to *Magill*, a separate market had not been monopolised and that, even if there were a new product involved, it had not been prevented from appearing in another market since the sound and pictures were not an essential ingredient in it.⁸⁴

⁸¹ *Id.*, at § 8-9.

⁸² Govaere 1996, p. 149; Duijvenvoorde 1996, p. 450; Gilliams 1996, p. 170; Doutrelepoint 1994, p. 307; and Vinje 1995, p. 301.

⁸³ Case T-504/93, *Tiercé Ladbroke SA v. Commission*, [1997] E.C.R. II-923.

⁸⁴ Fitzgerald 1998, p. 158.

In the *Bronner* case, the Court of Justice introduced important nuances to the *Magill* decision.⁸⁵ The Court was asked by the Higher Regional Court of Vienna for a preliminary ruling on the question of whether the refusal by a newspaper group holding a substantial share of the market in daily newspaper to allow the publisher of a competing newspaper access to its home-delivery network, or to do so only if it purchases certain additional services from the group, constituted an abuse of a dominant position contrary to Article 82 of the EC Treaty. The Court held that the *Magill* precedent would be applicable to the present case under two conditions only: first, that the refusal to grant access to the home delivery scheme would be likely to eliminate all competition in the daily newspaper market on the part of Bronner without being objectively justified by the newspaper group. Second and perhaps more importantly, the service in itself must be indispensable to carrying on Bronner's business – in other words, if the service constituted an ‘essential facility’ – insofar as there is no actual or potential substitute in existence for the home-delivery scheme.⁸⁶ The Court found that, in order for a facility such as Mediaprint's home-delivery service to be essential, it must not be economically viable for a ‘competitor of a size comparable to Mediaprint’ to create a similar service. Since this was clearly not the case, the Court concluded that the newspaper group had not abused its dominant position by refusing to allow the publisher of a rival newspaper access to their home-delivery scheme.

The *Ladbroke* and *Bronner* decisions confirm the intention of the two courts to consider a refusal to license intellectual property rights as abusive only in ‘exceptional circumstances’. These decisions also attest to their intention to interpret the *Magill* decision and the doctrine of ‘essential facility’ fairly restrictively, recognising that too broad an application of the doctrine could lead to unwanted consequences. Indeed, if competitors could easily gain access to a firm's facilities by invoking the doctrine, then firms would be likely to lose all incentives to invest in infrastructure and other facilities that could possibly be seen as essential.⁸⁷ Whereas the *Magill* case dealt with television programming schedules, the *Ladbroke* case with televised pictures and sound commentaries on French horse races and the *Bronner* case with a home-delivery system for daily newspapers, these cases

⁸⁵ Case 7/97, *Oscar Bronner GmbH and Mediaprint Zeitungs- und Zeitschriftenverlag GmbH* [1999] 4 C.M.L.R. 112; also published in the Dutch language in *Mediaforum* 1999/2, p. 53 with comment from E. Loozen and K. Mortelmans.

⁸⁶ *Id.*, § 41.

⁸⁷ Opinion of Advocate General Jacobs, Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and Others*, delivered on 28 May 1998, § 57; and Bergman 2000, p. 62.

also suggest that information could be construed, in certain circumstances, as an ‘essential facility’. According to Larouche, these decisions could be read as introducing a two-pronged test to determine whether a facility is essential. Under the first element, the court would assess whether, on the basis of the relevant market, the lack of access to a facility such as the alleged essential facility has an effect on competition. If so, the court would next inquire whether it is economically viable for an ‘objective competitor’ comparable in size to the holder of the alleged essential facility to replicate or duplicate the facility in question. If no objective competitor could economically replicate the facility, the holder who refuses to grant access to that facility could be in violation of Article 82 of the Treaty, unless she could provide an objective justification for her refusal.⁸⁸

At the national level, it is generally accepted that mere ownership of an intellectual property right does not confer a dominant position on its owner. Nevertheless, a copyright holder's competitive behaviour is, in principle, not exempt from scrutiny under the rules on competition of the Member States.⁸⁹ There is relatively little case law on the subject in France and Germany. In France, the Court of Appeal of Paris once ruled that the refusal of a copyright owner in meteorological data to grant access to such data constituted an abuse of dominant position under article 8(1) of the Order No. 86-1243, of 1st December 1986.⁹⁰ In the Netherlands, the courts and competition authorities have been called upon in two series of cases to decide whether the withholding of factual information by an enterprise constitutes an abuse of dominant position under article 24 of the Dutch Competition Act.

The first series of cases concerns the request by a publisher to gain access under reasonable, fair, and non-discriminatory conditions to the basic telephone subscriber data held by the Dutch telecommunications operator and necessary for the production of a CD-ROM telephone directory.⁹¹ KPN's telephone directories received limited protection under the Dutch Copyright Act. In the last stage of very complex and lengthy proceedings held before

⁸⁸ Larouche 1999, p. 196.

⁸⁹ Gautier 1999, p. 261; Fikentscher 1995, p. 151; and Schricker 2001, p. 69 *et seq.*

⁹⁰ *National Meteorology*, Court of Appeals of Paris, decision of 18 March 1993, *Gaz. Pal.* 9 July 1993, p. 13.

⁹¹ *Denda Multimedia B.V. en Topware CD-service A.G. v. KPN Telecom B.V.*, Independent Post and Telecommunications Authority, decision of 29 September 1999; *Denda International et al. v. Koninklijke KPN Nederland N.V.*, District Court of The Hague, 9 March 1999, in *Mediaforum* 1999/4, p. 127-129; and *Koninklijke PTT Nederland N.V. v. Denda International et al.*, District Court of Almelo, 5 December 1996, in *Computerrecht* 1997/6, pp. 309 affirmed on appeal by the Court of Appeal of Arnhem, 5 August 1997, in *Computerrecht* 1997/6, p. 320-324 with comment from H. Struik.

the courts and the competition authorities, the Independent Post and Telecommunications Authority (OPTA) held that KPN had abused its dominant position by charging Denda in her view the exorbitant price of 0,85 NGL per basic subscriber data.⁹² KPN's refusal to licence under reasonable conditions could be assimilated in this case to a refusal to licence. Accordingly, the Authority ordered KPN to make its basic information available for a price to be determined by the parties but not exceeding 0,05 NGL per set of data.

Like the *Magill* case, the second series of cases considered under Dutch Competition Act involves the refusal by broadcasting organisations to grant a newspaper publisher a licence to the information necessary to produce weekly television programme listings. In the last decision to have been rendered in the case, the Dutch Competition Authority (NMa) recognised the presence of an abuse of dominant position on the part of the broadcasters and forced the latter to deliver their programme schedules under reasonable conditions, the failure of which would give rise to the application of a severe penalty.⁹³ Both in the *KPN v. Denda* case and in the *Telegraaf v. NOS/HMG* case, the Dutch competition authorities – the OPTA and the NMa – considered that the required data were essential for the exercise of commercial activities in the downstream market. The indispensable character of the data ensued to some extent from the particular circumstances of both cases. This would explain in part the rather summary inquiry into the possibility to duplicate the data or the presence of alternatives. According to some authors, the main consideration of the Dutch competition authorities was not so much the presence of competition in the downstream market, but the individual position of the information holders. The organisations' independent position formed one of the bases for the assessment that the refusal to licence violated article 24 of the Competition Act. Nevertheless, it is difficult to identify in the motives of the two decisions, which element was determining for the conclusion of abuse. Consequently, one can hardly tell under what conditions a simple refusal to licence, without additional circumstances, would contravene article 24 of the Dutch Competition Act.⁹⁴

⁹² Overdijk 1997, p. 37.

⁹³ *De Telegraaf v. Nederlandse Onroep Stichting (NOS) and Holland Media Groep (HMG)*, Dutch Competition Authority, decision of 16 February 2000, in *Mediaforum* 2000/3, p. 107 with comment from R. Mahler; District Court of The Hague, 5 January 1999, in *Mediaforum* 1999/2, p. 70 with comment from P.B. Hugenholtz; and Dutch Competition Authority, decision of 10 September 1998, in *Mediaforum* 1998/10, p. 304 with comment from P.B. Hugenholtz.

⁹⁴ Hancher and Lugard 1999, p. 328.

United States

Section 1 of the U.S. Sherman Act⁹⁵ prohibits the conclusion of agreements in restraint of trade. Such agreements are illegal and subject to penal sanctions. Section 2 of the same Act concentrates on how a dominant position is acquired rather than on what the undertaking does once it dominates the market.⁹⁶ Two main elements must be established under section 2: first, the possession of monopoly power in the relevant market; and second, the wilful acquisition or maintenance of that power, as distinguished from the growth or development of that power as a consequence of a superior product, business ability or historic accident. A firm is said to have monopoly power if it can exact a monopoly price for a significant time without losing sufficient customers to make such pricing unprofitable. The inquiry into an allegation of monopolisation requires courts to define the relevant product and geographic market and to evaluate the enterprise's market share. The next step is to determine whether the monopoly power has been acquired or maintained by improper means, such as by a refusal to deal, by tie-in arrangements or by any other form of conduct not motivated by competition or having a valid business purpose. Whereas unilateral refusals to deal arise in the context of so many different transactions, United States courts have had difficulty formulating a single rule to determine whether the monopolist acquired or maintained the monopoly abusively.⁹⁷ Refusals to license and other types of anti-competitive behaviour are therefore evaluated on a case-by-case basis in the light of either one of two tests: the intent test or the essential facilities doctrine.

Under the intent test, the acquisition or maintenance of monopoly power will be considered wilful in the sense of section 2 of the Sherman Act, if it is meant to exclude competition in order to gain a competitive advantage or to destroy a competitor.⁹⁸ Since every competitor aims by definition at gaining an advantage over the competition, the determinative element of the intent test focuses not merely on the monopolist's intention to succeed over competitors, but rather on whether the monopolist had a specific intent to wilfully or purposefully hinder competition. Given that a monopolist's intention can be very difficult to identify, courts also look at the effect of the monopolist's behaviour on the market. Wilful conduct therefore includes not only the behaviour that tends to impair the opportunities of rivals, but also

⁹⁵ Codified at U.S.C. Title 15, §§ 12 and ff.

⁹⁶ Larouche 1999, p. 172.

⁹⁷ Vermut 1997, p. 34.

⁹⁸ See: *Aspen Skiing Corp. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992).

that which either does not further competition on the merits or does so in an unnecessarily restrictive way.⁹⁹ However, even when particular behaviour meets the two requirements of intent and anti-competitive effect, the monopolist may escape liability by presenting legitimate business justifications.¹⁰⁰

Under the 'essential facilities' doctrine, a refusal to deal may be declared unlawful where a monopolist's control of an essential facility is intended to eliminate competition in the downstream market. In the leading case on the issue,¹⁰¹ the elements of liability are described as follows: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. A facility is thus regarded as essential when access to it is needed in order to compete on the market with the company that controls it.¹⁰² To maintain effective competition in the market, the antitrust laws may impose on firms controlling an essential facility the obligation to make the facility available on reasonable non-discriminatory terms unless the firms can provide a legitimate business reason for refusing access. The 'essential facilities' doctrine has been applied to railroad terminals, ski-lift tickets, telecommunication networks, and baseball stadiums. In most cases however, the doctrine was applied only where the undertaking controlling the facility competed in the same market as the undertaking that requested access to the facility.

Over the years, United States courts and competition authorities have come to recognise that while copyright holders are free to exercise the exclusive rights granted under the Copyright Act as they see fit, including by refusing to license the use of their works, they are not immune from antitrust liability.¹⁰³ Under the *Noerr-Pennington* doctrine however, the institution of a good-faith copyright cause of action designed to enforce an owner's exclusive rights is protected from antitrust liability. The *Noerr-Pennington* doctrine derives from two non-copyright-related decisions of the Supreme Court,¹⁰⁴ in which efforts to influence legislation or executive decisions were

⁹⁹ *Aspen Skiing Corp. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), at p. 605.

¹⁰⁰ See: *Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147 (1st Cir. 1994), at p. 1187.

¹⁰¹ *MCI Communications v. AT&T*, 708 F.2d 1081 (7th Cir. 1983) at p. 1132.

¹⁰² *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986).

¹⁰³ *United States v. Colgate & Co.*, 250 U.S. 300 (1919), p. 307.

¹⁰⁴ The name derives from two Supreme Court cases: *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Mine Workers v. Pennington*, 381 U.S. 657 (1965).

recognised as immune from antitrust liability, even if the intent of such action was to eliminate competition. The doctrine was later extended to judicial conduct as well.¹⁰⁵ Nevertheless, the *Noerr-Pennington* doctrine is subject to an exception for purely ‘sham’ activity.¹⁰⁶ Accordingly, no antitrust liability will be found with respect to such conduct as a refusal to license, unless the copyright owner's action is both ‘objectively baseless, in the sense that no reasonable litigant could realistically expect success on the merits’ and ‘an attempt to interfere *directly* with the business relationships of a competitor’.¹⁰⁷

The recent decision of the United States Court of Appeals for the Second Circuit in *PrimeTime v. National Broadcasting Company et al.*¹⁰⁸ provides a clear example of the application of the *Noerr-Pennington* doctrine in the context of the exercise of a statutory limitation on copyright. The dispute arose from the application of the exemption provided under the Satellite Home Viewer Act of 1994 (SHVA), which is codified in Section 119 of the U.S. Copyright Act. This rather technical provision of the Copyright Act deals with the secondary transmission of copyrighted works by a satellite carrier. While the retransmission of network television programming is normally subject to the broadcasting networks' permission or licence, Section 119(a)(2)(E) of the Act allows satellite broadcasters to request a licence from networks for a statutorily fixed royalty fee, for distribution to viewers who cannot receive a sufficiently strong over-the-air broadcast signal. This mandatory licence extends only to households that cannot receive, through the use of conventional stationary outdoor rooftop receiving antenna, an over-the-air signal and have not received cable service in the preceding 90 days. In practice, satellite providers usually designate those households for which they claim a statutory right to serve under the mandatory licence. Local broadcasters have the right to challenge the satellite operator's estimate of the signal-strength received by the designated households. If the test shows that the challenged household is adequately served by the challenging stations, the satellite provider must cease providing the programming from that station; if the test shows that the challenged

¹⁰⁵ *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 161 (3d Cir. 1984) (holding good-faith litigation to enforce a copyright is protected under the *Noerr-Pennington* doctrine).

¹⁰⁶ Nimmer 1999, p. 13-285.

¹⁰⁷ *Professional Real Estate Investors, Inc. v. Columbia Pictures Industry, Inc.*, 508 U.S. 49 (1993), at p. 63 (emphasis in original); and Nimmer 1999, p. 13-286.

¹⁰⁸ *PrimeTime 24 Joint Venture v. National Broadcasting Company, Inc. et al.*, U.S. 2nd Circuit Court of Appeals, Docket No. 98-9392, decision of July 7, 2000.

household is not adequately served, the challenging station must reimburse the satellite provider for the cost of conducting the test.

PrimeTime brought an antitrust action against the major television networks, their affiliates' trade associations, independent television stations, and the National Association of Broadcasters (NAB). The complaint alleged that the defendants had violated Section 1 of the Sherman Act through concerted, baseless, signal-strength challenges brought under the Satellite Home Viewer Act, and through a concerted refusal to license copyrighted television programming to PrimeTime. On the first claim, PrimeTime alleged that the defendants submitted 'simultaneous and voluminous challenges . . . without regard to whether the challenges had merit'. Moreover, PrimeTime alleged that the defendants' co-ordinated scheme was done in order to overwhelm it and make it difficult and expensive for it to comply with the Act. On the second claim, the plaintiff alleged that it attempted to deal individually with each of the affiliated stations, but that the NAB and other defendants organised a campaign to ensure that no affiliate would break ranks and would enter into discussions with it. The plaintiff further alleged that none of the network-affiliated stations had engaged in any real negotiation with it; that many had sent identical rejection letters, and that NBC and ABC had specifically discouraged their affiliated stations from dealing with it. The plaintiff's action was rejected in first instance on the ground that the defendant's SHVA challenges were protected under the *Noerr-Pennington* doctrine.

On appeal, the Court reversed the lower court's decision on both claims. Recognising the right of network broadcasters to make good-faith signal-strength challenges, the court observed however that Congress did not intend to permit co-ordinated SHVA challenges to be made without regard to their merits and for the purpose of imposing upon a satellite carrier unnecessary costs as a means of limiting that carrier's ability to operate and compete. The Court found support for its argument in the Report of the House Judiciary Committee, which states that: 'Absent any anti-competitive ancillary restraints, cooperation among network stations, networks and satellite carriers in achieving compliance with [the SHVA] will serve the public interest and will provide an efficient method to achieve the ends of the copyright law and [the SHVA].¹⁰⁹ Concluding that the network broadcasters had lodged simultaneous and voluminous signal-strength challenges without regard to their merit, the Court of Appeals ruled in favour of Prime Time on its first claim. Regarding the second antitrust claim, the Court noted that 'although coordinated efforts to enforce copyrights against a common

¹⁰⁹ H.P. Rep. No. 100-887(1), at p. 19 reprinted in 1988 U.S.C.C.A.N. 5611, p. 5623.

infringer may be permissible, copyright holders may not agree to limit their individual freedom of action in licensing future rights to such an infringer before, during, or after the lawsuit. Such an agreement would, absent litigation, violate the Sherman Act, and cannot be immunized by the existence of a common lawsuit'. On this point, the Court declared that a concerted refusal to license copyrighted programming to PrimeTime in order to prevent competition from it is a boycott that, if proven, violates the Sherman Act.

Where the *Noerr-Pennington* doctrine cannot be applied, a copyright owner may be held liable under Sections 1 or 2 of the Sherman Act, either for concluding agreements in restraint of trade or for acquiring or maintaining monopoly power by improper means.¹¹⁰ The number of cases explicitly considering antitrust issues in the context of copyright are relatively few and are largely concentrated in the areas of blanket licensing of copyrighted music and motion pictures by collecting societies,¹¹¹ of alleged tying of copyrighted software to hardware or to maintenance services, and of mergers.¹¹² For instance, the U.S. Supreme Court has long held the licensing practice of 'block booking' copyrighted feature motion picture films and television programming to be a *per se* violation of the Sherman Act.¹¹³ 'Block booking' is a form of tie-in arrangement, which consists in conditioning the sale or licence to television stations of one or more feature films upon the acceptance by the station of a package or block containing one or more unwanted or inferior films.

In the *Loews* case, the United States antitrust authorities brought an action against six major distributors of pre-1948 copyrighted motion picture feature films for television exhibition, alleging that each defendant had engaged in 'block booking' in violation of Section 1 of the Sherman Act. Evidence showed that television stations' officials had asked for the right to select films but that their request was denied. The Supreme Court held that tying arrangements of this sort are an object of antitrust concern for two reasons: first, they may force buyers into giving up the purchase of substitutes for the tied product and second, they may destroy the free access of competing suppliers of the tied product to the consuming market. The Court concluded that the conditioning of the sale of one or more copyrighted

¹¹⁰ R. Nimmer 1999, p. S11-9.

¹¹¹ *Broadcast Music Inc. v. Columbia Broadcasting Systems, Inc.*, 441 U.S. 1 (1979); *National Cable Television Advertising Association v. Broadcast Music, Inc.*, 772 F.Supp. 614 (D.D.C. 1991).

¹¹² Lande and Sobin 1996, p. 248.

¹¹³ *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); and *United States v. Loews' Inc.*, 371 U.S. 38 (1962).

feature films to television stations upon the purchase of one or more other films was illegal and that the antitrust laws did not permit a compounding of the statutorily conferred monopoly. In other words, tying arrangements, once found to exist in a context of sufficient economic power, are illegal without elaborate inquiry as to the business excuse for their use. The Supreme Court's ruling in *Loews* still serves today as a valid precedent on the issue of block booking, as shown by the recent decision of Court of Appeals for the Eleventh Circuit in *MCA Television Ltd. v. Public Interest Corporation*.¹¹⁴

A copyright owner's unilateral refusal to license may also give rise to an antitrust action, which is to be assessed on a case-by-case basis either under the 'intent test' or the 'essential facilities' doctrine. In practice, since refusals to licence are generally deemed permissible under the new Antitrust Guidelines for Licensing of Intellectual Property, U.S. courts conduct a more thorough economic analysis under the 'intent test', than would European courts under Article 82 of the EC Treaty. As Larouche points out, the 'intent test' is still fairly vague and its application requires quite a substantial proof against the defendant.¹¹⁵ The intention to maintain or increase monopoly power in a relevant market by anti-competitive conduct is thus seldom found to exist.¹¹⁶ In *In re Independent Service Organizations Antitrust Litigation*¹¹⁷, the Independent Service Organizations filed suit against Xerox alleging that it violated the Sherman Act by refusing to sell or license its patented parts. The Court of Appeals for the Federal Circuit rejected the plaintiffs' request 'to examine Xerox's subjective motivation in asserting its right to exclude under the copyright laws for pretext, in the absence of any evidence that the copyrights were obtained by unlawful means or were used to gain monopoly power beyond the statutory copyright granted by Congress.' The Court concluded that 'in the absence of such definitive rebuttal evidence, Xerox's refusal to sell or license its copyrighted works was squarely within the rights granted by Congress to the copyright holder and did not constitute a violation of the antitrust laws'.

The 'essential facilities' doctrine is derived from two Supreme Court decisions dealing with collective refusals to deal, one of which concerned the

¹¹⁴ *MCA Television Ltd. v. Public Interest Corporation*, U.S. Court of Appeals for the Eleventh Circuit, Docket No. 98-2006, decision of April 6, 1999.

¹¹⁵ Larouche 1999, p. 175.

¹¹⁶ For cases where intention to hinder competition by anti-competitive conduct was found to exist, see: *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F3d 1195 (9th Cir. 1997); and *United States v. Microsoft Corp.*, 65 F. Supp. 2d 1 (DDC 1999).

¹¹⁷ *In re Independent Service Organisations Antitrust Litigation*, United States Court of Appeals for the Federal Circuit, Docket No. 99-1323, decision of February 17, 2000.

collection, assembly and distribution of news.¹¹⁸ Like in Europe, news items are non-copyrightable subject matter in the United States.¹¹⁹ Contrary to the Dutch or German copyright acts however, the U.S. Copyright Act contains no copyright limitation allowing for the reproduction, unless expressly reserved, of news articles, reports or other miscellaneous reports published in one newspaper or periodical by another newspaper or periodical. Exchanges of this sort have therefore always taken place on a contractual basis. In *Associated Press v. United States* case, the Supreme Court had to decide whether Associated Press (AP), by concerted effort with its member newspapers, had violated the Sherman Act by setting up a system of by-laws, which prohibited all AP members from selling news to non-members, and which granted each member powers to block its non-member competitors from membership. In the Court's opinion, the inability to buy news from the largest news agency, or any one of its multitude of members, could have most serious effects on the publication of competitive newspapers, both those presently published and those which but for these restrictions might be published in the future. Records showed that morning newspapers, which controlled 96% of the total circulation in the United States, had AP news service. In fact, AP was found to be 'a vast, intricately reticulated organization, the largest of its kind, gathering news from all over the world, the chief single source of news for the American press, universally agreed to be of great consequence'. Without making any reference to the doctrine of 'essential facilities', the Court nevertheless estimated that the AP reports were 'clothed in the robes of indispensability'.¹²⁰ As a result, the Court held that AP's onerous membership conditions contravened Section 1 of the Sherman Act and enjoined AP to treat all new applicants without discrimination. By contrast, the limitations contained in the Dutch and German copyright acts essentially avoid antitrust litigation by allowing, unless expressly reserved, any publisher of a newspaper or periodical to reproduce articles from another newspaper or periodical on a non-discriminatory basis.

According to Larouche, the doctrine of 'essential facilities' has evolved since then from the case law of the lower courts and has generally met with limited success.¹²¹ In view of the fact that the Supreme Court has so far carefully avoided dealing with the doctrine, it cannot therefore be

¹¹⁸ *Associated Press v. United States*, 326 U.S. 1 (1945); and *United States v. Terminal Railroad Association of St. Louis*, 224 U.S. 383 (1912).

¹¹⁹ *International News Service v. Associated Press*, 248 U.S. 215 (1918).

¹²⁰ *Associated Press v. United States*, 326 U.S. 1 (1945), at p. 18.

¹²¹ The leading case on the 'essential facilities' doctrine remains: *MCI Communications v. AT&T*, 708 F.2d 1081 (7th Cir. 1983).

considered as an established feature of American antitrust law.¹²² The litigation that opposed Intergraph to Intel is a revealing illustration of the judicial hesitations around the 'essential facilities' doctrine.¹²³ Intel is a manufacturer of high performance computer microprocessors, which it sells to producers of various computer-based devices, who in turn adapt and integrate the microprocessors into products that are designed and sold for particular uses. Intergraph produces, on the basis of Intel's microprocessor, computer workstations that are used in producing computer-aided graphics. In the context of their business relationship, Intel provided Intergraph with various special benefits, including proprietary information and products under non-disclosure agreements. After a while however, the business relationship deteriorated and Intel stopped providing Intergraph with technical assistance and other special benefits. In reaction to this, Intergraph sued Intel on several grounds, including Intel's alleged violation of the antitrust laws for refusal to license.

In first instance, the District Court of Alabama observed from the facts of the record that Intel had monopoly power on the market for microprocessors. The court further noted that manufacturers, such as Intergraph, who rely entirely on Intel for their supply of microprocessors and chip sets, have become technologically and financially locked into the Intel microprocessor, its associated chip sets, and the P6 Bus, and that they have no feasible alternative to it. The Court accepted Intergraph's contention that it could not continue to design, manufacture and sell competitive workstations unless it could secure a continued supply of Intel chips, advance chip samples, essential advance technical information, support and advice. The Court also found that Intel had no legitimate business purpose in refusing to deal with Intergraph in accordance with the previously established business relationship between the parties, especially in view of the fact that Intergraph needed Intel's benefits in order to compete in its workstation market. Intel was therefore ordered to supply Intergraph with all of its product information, including trade secrets, proprietary information, intellectual property, pre-release products, allocation of new products and other preferences.¹²⁴

This decision was reversed on appeal.¹²⁵ After reviewing the relevant case law, the Court of Appeals observed that the 'essential facilities' doctrine is not 'an invitation to demand access to the property or privileges of another,

¹²² Larouche 1999, p. 177 and 178.

¹²³ *Intergraph Corp. v. Intel Corp.*, 3 F. Supp. 2d 1255 (N. D. Ala 1998) reversed by 1999 U.S. App. Lexis 29199 (C.A. Fed Cir. Nov. 5, 1999).

¹²⁴ O'Rourke 1998, p. 31.

¹²⁵ *Intel v. Intergraph*, 1999 U.S. App. Lexis 29199 (C.A. Fed Cir. Nov. 5, 1999).

on pain of antitrust penalties and compulsion'. In other words, courts have found an anti-competitive action to exist only when the proof was established that the monopolist intended to eliminate competition in the downstream market. The Court of Appeals further noted that for the doctrine to apply there must be a market in which plaintiff and defendant compete, in such a way that a monopolist extends its monopoly to the downstream market by refusing access to the facility it controls. In the Court's opinion, Intergraph had failed to establish such a competitive relationship and in the absence of such a relevant market and competitive relationship, the 'essential facilities' doctrine did not support a Sherman Act violation.

On the allegation of refusal to deal, the Court of Appeals reiterated that in the 'absence of any purpose to create or maintain a monopoly, the Sherman Act does not restrict the long recognised right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal'.¹²⁶ Referring to a decision of the Court of Appeals for the Second Circuit, the Court also recognised that 'the relationship between a manufacturer and its customer should be reasonably harmonious; and the bringing of a lawsuit by the customer may provide a sound business reason for the manufacturer to terminate their relations'.¹²⁷ The court also believed that Intergraph had provided no support for its claim that Intel's action in withholding 'strategic customer' benefits from Intergraph was for the purpose of enhancing Intel's competitive position. Since there was no showing of harm to competition with Intel, there was therefore no need to establish the defence of business justification. In any case, the Court accepted the principle that, while exclusionary conduct can include a monopolist's unilateral refusal to license a copyright, an author's desire to exclude others from use of its copyrighted work is a presumptively valid business justification for any immediate harm to consumers.¹²⁸

A review of the relevant antitrust case law is very revealing of the manner in which United States courts draw the balance between the rights of intellectual property owners and the values of competition in American law.¹²⁹ On the one hand, courts recognise the right of copyright owners, like other property owners, to choose their business partners. On the other hand, a copyright does not give its owner the right to harm competition either by

¹²⁶ Citing: *United States v. Colgate & Co*, 250 U.S. 300 (1919), at p. 307.

¹²⁷ Citing: *House of Materials Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir. 1962) at p. 871.

¹²⁸ *Data General Corp. v. Grumman Systems Support Group*, 36 F. 3d 1147 (1st Cir. 1994), at p. 1187.

¹²⁹ Valentine 2000, p. 79.

concerted effort, like in the *PrimeTime*, and *Loews* cases, or by unlawful acquisition or maintenance of monopoly power.¹³⁰ It is also clear from the *Intergraph* decision that, just like in Europe, the ‘essential facilities’ doctrine is to be interpreted fairly restrictively. Short of sufficient evidence on a copyright owner's intention to create or maintain a monopoly and on the harmful effect of the conduct on competition, a court will be reluctant to apply the doctrine of ‘essential facilities’ except in the most obvious cases. What the implications of the general rules on competition and antitrust law are for the validity of restrictive copyright licences is examined in more detail in subsection 4.2.2.1 below.

3.2.1.2 *Protective public order*

The contractual practices that had led to the creation of monopolies and cartels, by the end of the 19th century, not only disrupted the competitive process, but also upset the balance of bargaining power between contracting parties. In certain areas of activity, Freedom of contract had thus become more a means of constraint in the hands of the more powerful party, than the engine of autonomy whereby equal parties reach a just result for each of them. The constraining effect of a contractual agreement is all the more evident in cases where a powerful party succeeds in imposing her will on another through the use of a standard form contract. Admittedly, the general principles of law already provide a number of tools that allow courts to interpret, supplement, or correct the agreement made by the parties. In numerous spheres of contractual activity, the traditional rules of law have been judged insufficient to correct the severe inequalities of economic power, of practical experience and of technical knowledge that might affect the weaker party's capacity to express consent when entering into a contract.¹³¹ A vast array of legislative measures limiting the stronger party's freedom of contract has therefore been put in place to protect the weaker party to a contract.¹³² Such measures range from the prohibition of certain contract clauses that are deemed unfair or excessive, to the imposition of substantial provisions in favour of the weaker party and to the obligation to fulfil certain formalities (of form or of information) at the time of conclusion of the contract.¹³³ Such mandatory rules of law have long been in force everywhere

¹³⁰ For cases where intention to hinder competition by anti-competitive conduct was found to exist, see: *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F3d 1195 (9th Cir. 1997); and *United States v. Microsoft Corp.*, 65 F. Supp. 2d 1 (DDC 1999).

¹³¹ Ghestin 1993, p. 117; Hartlief 1999a, p. 33; Farnsworth 1999, p. 301.

¹³² See: Hondius 1999, p. 390; and Hartlief 1999a, p. 1.

¹³³ Principles of European Contract Law, art. 4:118; Spickhoff 1989, p. 174 and f.

to protect particular groups of individuals in their relations with others, such as employees and tenants. Through the years, numerous other groups have been recognised in different jurisdictions as weaker parties, to which protection should be awarded.

Europe

The *contra proferentem* rule of interpretation constitutes one instrument in the hands of judges, which is designed to elicit the meaning that a reasonable person would give a contract term whose signification is unclear. This rule provides that, when the meaning of a term included in a contract is unclear, that term will generally be interpreted against the party who has stipulated it and in favour of the party who has committed the obligation.¹³⁴ Under the *contra proferentem* rule, the risk of ambiguity in a contractual clause is placed on the party who could more easily avoid it, that is, on the party who selected or drafted the clause, rather than on the party to whom it was presented. The use of this rule of interpretation is subject to two requirements: first, it must be clear which party formulated the clause in question; and second, the clause must be ambiguous. While the drafting of terms can hardly be attributed to one particular party in the case of fully negotiated contracts, the drafting of standard terms will usually originate with the party who presents them ready-made for acceptance by the other party. The *contra proferentem* rule is thus applied with particular rigour in the context of standard form contracts. The second requirement of the rule poses more difficulty. In a system where private autonomy prevails, judges should, in principle, refrain from interpreting clauses whose meaning is clear and unambiguous. Nevertheless, in their eagerness to protect weaker parties from unfair terms, the courts have proved remarkably imaginative at discovering ‘ambiguities’ in standard form contracts.¹³⁵

The principle of good faith plays an important role in continental European contract law, for it pervades the entire legal system and is synonymous with sincerity, candour, and more globally to loyalty.¹³⁶ Most systems make a distinction between subjective good faith and objective good faith. Subjective good faith is usually defined as a subjective state of mind: not knowing or having to know of a certain fact or event.¹³⁷ Objective good

¹³⁴ French Civil Code, art. 1162; BGB, § 133, 157 and AGBG, § 5; Dutch Supreme Court, decision of 1 July 1977, *NJ* 1978, p. 125 and Dutch Supreme Court, decision of 28 Sept. 1989, *NJ* 1990, p. 583; see: Hijma 1999, p. 462.

¹³⁵ Kötz and Flessner 1997, p. 115.

¹³⁶ Smits and Wijers 1995, § 2.1; Ghestin 1993, p. 231; and Palandt 2000, § 242, p. 227.

¹³⁷ See for example: Restatement (Second) of Contracts, § 205 on the duty of good faith and fair dealing where ‘good faith’ is defined as ‘honesty in fact in the conduct or transaction concerned’.

faith, by contrast, is usually regarded as a standard of conduct of contracting parties.¹³⁸ Objective good faith is the concept to which most statutory provisions refer either in general terms¹³⁹ or in specific terms like *Treu und Glauben* in Germany,¹⁴⁰ or *redelijkheid en billijkheid* in the Netherlands.¹⁴¹ Article 6:248 of the NBW provides, for example, that ‘a rule binding upon the parties as a result of the contract does not apply to the extent that, in the given circumstances, this would be unacceptable according to the criteria of reason and equity’. In this sense, the objective good faith of the civil law system could be assimilated to the concept of equity in the common law system.

The requirement of good faith is for some authors one of the most important open norms of the civil law system, on the basis of which courts can interpret, supplement, and correct the obligations of contracting parties.¹⁴² Considering that good faith has been applied in so many different circumstances, no definition of good faith has emerged from the case law. In view of its broadness and lack of definite content, some commentators contest the idea that the requirement of objective good faith constitutes a separate legal norm.¹⁴³ Just like the principle of equity in the common law system, the principle of good faith is said to allow courts to bring correctives to the judicial application of other legal norms, when in certain concrete circumstances, their harshness would need to be mitigated. These authors insist that the obligation of objective good faith cannot constitute a separate legal norm since it may not be violated in isolation of other rules of contract law.¹⁴⁴

In France, parties to a contract have an obligation of good faith under Article 1134 of the CC. The requirement of good faith in French contract law has for the most part been interpreted as imposing an obligation of information on the seller.¹⁴⁵ However, the requirement of good faith in contractual relationships has also been interpreted as imposing a duty on each party to take the interest of the other party into account.¹⁴⁶ In the Netherlands, this view on the principle of *redelijkheid en billijkheid* derives from an explicit comment of the Dutch Supreme Court in a decision of

¹³⁸ Hesselink 1998, p. 288; Ghestin 1993, p. 239.

¹³⁹ French Civil Code, art. 1134.

¹⁴⁰ BGB, § 242.

¹⁴¹ NBW, art. 6:2 and 6:248.

¹⁴² Fikentscher 1985, p. 123; and Larenz 1987, p. 129.

¹⁴³ Hesselink 1998, p. 288; Ghestin 1993, p. 238.

¹⁴⁴ Palandt 2000, § 242, p. 228.

¹⁴⁵ Hesselink 1998, p. 239.

¹⁴⁶ Asser-Hartkamp 1997, p. 285; Smits 1995, p. 101; and NBW, art. 6:2(1).

1957.¹⁴⁷ In other words, the principle of good faith reflects the general recognition that parties have an obligation of loyalty whose degree may be defined by the legislator or by the courts according to the usage and good contractual practices.¹⁴⁸ In application of Article 6:2 of the NBW, a contract term which would normally be binding upon the parties, will not be so to the extent that, given all relevant circumstances, this would be unacceptable according to the criterion of objective good faith. This provision clearly adopts the view that even express terms of contract can be set aside whenever their enforcement would be grossly unjust. The term ‘unacceptable’ indicates that such a decision should be reserved for exceptional situations.¹⁴⁹ Paragraph 242 of the BGB has received a similar interpretation in the German courts.¹⁵⁰ Hence, an unreasonably burdensome obligation could be declared invalid as contrary to the general principle of good faith and to the standard of good contractual practices. The use of the requirement of good faith as a mitigating or correcting factor of the contracting parties' respective obligations really depends on the courts' vision of the significance of that principle within the legal system.¹⁵¹

Besides tenants and workers, authors represent one of those social groups for whom increased protection was deemed necessary. In France, the economic disparity between authors and publishers was judged so important during the 1950's as to warrant the adoption of a series of measures that still provide today the framework within which contractual relationships for the exploitation of works take place.¹⁵² According to these provisions, the global assignment of rights in future works is null and void, whereas any assignment of an author's rights must be put in writing and specify expressly for each right the scope, purpose, territory and duration of the assignment. Furthermore, the person exploiting the work has the obligation to pay the author a remuneration proportional to the revenues produced, as well as to give an account of the revenues produced.¹⁵³ In Germany, authors receive some protection under the doctrine of the ‘purpose-of-transfer’ rule (*Zweckübertragungslehre*), which limits the transfer of rights granted by an author to that which is truly necessary for the purpose envisaged by the parties.¹⁵⁴ German authors may also invoke the ‘best-seller’ provision of the

¹⁴⁷ *Baris/Riezenkamp*, Dutch Supreme Court, 15 November 1957, *NJ* 1958, p. 67.

¹⁴⁸ Ghestin 1993, p. 239.

¹⁴⁹ Hartkamp 1999, p. 126.

¹⁵⁰ Fikentscher 1985, p. 139.

¹⁵¹ Smits 1995, p. 102.

¹⁵² Hugenholtz 2000a; Cohen Jehoram 1977, p. 79; and Hillig 1977, p. 1.

¹⁵³ French Intellectual Property Code, art. L. 131-1 to 131-8.

¹⁵⁴ German Copyright Act, § 31(5); see also: Dessemontet 1998b, p. 53.

Act against their publishers to renegotiate the amount of remuneration due to them in case of unexpected success.¹⁵⁵

Consumers form yet another group of weak parties, to whom legislators have devoted much attention in recent years. Let me recall that, in practice, merchants generally draft the terms of the standard form contract and present them to consumers on a take-it-or-leave-it basis. In many instances, prohibitively high transaction costs will prevent the consumer from negotiating with the other party, from obtaining the necessary information or from tracking down a more favourable offer. Moreover, consumers may not even try to shop around for better terms assuming that all merchants in a given sector employ the same or similar general conditions. This behaviour on the part of consumers is entirely rational but may be exploited by merchants.¹⁵⁶ The rules of law designed to protect consumers concern various aspects of their transactions with merchants. Some measures regulate specific commercial activities, such as door-to-door sale, insurance, travel, and credit,¹⁵⁷ while others regulate the use of standard form contracts.¹⁵⁸ In the last case, the courts are often given the power to review and actively control the fairness of terms presented in standard form contracts, including contracts dealing with information products.

The main difficulty with the regulation of the content of standard form contracts is finding the appropriate level of protection against merchants who act in ways that violate the consumers' expectations, while at the same time continuing to honour freedom of contract as a basic tenet of the legal system.¹⁵⁹ In principle, a party who accepts another party's standard terms is bound by those terms, irrespective of whether or not she actually has knowledge of their content in detail or fully understands their implications. Where the circumstances indicate that one party did not, or could not, fully comprehend the meaning of the contract, arguments have been made in favour of a judicial enquiry into the fairness of the contract terms. The judicial review of the fairness of clauses relating to the price paid or to the main subject matter of the contract is known as the *iustum pretium* doctrine.

While carefully avoiding to introduce the *iustum pretium* doctrine into the national legal regime, the approach of legislators and courts regarding the control of the content of standard form contracts oscillates between a more liberal or social view of the need for public intervention in private relations. At the European level, the use of standard form contracts has been the object

¹⁵⁵ German Copyright Act, § 34.

¹⁵⁶ Hartlief 1999a, p. 59; and van Arkel 1999, p. 475.

¹⁵⁷ Farnsworth 1999, p. 316.

¹⁵⁸ Kötz and Flessner 1997, p. 147.

¹⁵⁹ Chirelstein 1990, p. 75.

of regulation and judicial review for several years in Germany and the Netherlands. In fact, the German *Gesetz über den Allgemeinen Geschäftsbedingungen* (AGBG) was the source of inspiration for the provisions on standard form contracts that were introduced in section 6.5.3 of the NBW in 1987.¹⁶⁰ Consequently, both acts show definite similarities. Both acts apply to stipulations that are drafted by one party to be included in standard form contracts and imposed on another party, with the exception of terms that pertain to the main subject matter of the contract.¹⁶¹ This last exception reflects the legislators' reluctance to introduce the *iustum pretium* doctrine into positive law. Both acts set out as a general principle that a stipulation in general conditions may be declared invalid, if it is unreasonably onerous to the other party.¹⁶² A clause is deemed not to be included in the contract under Article 3 of the AGBG, if it is 'surprising'; that is, if it is so unusual that the other party does not have to take it into account. Under Dutch law, the protection against the use of a 'surprising' clause is said to fall under the general provision of Article 6:233(a) of the NBW. Further, both acts contain two lists, a 'black list' of terms that are always invalid because they are considered to be unreasonably onerous to the other party and a 'grey list' of terms that, unless proven otherwise, are presumed to be unreasonably onerous.¹⁶³ The terms enumerated in these lists are meant to apply only in consumer relations, while the open norms set out in Article 9 of the AGBG and Article 6:233 of the NBW may also be invoked under certain conditions in relations between professionals.¹⁶⁴

Modelled after the Dutch and German laws, the European Directive on unfair terms in consumer contracts was adopted in 1993.¹⁶⁵ Contrary to the Dutch or German provisions, however, the scope of application of the Directive is exclusively limited to transactions involving consumers, i.e., 'any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession'.¹⁶⁶ Article 3 of the Directive generally prohibits the use in non-negotiated contracts of terms, which contrary to the requirement of good faith, cause significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. For more certainty, the Directive contains an

¹⁶⁰ Act of 18 June 1987, Official Gazette of the Netherlands No. 327.

¹⁶¹ NBW, art. 6:231(a); AGBG, § 8.

¹⁶² NBW, art. 6:233(a); AGBG, § 9.

¹⁶³ NBW, art. 6:236 and 237; AGBG, §§ 10 and 11.

¹⁶⁴ Smits and Mijers 1995, p. 54.

¹⁶⁵ Directive on Unfair Terms in Consumer Contracts, 93/13/EEC, of 5 April 1993, O.J. L 95/29.

¹⁶⁶ *Id.*, art. 2(b).

indicative and non-exhaustive 'grey list' of clauses, which may be regarded as unfair. Inspired by the requirement of good faith, the unfairness of contractual terms is to be assessed according to the nature of the goods or services for which the contract was concluded, to all the circumstances attending the conclusion of the contract, as well as to all the other terms of the contract. However, no judicial review is permitted under the Directive for terms that deal with the definition of the main subject matter of the contract or with the adequacy of the price and remuneration in relation to the goods or services supplied, insofar as these terms are in plain intelligible language. The Directive establishes therefore a minimum level of protection for consumers confronted with standard form contracts. Countries like the Netherlands and Germany, where the level of protection on the subject was already high, introduced only few modifications to their existing legislation. Other countries like France had to make more significant changes to their laws.

Indeed, French consumer protection was confined for a long time to the general principles of law and to the provisions of the Act No. 78-23 of January 10, 1978 concerning the protection of consumers against abusive clauses. The protection afforded under the Act of 1978 did apply to contracts concluded between a professional and a consumer or a non-professional, but it was in fact of very narrow scope, for the courts could only invalidate abusive clauses that had been declared so by decree of the *Conseil d'État* or by non-binding recommendation of the *Commission des clauses abusives*. Only one decree has ever been adopted pursuant to the Act,¹⁶⁷ whereby a clause in a contract between a professional and a non-professional or a consumer was considered abusive in the three following circumstances: 1) if it had the object or the effect of binding the other party to terms that did not appear in the contract; 2) if it had the object or the effect of suppressing or limiting the other party's right to damages in case of failure by the professional to perform any of her obligations and; 3) if it had the objective or the effect of reserving to the professional the right to unilaterally modify the characteristics of the good to deliver or of the service to render.

Subsequent modifications to the Act never recognised the courts' independent power to intervene with respect to unfair terms in standard form contracts. Nevertheless, the *Cour de Cassation* did develop a line of normative jurisprudence, on the basis of which courts of lower instance have invalidated certain abusive clauses notwithstanding the absence of any decree.¹⁶⁸ The implementation of the European Directive on Unfair Contract

¹⁶⁷ French Decree No. 78-464 of March 24 1978, O.J. April 1st, 1978.

¹⁶⁸ Sinay-Cytermann 1996, p. 246.

Terms brought French consumer protection law somewhat closer to Dutch and German law on the subject.¹⁶⁹ The implementing Act finally confirms the courts' autonomous power to annul unfair clauses in standard form contracts, and transposes the Directive's list of presumably abusive terms into French law. However instead of introducing a 'black' and a 'grey' list of abusive clauses, Article L. 132-1 of the French Consumer Code merely states that, in an action involving one of the clauses listed in annex, the plaintiff is not discharged from providing evidence regarding the abusive character of the clause.¹⁷⁰

United States

In contrast with European law, the United States never adopted specific regulation concerning the use of standard form contracts. Courts generally purport to enforce all terms in standard forms because they regard standard forms as contracts. Yet, in many cases, the courts have struggled to invalidate what they considered to be a very unfair term.¹⁷¹ In doing so, they have resorted to some imaginative 'judicial construction' of the rules on contract, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. The courts have also applied the doctrine of ambiguity, or *contra proferentem*, which holds that ambiguities in contracts are construed against the party that stipulates the terms and in favour of the other party.¹⁷² After years of rather unsatisfying judicial 'construction' however, the equitable concept of unconscionability inspired one of the most innovative sections of the Uniform Commercial Code (UCC).¹⁷³ As a result, the main limit to the stronger party's freedom of contract is the general and open norm embodied in section 2-302 of the UCC, which provides that:

'(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may

¹⁶⁹ French Act No. 95-96 of February 1st, 1995 concerning abusive clauses and the presentation of contracts and regulating various activities of an economic and commercial nature, O.J. February 2, 1995, p. 1755.

¹⁷⁰ Sinay-Cytermann 1996, p. 249.

¹⁷¹ Slawson 1971, p. 562.

¹⁷² Restatement (Second) of Contracts, § 206; *Lang v. Long-Term Disability Plan of Sponsor Applied Remote Technology, Inc.*, 125 F.3d 794 (9th Cir. 1997); and *Berry v. Commercial Union Ins. Co.*, 87 F.3d 387 (9th Cir. 1996).

¹⁷³ Farnsworth 1999, p. 307.

so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence to its commercial setting, purpose and effect to aid the court in making the determination'.

Section 2-302 UCC is intended to make it possible for the courts to review the terms of a contract that they find unfair or 'unconscionable'. The Restatement (Second) of Contracts¹⁷⁴ contains a section on unconscionability that is patterned after that of the Code's and applicable to contracts generally. Several uniform laws, including the recent UCITA, also contain similar provisions applicable to contracts concluded within their purview.¹⁷⁵ While the expression 'unconscionable' is nowhere defined, the basic test is whether, in light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the conclusion of the contract. As it emanates from case law, the principle behind the application of the doctrine is the prevention of oppression and unfair surprise, and not of disturbance of allocation of risks because of superior bargaining power.¹⁷⁶

United States courts have generally been cautious in applying the doctrine of unconscionability, accepting the fact that parties must often conclude their contract quickly, that their bargaining power will rarely be equal and that courts are ill-equipped to deal with problems of unequal distribution of wealth in society. When rejecting a defence of unconscionability, the courts have often supported their conclusion by stressing that the goods or services were not essential or could have been obtained elsewhere. In order to grant relief from a challenged term, some courts have also required that the disadvantaged party establish both procedural and substantive unconscionability.¹⁷⁷ In other words, in some cases, terms have been held unconscionable only when the party could show that she had not given proper consent and that the term was unreasonable. As Farnsworth further points out, most of the parties that have successfully invoked the doctrine of unconscionability have been consumers, since the courts are generally circumspect about using the doctrine to protect

¹⁷⁴ Restatement (Second) of Contracts, sec. 208.

¹⁷⁵ UCITA, sec. 111.

¹⁷⁶ Sec. 2-302 UCC, comment 1.

¹⁷⁷ Craswell 1993, p. 18.

merchants and similar professionals, declining to apply it in favour of sophisticated corporations.¹⁷⁸

The interpretation of the American doctrine of unconscionability differs quite substantially from the continental European interpretation of unfair terms, where courts not only look at the oppressive or surprising effect of a term but also at whether the allocation of risks by such a term 'unfairly prejudices' the other party.¹⁷⁹ In fact, the Dutch and German laws on contracts seem to follow a more social approach to contracting – one might say more 'paternalistic' – than the United States or even France might have in comparable circumstances. This social approach to contracting is particularly clear when one considers that the principle of objective good faith has been interpreted in the Netherlands and Germany as imposing a duty on each contracting party to take each other's interests into account. The question of whether and to what extent the rules on consumer protection and the unconscionability doctrine apply in the context of copyright licensing is discussed in more detail in subsection 4.2.2.2 below.

3.2.2 CONSTITUTIONAL RIGHTS

Like any other freedom, a person's freedom of contract is guaranteed only as far as it does not conflict with the freedoms of others. What if the exercise by one person of her freedom of contract affects the fundamental right of another person, for example by discriminating towards the contracting party or by unduly restricting the party's freedom of expression? Could this individual stop the violation by invoking her fundamental rights? In the following pages, I first examine whether and to what extent constitutional rights can be applied in private relations under the national constitutions of France, Germany, and the Netherlands, under the European Convention on Human Rights and under the American Bill of Rights.¹⁸⁰ I then analyse whether and under what conditions these constitutional systems tolerate certain limits on the rights protected therein. I consider next the possibility that individuals may waive the protection afforded under these instruments. Even if fundamental rights were, in principle, to find some application in private relations, I enquire finally whether the fact that the encroachment upon the right occurs in a contractual setting has an impact on its application.

¹⁷⁸ Farnsworth 1999, p. 314.

¹⁷⁹ Kötz and Flessner 1997, p. 146.

¹⁸⁰ The Bill of Rights consists of Amendments 1 to 10 of the U.S. Constitution.

3.2.2.1 'Horizontal working' of fundamental rights

Fundamental rights traditionally protect individuals against interference from the State. Yet, the argument has increasingly been put forward for the need to protect citizens not only against the actions of the State, but also against those of other powerful people, institutions and organisations.¹⁸¹ The underlying premise of the application of constitutional rights in private relations is the recognition that fundamental rights constitute principles that are so important to society as to be applied not only in the traditional relation between citizens and the State, but also between citizens themselves.¹⁸² Constitutional rights thus lie at the basis of the entire legal system and can only unfold to their intended purpose if they are taken into consideration in all areas of the law, including in matters of private law. Constitutional rights should therefore bind the legislator and the courts, including at the time of enacting private law provisions or of enforcing private contracts. The legal system would otherwise find itself in an unbearable contradiction.¹⁸³

Europe

In France, the fact that the protection of fundamental rights has been felt most necessary against actions of the State does not preclude the possibility that fundamental rights might also apply in private relations.¹⁸⁴ As Rivero justly points out, fundamental freedoms do not change in nature if the threat comes from the State or from private individuals.¹⁸⁵ Freedom of expression may be compromised by an employer, just as it may by a governmental body. Ultimately, the State has the responsibility to protect individuals in their private relationships, where the legislator determines the rules and the judge enforces them. The State would fail in its obligation if its bodies refused to ensure such protection. Indeed, the drafters of the *Déclaration des droits de l'homme et du citoyen de 1789* were fully aware of the need to put certain limits on the exercise of individual freedoms.¹⁸⁶ Article 4 of the *Déclaration* states that 'freedom consists in the ability to do everything that does not harm others: thus, the exercise of every man's

¹⁸¹ De Meij, Hins, Nieuwenhuis and Schuijt 2000, p. 81.

¹⁸² Rivero 1974, p. 192; and Asser-Hartkamp 1997, p. 43.

¹⁸³ Rübner 1992, p. 552.

¹⁸⁴ Molfessis 1997.

¹⁸⁵ Id., p. 197.

¹⁸⁶ Rivero 1971, p. 316.

natural rights has only those limits that allow other Members of Society to enjoy the same rights.’ This provision of the Declaration emphasises the fact that even following the liberal philosophy of 1789 there was a need to ensure the peaceful co-existence of freedoms in private relations. On the basis of Article 4 of the French *Déclaration* and of the Preamble of the Constitution of 1946, Rivero maintains that the protection of constitutional rights in relationships with the State cannot be dissociated from the protection in private relationships. How otherwise could two series of potentially opposite values co-exist in the minds of individuals depending on whether their freedom is violated in their relationships with the State or in their relationships among themselves?¹⁸⁷ But Rivero’s convictions have been contested. Against a direct application of the constitutional rights in private relationships, Rigaux declares that:

‘What one wrongly calls the ‘horizontal effect’ of the Constitution would suggest that in their mutual relations citizens would have to respect such a norm, which is purely absurd. The provisions of the Constitution put obligations only on the organisations of the State. No doubt can citizens invoke the constitutional guarantee of their fundamental rights but only against an organisation of the public power and not against another citizen. The journalist accused before the judge of having violated another person’s right to privacy finds an adequate means of defence in the exercise of freedom of expression. Having to arbitrate a conflict between this liberty and the right to privacy (or right to personality), the ordinary judge is likely to have badly weighed the balance to be maintained between these two freedoms and the constitutional action directed, if necessary, against the judge’s decision has indeed the latter as object: in civil relations the vice of unconstitutionality would not be attached to the parties’ behaviour but to the decisions of public authorities and, in particular the jurisdictions that have exercised their competence in these relations. The alleged horizontal effect of constitutional norms is a doctrinal chimera without significance and without substance.’¹⁸⁸

For Rigaux, private disputes only enter the field of constitutional law through the action of the judge or of the state.

The question of the possible application of fundamental rights in private relations has given rise to a lively doctrinal debate and to a large

¹⁸⁷ Id., p. 322; and see: Robert and Duffar 1999, p. 28.

¹⁸⁸ Rigaux 1992, p. 32.

volume of literature in the Netherlands and Germany. The discussion has its origins in the writings of Nipperdey, who in the wake of the Second World War was the first author in Germany to formulate the theory of the '*Drittwirkung*' ('third-party effect') of fundamental rights. The 'third party' refers to the party outside of the traditional individual/State relationship that is normally subject to the constitutional norms.¹⁸⁹ Nipperdey argued that the application of constitutional rights in private relationships was possible as a principle, even if the extent of the application was to be determined for each constitutional right, on a case-by-case basis.¹⁹⁰ The debate over the '*Drittwirkung*' of fundamental rights culminated during the 1960's, at which time it also reached the Netherlands.¹⁹¹ The theory of the '*horizontale werking*' of fundamental rights, or 'horizontal working', followed there essentially the same lines as in Germany. In fact, the question today in Germany and the Netherlands is not so much whether constitutional rights are meant to protect individuals in their private relationships, but rather to what extent they are to apply.¹⁹²

In Germany, the application of fundamental rights in private relationships is said to rest on Article 1 of the *Grundgesetz* (GG), which proclaims that '(1) The dignity of man is inviolable. To respect and protect it is the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.' This provision of the *Grundgesetz* is thus understood as embodying the highest order of value of German society, where the inviolability of human dignity is placed at the forefront. The right to freedom (Article 2(1) of the GG) and the right to equality (Article 3(1) of the GG), as well as all other rights granted under the constitution, derive from this paramount principle. From this perspective, it would be only logical that constitutional rights have effect not only between individuals and the State, but also between private individuals: fundamental values should be applied throughout the law. Early on, the Federal Constitutional Court recognised that, on the basis of Article 1 of the GG, fundamental rights were to have indirect effect on private relationships. In the *Lüth* case, the Court declared that: 'the basic rights are primarily rights of defence of the citizen against the state; however, the basic rights provisions of the *Grundgesetz* also embody an objective order of values which has, as a

¹⁸⁹ Clapham 1993b, p. 165.

¹⁹⁰ Nipperdey 1961, p. 15. See also: Leisner 1960, p. 335 and ff.; and Schmalz 1991, p. 100.

¹⁹¹ Boukema 1966, p. 140.

¹⁹² In Germany: Rübner 1992, p. 551; in the Netherlands: Koopmans 1998, p. 276; Groen 1995, 136; and Burkens 1989, p. 192.

fundamental decision of constitutional law, validity for all areas of the law'.¹⁹³

Since the Constitutional Court's ruling in the *Lüth* case, the importance of protecting certain fundamental aspects of the private sphere against others is generally admitted. However, where an individual disposes of her rights and commits herself to obligations as a manifestation of her private autonomy, this right to self-determination must be respected and the constitutional protection must give way accordingly. On the other hand, the protection of fundamental rights will gradually gain more and more importance as the individual finds herself at the mercy of a one-sided regulating power, of other private persons or of social powers. That fundamental rights receive horizontal application is particularly obvious with respect to the guarantee of the inviolability of human dignity and the protection of life and health. The constitutional protection of individual freedoms and equality can also be afforded, including in relationships between private contracting partners, when one of the parties is not acting freely.¹⁹⁴ Although the jurisprudence has not always been constant, the German courts have, in practice, shown a distinct preference for the *indirect* application of fundamental rights in private relationships.¹⁹⁵

In the Netherlands, the issue of the horizontal working of fundamental rights was brought to the forefront of the discussions during the Constitutional Reform of 1983.¹⁹⁶ At that time, the position of the Dutch government was that the horizontal working of fundamental rights should not, in principle, be excluded. Whether in a specific case, one could speak of horizontal working varied according to the government per Article or per part of an Article of the Constitution and was to be evaluated by the Courts. The concept of horizontal working was also broadened to include the indirect effect of unwritten fundamental rights into private law as one form of horizontal working, albeit a weak one. In this sense, the Explanatory Memorandum to the Bill on the Constitutional Reform proposed a sliding scale of five forms of horizontal working of fundamental rights, going from the least to the furthest-reaching as follows:

1. The mandate on the legislator or the government to implement a specific policy or principle, including inside private relationships; this is the case

¹⁹³ BVerfGE 7, 198 decision of 15 January 1958 (*Lüth*); and Stern 1988, § 76, p. 1532.

¹⁹⁴ Maunz and Zippelius 1998, p. 143.

¹⁹⁵ See for example: BVerfGE 7, 198 decision of 15 January 1958 (*Lüth*); and BVerfGE 89, 214 (*Bürgerschaftsverträge*), at p. 233.

¹⁹⁶ Alkema 1978, p. 253; Biesheuvel 1981, p. 147; Dommering 1982, p. 20; Rimanque and Peeters 1982, p. 16; Burkens 1989, p. 192; Verhey 1992, p. 135; and Groen 1995, p. 135.

- for example of the instruction norms found in the fundamental social rights, like the rights to education, work and housing;
2. The fundamental norm, which is not directed solely at the legislator, can also present itself to the judge as an *important value* that influences the interpretation of the rules or principles of private law, such as good morals, public order, or good faith;
 3. The fundamental right can be the independent expression of a *legal interest*, which the judge must take into consideration when weighing all interests at hand;
 4. The fundamental right can be the expression of a *legal principle* from which the judge may only deviate for compelling reasons;
 5. Finally, the fundamental rights recognised in the Constitution impose themselves as imperative norms of law, which can be restricted only in compliance with the constitutional limitation clauses.¹⁹⁷

The Dutch legislator gave no further explanation or concrete examples regarding the workings of the different steps of the scale in relation to the specific rights recognised under the Dutch Constitution. As a result, the issue of the horizontal working of constitutional rights has been left, as it had been until then, essentially to the interpretation of the Courts.¹⁹⁸ The strongest critique of the government's sliding scale is of a more fundamental nature. In the eyes of many commentators, the horizontal working of constitutional rights truly takes place only in the fifth instance. In this case, one can speak of a *direct* horizontal working of constitutional rights, which operates against individuals as it does against the State.¹⁹⁹ But the *direct* horizontal working of fundamental rights has yet to be recognised in jurisprudence.²⁰⁰ Moreover, the first instance mentioned in the scale could, in principle, never qualify as horizontal working of constitutional rights, because in this case, the protection does not come from the constitutional right itself but rather from the implementing act.²⁰¹ The same remark can also be made regarding the other three levels of the scale, insofar as their concretisation requires the intervention of the courts, which of itself can be assimilated to a 'state action'.²⁰² Most forms of horizontal working of constitutional rights are thus

¹⁹⁷ *Algehele grondwetsherziening*, Part I-a, Second Chamber 1975-1976, 13 872, No. 3, p. 15-16.

¹⁹⁸ Van der Pot and Donner 2001, p. 248; Kortmann 1997, p. 353; and Burkens 1989, p. 171.

¹⁹⁹ Dommering 1982, p. 17.

²⁰⁰ De Meij, Hins, Nieuwenhuis and Schuijt 2000, p. 83.

²⁰¹ Hofman, Sap and Sewandono 1995, p. 245; and Burkens 1989, p. 175.

²⁰² Rimanque and Peeters 1982, p. 13.

indirect. In practice, constitutional rights have been given an *indirect* effect on relations between individuals through the interpretation of the general rules of law in conformity with the constitutional principles.²⁰³

Commentators have also examined the extent to which the rights guaranteed under the European Convention of Human Rights (ECHR) can have a horizontal effect.²⁰⁴ In principle, the European Court of Human Rights is competent to receive only applications directed against a Contracting State and not against individuals. Since only a State can be the object of a complaint before the Convention organs, the *direct* effect of the Convention's provisions in private relationships is excluded. However, it is now generally accepted that the rights protected under the Convention can have an *indirect* effect inside private relations. An argument in this sense could be inferred from the language of several provisions of the Convention itself. First, the Preamble to the Convention emphasises the importance of 'securing the universal and effective recognition and observance of the Rights therein declared' and Contracting States affirm 'their profound belief in those fundamental freedoms, which are the foundation of justice and peace in the world'. Second, Article 1 of the Convention compels each Contracting State to 'secure to everyone within its jurisdiction the rights and freedoms defined in the Convention'. Third, Contracting States must provide to everyone whose rights and freedoms are violated an 'effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'²⁰⁵ Any kind of protection of the rights and freedoms of individuals and any kind of remedy against their violation would be entirely illusory if violations committed by private parties were to remain unsanctioned.²⁰⁶

The jurisprudence of the European Court of Human Rights and of the former European Commission for Human Rights²⁰⁷ unmistakably points to an *indirect* application of the rights inside private relations. Following a number of decisions rendered by the Court over the last twenty years, the rights

²⁰³ De Meij, Hins, Nieuwenhuis, Schuijt 2000, p. 83; Van Wissen 1992, p. 41; and Verhey 1992, p. 118.

²⁰⁴ Alkema 1995, p. 32; Clapham 1993b, p. 163; and Tsakiridis 1988, p. 219.

²⁰⁵ ECHR, art. 1 and 13.

²⁰⁶ Van Dijk and Van Hoof, p. 24-25.

²⁰⁷ Until November 1, 1998, the European Commission for Human Rights decided the admissibility of complaints of human rights infringement; only cases deemed admissible by the Commission were brought before the European Court of Human Rights. The European Commission for Human Rights has since then become part of the European Court of Human Rights.

guaranteed under the ECHR can find an *indirect* application in either one of the following circumstances:

1. When a complainant is told that her action is inadmissible, as complainants themselves have to respect the provisions of the Convention;²⁰⁸
2. When the State is held responsible for a private violation, due to its failure to legislate or take other preventive action;²⁰⁹
3. Where the Court decides whether a particular body is an organ of the State or a private body;²¹⁰ and
4. Where the State is held responsible due to a national court sanctioning or failing to compensate a private violation.²¹¹

It is indeed well accepted in public law that a State may be found accountable for the acts of individuals, insofar as it encouraged their commission, gave permission for it or was negligent in preventing them through the imposition of penal or civil sanctions.²¹² The European Court of Human Rights ruled in the *Young, James and Webster* case that:

²⁰⁸ See: *Kommunistische Partei Deutschland v. Federal Republic of Germany*, Case No. 250/57, Yearbook 1 (1955-1957), p. 223.

²⁰⁹ *Case Of Airey V. Ireland*, European Court of Human Rights, 9/10/1979, Series A, no. 32, § 25 where the Court wrote: 'Furthermore, fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive and "there is ... no room to distinguish between acts and omissions'. See: *Case Relating To Certain Aspects Of The Laws On The Use Of Languages In Education In Belgium v. Belgium*, 23 July 1968, Series A no. 6, p. 31, paras. 3 in fine and 4; *Luedicke, Belkacem and Koç v. Germany*, 28 November 1978, Series A no. 29, pp. 17-18; para. 42; and *Marckx v. Belgium*, 13 June 1979, Series A no. 31, p. 15, para. 31.

²¹⁰ See for example: *Fuentes Bobo v. Spain*, European Court of Human Rights, 29 February 2000, § 37, in *Mediaforum* 2000/9, p. 293 with note by Verhulp.

²¹¹ See: *Tolstoy Miloslavsky V. The United Kingdom*, European Court of Human Rights, 13/07/1995, A316-B, § 55 where the Court wrote: 'In sum, the Court concludes that the award was 'prescribed by law' but was not 'necessary in a democratic society' as there was not, having regard to its size in conjunction with the state of national law at the relevant time, the assurance of a reasonable relationship of proportionality to the legitimate aim pursued. Accordingly, on the latter point, there has been a violation of Article 10 (art. 10). On the other hand, the injunction, either taken alone or together with the award, did not give rise to any breach of that Article (art. 10).'

²¹² Van der Pot and Donner 2001, p. 219; Clapham 1993a, p. 170; Burkens 1989, p. 178; see also: *A. Mühren v. the Netherlands*, European Commission on Human Rights, no. 9322/81, where the Commission declared: 'it could be argued that the responsibility of the Netherlands Government is engaged to the extent that its duty to ensure that the rules, adopted, it is true, by a private association, do not run contrary to the provisions of the

‘Under Article 1 of the Convention each Contracting State ‘shall secure to everyone within [its] jurisdiction the rights and freedoms defined in... [the] Convention’; hence, if a violation of one of those rights and freedoms is the result of non-observance of that obligation in the enactment of domestic legislation, the responsibility of the State for that violation is engaged.’²¹³

More recently, the European Court of Human Rights unequivocally declared that ‘Article 10 is not only compelling in relations between employer and employees that are regulated under public law, but can also find application when those relations fall under private law. Furthermore, in some cases, the State has the positive obligation to protect freedom of expression even against encroachments that are caused by private persons.’²¹⁴ Of course, the provisions of the ECHR could also be given horizontal application at the national level, if a private party were to bring an action before a national court against another private individual for the violation of a right guaranteed under the Convention.²¹⁵

United States

In the United States, the Bill of Rights protects citizens only against acts of the State and not against acts of private individuals. Consequently, whenever a suit is brought against private individuals on the basis that they have taken actions which allegedly violate the civil or political rights of another, there must be a determination of whether a defendant’s actions constitute governmental or ‘state’ action of a type regulated by the appropriate constitutional provision.²¹⁶ As Justice O’Connor pointed out, the Supreme Court’s case law on the question of when private action may be

Convention, in particular where the Netherlands courts have jurisdiction to examine their application’.

²¹³ *In the case of Young, James and Webster v. The United Kingdom*, European Court of Human Rights, 13 August 1981, Series A, No. 44, § 49. See also: *X and Y v. Netherlands*, European Court on Human Rights, 26 March 1985, Series A, No. 91 (1985).

²¹⁴ *Fuentes Bobo v. Spain*, European Court of Human Rights, 29 February 2000, § 38, in *Mediaforum* 2000/9, p. 293 with note by Verhulp; see: *Young, James and Webster v. United Kingdom*, 13 August 1981, Series A No. 44, pp. 22-23, § 55; and *Schmidt and Dahlström v. Sweden*, 6 February 1976, Series A No. 21, p. 15, § 33.

²¹⁵ De Meij, Hins, Nieuwenhuis and Schuijt 2000, p. 90.

²¹⁶ Rotunda and Nowak 1992, t. 2, p. 523; and Clapham 1993a, p. 155.

deemed that of the State is not a model of consistency.²¹⁷ Generally speaking, the United States courts are very reluctant to admit a state intrusion into the private sphere; a reluctance that can be explained by the belief that, by limiting the reach of federal law, one preserves an area of individual freedom.²¹⁸ In the opinion of the majority of the Supreme Court, 'one great object of the Constitution is to permit citizens to structure their private relations as they choose, subject only to the constraints of statutory or decisional law'.²¹⁹

There is no generally accepted formula for determining whether a private action can be assimilated to a state action for the purposes of the application of constitutional guarantees. Although several tests have emerged from Supreme Court decisions, none is adequate to predict whether state action will be found in a new case.²²⁰ According to one of these tests, the Courts must first examine whether the encroachment upon one's constitutional right results from the exercise of a right or privilege having its source in state authority, i.e., whether the challenged activity is allowed on the basis of a statutory enactment or a rule of the common law. The Courts must then determine whether the private party charged with the encroachment could be described in all fairness as a state actor. Under this second factor, the Courts would consider the extent to which the actor relies on governmental assistance and benefits to carry out its activity, whether the actor is performing a traditional governmental function or whether the injury caused is aggravated in a unique way by the incidence of government authority.²²¹

The Courts have generally followed a strict line of interpretation for these two factors.²²² In principle, only those activities or functions that are traditionally associated with sovereign governments or that are operated almost exclusively by governmental entities will be deemed public functions. State action has been found to exist for example when a judge commanded private persons to take specific actions, which would have violated the Constitution had such actions been done by the State. In *Shelley v. Kraemer*²²³ for example, the Supreme Court examined whether the judicial

²¹⁷ *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), at p. 632 (J. O'Connor dissenting).

²¹⁸ *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982), at p. 936.

²¹⁹ *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), at p. 619.

²²⁰ Rotunda and Nowak 1992, t. 2, p. 573.

²²¹ *Id.*, p. 621.

²²² Rotunda and Nowak 1992, t. 2, p. 533; and see: *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978) (state action denied for the sale of a debtor's goods by a warehouseman).

²²³ *Shelley v. Kraemer*, 334 U.S. 1 (1948).

enforcement of a restrictive covenant in an agreement under a state common law rule amounted to a state action of a type regulated by the 'equal protection of the laws' clause of the Fourteenth Amendment. In this case, a couple of black citizens were barred from the occupancy of a property by the terms of an agreement, signed by thirty out of thirty-nine owners of property in a district of St-Louis, Missouri, which limited transfers of ownership in that district to persons of the 'Caucasian race'. The Supreme Court of Missouri upheld the agreement and the plaintiffs were ordered to vacate the premises. For the highest court of the United States, it made no doubt that there had been State action in the full and complete sense of the phrase and that 'but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint'.²²⁴ In a *Barrows v. Jackson*,²²⁵ the Supreme Court rendered a similar ruling, where the enforcement by state courts of the restrictive terms of an agreement was also deemed to constitute state action.

The enforcement by a state court of a private cause of action was also found to constitute a state action in *New York Times v. Sullivan*.²²⁶ In this case, Sullivan, an elected official in Montgomery, Alabama, brought a suit in a state court alleging that he had been libelled by an advertisement in the *New York Times*. On the basis of the trial judge's instruction, the jury found in favour of Sullivan. On appeal, the *New York Times* argued that the trial judge's ruling abridged the freedoms of speech and of the press that are guaranteed by the First and Fourteenth Amendments. Rejecting the contention that the judgment of the Alabama court was immune from constitutional scrutiny, because the Fourteenth Amendment is directed against State action and not private action, the Supreme Court declared:

'Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised'.²²⁷

²²⁴ *Id.*, p. 19.

²²⁵ *Barrows v. Jackson*, 346 U.S. 249 (1953).

²²⁶ 376 U.S. 254 (1964); and see: *Zacchini v. Scripps-Howard Broadcast Co.*, 433 U.S. 562 (1977) at p. 574-78; and *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), at p. 567.

²²⁷ 376 U.S. 254 (1964), at p. 265.

In some cases, State action has been admitted where the private actor entertained a close relationship with the government. Such a relationship can be inferred either in cases where the private actor is subjected to extensive regulation by the government; where a wide range of physical and economic contacts tie the actor to the government; or where the government provides some sort of aid or subsidy to the private actor. Even if an entity's relationship were to be characterised by all three elements – it has a licence from the government, it has a wide range of economic ties to the government, and it receives public subsidies – this would not necessarily imply, however, that its actions must be made subject to constitutional restrictions.²²⁸ The assessment of the proximity of the relationship between a private actor and the government is made on a case-by-case basis.

The Supreme Court's decision in *San Francisco Art & Athletics, Inc., et al. v. United States Olympic Committee et al.*²²⁹ would fall under the category of cases where the private actor is subjected to extensive regulation by the government. In this case, the Court examined the constitutionality of federal statutes that granted the United States Olympic Committee exclusive use of the word 'Olympic' and allowed it to prohibit others from using that word without its permission. Plaintiffs, who promoted the 'Gay Olympic Games', argued that the word 'Olympic' was a generic word that constitutionally could not gain trademark protection under the Lanham Act and that the First Amendment prohibited Congress from granting trademark protection in the word. The Supreme Court observed that the grant of protection was in this case the result of organisation and the expenditure of labour, skill and money by the Olympic Committee and was properly characterised as incidental to the primary congressional purpose of encouraging and rewarding the Committee's activities of promoting amateur sport. Consequently, the Court estimated that the grant of the exclusive right to use the word 'Olympic' did not violate the First Amendment, insofar as such restriction on expressive speech was not broader than necessary to protect the legitimate congressional interests in the activities of the Olympic Committee. Alternatively, the plaintiffs contended that the Committee's enforcement of its right was discriminatory against them, and violated the equal protection component of the Fifth Amendment. This argument was rejected on the ground that the Olympic Committee was not a governmental actor to whom the Fifth Amendment applied. The Court found that the fact that Congress had granted it a corporate charter did not render the Committee

²²⁸ Rotunda and Nowak 1992, vol. 2, p. 555.

²²⁹ *San Francisco Art & Athletics, Inc., et al. v. United States Olympic Committee et al.*, 483 U.S. 522 (1987).

a government agent, nor did the fact that Congress intended to help the Committee to obtain funding change the analysis. Finally, the Committee did not perform any function that is traditionally the exclusive prerogative of the government.

As Rotunda and Nowak point out, a determination of state action under the several tests developed by the Supreme Court only looks at whether sufficient state contacts do, or do not, exist. If the court finds sufficient connections with the state in respect of a particular activity, then that activity is subject in theory to the restrictions of the Constitution, even though performed by a private party. Under this traditional theory of state action, both the value of the challenged practice and the nature of complainant's asserted rights are irrelevant.²³⁰ In fact, the Supreme Court followed the same method of analysis in *Cohen v. Cowles Media Co.*²³¹ There, the Court declared that 'the initial question we face is whether a private cause of action for promissory estoppel involves 'state action' within the meaning of the Fourteenth Amendment such that the protections of the First Amendment are triggered. For if it does not, then the First Amendment has no bearing on this case.'²³² Indeed, the Court concluded on this point that 'the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment.'²³³

3.2.2.2 *Constitutional limits to fundamental rights*

Constitutional rights do not grant unlimited freedoms.²³⁴ Whether a right is guaranteed under a national constitution or under an international instrument, the protection afforded is usually subject to certain limits. Their contours are laid down either in the constitutional laws, like in most continental European countries, or in the jurisprudence, like in the United States. Essentially, these limits fix the boundaries beyond which a restriction on a right will be held to constitute a violation of that right, boundaries that differ from one constitutional act to another and from one right to another. Constitutional limits are usually addressed to the State. In the context of the horizontal application of fundamental rights, the question is whether the constitutional limits apply to relations between private individuals.

²³⁰ Rotunda and Nowak 1992, vol. 2, p. 573.

²³¹ *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

²³² *Id.*, p. 668.

²³³ *Ibid.*

²³⁴ Rotunda and Nowak 1992, vol. 4, p. 21; and Maunz and Zippelius 1998, p. 149.

Expressed another way, are private parties bound by the same preconditions as the State when they wish to restrict another party's fundamental right? Could a restriction put on an individual's particular freedom be legitimised if it remained within the boundaries defined under the constitutional laws or the relevant jurisprudence? In the following pages, I give a brief overview of the main limits on the fundamental rights and consider whether they can be applied to private relationships.

Europe

Under most modern constitutions, the definition of the content and limits of the different rights and freedoms is left to the legislator. The idea of reserving to the 'law' – in the sense of legislation, or *loi* as opposed to *droit* – as sole source of limits on fundamental rights dates back to the French Revolution. The designation of the law to fulfil that role, one that is general and adopted by a representative assembly, came in reaction to the arbitrariness and the unforeseeable absolutism of the monarch. The generality of the law is in itself a fundamental guarantee against arbitrariness. It certifies that the restrictions that are to be placed on the individual freedoms will not be adopted solely on the basis of personal considerations and ensures thereby the equality of all in the exercise of their freedoms. The fact that a representative assembly elaborates the law ensures the publicity of its elaboration, guarantees that it will not be voted upon before a contradictory debate has taken place. This ensures in turn that the process followed for its adoption is necessarily slow and formal, which makes future modifications more difficult.²³⁵

Article 4 *in fine* of the French *Déclaration of 1789* reserves to the State the exclusive power to set limits on 'man's natural rights'. A limit on individual freedom is only admissible provided that it is rooted in a legal basis. This legal basis is today a basic condition to the restriction for constitutional rights. This principle is affirmed at Article 5 of the Declaration.²³⁶ Therefore, freedom remains the rule and any limit on that freedom, the exception: the law. The consequence of this provision is to be found at Article 10 of the Declaration on the freedom of religion and at Article 11 on the free communication of thoughts: both freedoms are expressly limited by the law. Article 6 proclaims that 'the Law is the

²³⁵ Robert and Duffar 1999, p. 111; and Maunz and Zippelius 1998, p. 130.

²³⁶ Declaration of 1789, art. 5, which reads as follows: 'The law may only prohibit those acts that are prejudicial to society. Everything that is not prohibited by law may not be prevented and no one may be compelled to do that which the law does not order'.

expression of the common will. All Citizens have the right to concur personally, or through their Representatives, to its formation. It must be the same for all, either it protects or it punishes.'

The formalism that was traditionally required for the elaboration of limits on constitutional rights has been somewhat attenuated with the adoption of the Constitutional Act of 1958. Article 34 of this Act states that 'the law establishes the rules concerning the *fundamental* guarantees granted to citizens for the exercise of their freedoms' (emphasis added). This provision seems to suggest that the legislator's power to establish rules only relates to those guarantees that are judged 'fundamental'. Consequently, everything in the determination of the constitutional rights regime that exceeds the 'fundamental guarantees' no longer falls under the exclusive power of the legislator.²³⁷ As a consequence of this formulation, the power of the Executive to implement and regulate the exercise of individual freedoms in France has, since 1958, considerably increased. This regulatory power remains subsidiary: it must always be exercised in conformity with either enabling legislation, where it exists, or with the general principles of law, as developed in the case law of the *Conseil d'État*. There is, to my knowledge, no relevant case law or legal commentary, in France, concerning the binding nature of these requirements on private individuals. However, considering the constantly-reaffirmed importance of preserving individual freedoms, I believe that the requirement of conformity with the legislation and the general principles of law bind private individuals in their relations with others, in the same manner as it binds the regulatory power. Rivero's conviction, that the protection of constitutional rights in the relationships that an individual entertains with the State cannot be dissociated from the protection of constitutional rights in the individual's private relationships, would otherwise make little sense.

The rights guaranteed under the German *Grundgesetz* may generally be subject to certain limits provided that they are adopted either 'pursuant to the law' (*durch Gesetz*) or 'in accordance with the law' (*auf Grund eines Gesetz*), depending on the provision involved. When the *Grundgesetz* requires that a restriction be 'pursuant to the law', it demands in fact that the restriction be provided through legislative enactment. By contrast, when the restriction needs to be 'in accordance with the law', its implementation may be delegated to a lower level of government as long as it occurs in conformity with enabling legislation. Such general reservations of power to the legislator – where restrictions are either 'pursuant to the law' or 'in accordance with the law' – were deemed insufficient in Germany to give

²³⁷ Robert and Duffar 1999, p. 112.

adequate protection to the constitutional rights recognised in the *Grundgesetz*. The current constitution was drafted in 1948 immediately after the Second World War, which was triggered by the overthrow of the Weimar Constitution by the national-socialist regime. To avoid the reoccurrence of such tragic events, the drafters of the new constitution built into the text of the *Grundgesetz* a number of additional safeguards to prevent the possibility of constitutional rights being deprived of their substance again.

Article 19(1) of the GG states that, insofar as a basic right may be restricted by or pursuant to a law, the law must apply generally and not solely to an individual case (*allgemeine Gesetze*). This requirement essentially corresponds to the one recognised under Article 6 of the French Declaration. Since the provisions of the *Grundgesetz* also bind the German legislator,²³⁸ the latter may not adopt just any limit on the fundamental rights guaranteed therein. Such a limitation on the legislator's action is known as the 'reciprocal effect' (*Wechselwirkung*): a simple statute may well put restrictions on the fundamental rights, but it must be interpreted by acknowledging the fundamental significance of these rights, and restricting thereby its limiting effect. Article 19(1) of the GG further requires that the law name the fundamental right that it restricts, and indicate the relevant article of the *Grundgesetz*. To comply with this provision, the legislator must give a precise account, for every single piece of legislation, of any fundamental right affected by the restrictions.²³⁹

Article 19(2) of the GG imposes a second condition for the adoption of restrictions on fundamental rights. It states that: 'in no case may a basic right be infringed upon in its essential content'. Restrictions on an individual's fundamental right are thus admissible, provided that they do not encroach upon the core of that right.²⁴⁰ This 'essential content guarantee' (*Wesensgehaltsgarantie*) has three different components: the first, 'material' element, is the protection of a minimum content for a particular freedom or right that must remain once the legislative restriction has been placed. This inviolable minimum content must be determined for every right in light of the basic right's special meaning for the liberal democratic state. The precise scope of this minimum content cannot be determined once and for all; the essential content of each right is bound to evolve with the legal and social environment. There exists for each right an absolute 'core', which is limited to those essential characteristics that compose it, in other words, those that relate to its very nature and substance. This minimum content encompasses

²³⁸ German Basic Law, art. 20(3).

²³⁹ Maunz and Zippelius 1998, p. 152.

²⁴⁰ Leisner 1960, p. 332.

at least those characteristics, which demonstrate the necessary consequence of the obligation to respect human dignity. Assuming that the maxim '*in dubio pro libertate*' is the essence of a liberal constitutional order and that in specific situations, it is also a function of the constitutional rights to afford as much freedom as possible, then the second element of the 'essential content guarantee' lies in the principle of proportionality and rule of reason. According to the third element, a restriction on a constitutional right must be justified by a predominant interest. Moreover, among the several options present for the implementation of this predominant interest, the legislator must choose the one that affects the constitutional right the least.²⁴¹

The Constitutional Court has been called upon on numerous occasions to assess the validity of an encroachment upon the rights and freedoms guaranteed under the *Grundgesetz*.²⁴² Since most disputes are solved on the basis of the specific provision that relates to the constitutional right concerned, there is to my knowledge little case law dealing expressly with the criteria laid down in Article 19 of the GG.²⁴³ Whether the conditions contained in Article 19 are applicable in relations between private individuals is unclear. Considering the general acceptance in jurisprudence and literature of the *indirect* horizontal application of constitutional rights, I believe that the criteria of Article 19 of the GG can easily be extended to private relationships, or at least the more elaborate 'essential content guarantee'. In weighing all relevant interests, the courts should interpret the general rules of law, like the norms of objective good faith and of public order and good morals, in such a way as to ensure that the core of each party's right is respected.

It is worth pointing out that the obligation of Article 19(1) of the GG to name the constitutional right affected by a piece of legislation does not apply to freedom of expression and of the press, guaranteed under Article 5(1) of the GG. Indeed, Article 5(2) of the GG already provides that: 'these rights are limited by the provisions of the general laws, the provisions of law for the protection of youth and by the right to inviolability of personal honour'. Private law provisions, like the rules on civil liability, good morals and good faith, constitute 'general laws' in the sense of Article 5(2) of the GG and in this sense can restrict the basic right to freedom of expression. Nevertheless,

²⁴¹ Maunz and Zippelius 1998, p. 154.

²⁴² BVerfGE 7, 198 (*Lüth*); BVerfGE 35, 202 (*Lebach*); BVerfGE 42, 143 (*Deutschland Magazin*), at p. 149; and BVerfGE 101, 361 (*Caroline von Monaco II*), at p. 392.

²⁴³ See: BVerfGE 10, 244; 13, 229; 25, 398 (regarding the requirement of a general law); BVerfGE, 28, 46; 35, 189 (regarding the obligation to name the right affected); and BVerfGE, 22, 219; 47, 357 (regarding the 'essential content guarantee').

the requirement of a 'general law' and the 'essential content guarantee' do apply.

With respect to the scope of freedom of expression and of the press, the *Lüth* case is illustrative. This case involved an incitement to boycott a film. The Constitutional Court essentially declared that the protection of the complainant's property right in the film must give way if the defendant's expression contributed to the intellectual debate on an issue of substantial public importance.²⁴⁴ In other words, the validity of a restriction on an individual's freedom of expression depends above all on whether it prevents the individual from uttering an opinion that would contribute to the intellectual debate in a manner protected under Article 5(1) of the GG²⁴⁵

Essentially the same regime of constitutional limits exists under the Dutch Constitution as under the French and German constitutions. While the formulation of some rights rules out any possibility to impose a restriction on their exercise,²⁴⁶ most other rights can be subject to the limits set by law²⁴⁷ or in accordance with the law.²⁴⁸ Some rights may also be limited on the grounds of public interest. The distinction between a limit set by law and one that is in accordance with the law is the same as under German law. The first one must be adopted by an Act of Parliament, while the second may be implemented by a lower level of government as long as it occurs in conformity with an enabling legislation. By opting for a particular formulation, the Constitution gives an indication of whether the formal legislator is authorised to delegate its regulating power. Only as long as the formal law contains a delegation clause, may the lower regulating instances provide further regulations.²⁴⁹

In the absence of any relevant case law, the application of the principle of legality for the recognition of limitations on constitutional rights in private relations is at best uncertain. A majority of commentators argue that the limits that private individuals can impose on someone else's rights can hardly amount to a 'legal' rule or regulation equivalent to an 'Act of Parliament'.²⁵⁰ Others contend that, where the Constitution specifies that the exercise of a

²⁴⁴ BVerfGE 7, 198 at p. 211.

²⁴⁵ BVerfGE 42, 143 (*Deutschland Magazin*), at p. 149; and BVerfGE 101, 361 (*Caroline von Monaco II*), at p. 392.

²⁴⁶ See: *Grondwet*, art. 5 (Right of petition), 16 (No punishment without law), and art. 17 (Right to be heard).

²⁴⁷ *Grondwet*, art. 7(1) (Freedom of the press), art. 8 (Freedom of Assembly), art. 9 (Freedom of association and protest).

²⁴⁸ *Grondwet*, art. 10(1) (Right to privacy), art. 11 (Right to physical integrity).

²⁴⁹ Van der Pot and Donner 2001, p. 252.

²⁵⁰ Verhey 1992, p. 155; and Brenninkmeijer 1982, p. 183.

right must be 'in accordance with the law', a limitation based on the rules of civil liability or the open norms of public order, good morals or *redelijkheid en billijkheid* could be acceptable.²⁵¹

The theory of the 'right's core' (*kernrechtmethode*), inspired by German law, has also been put forward in Dutch law as one method of analysis to determine the lawfulness of restrictions on fundamental rights.²⁵² This theory holds that, within the scope of protection of a fundamental right, a distinction must be made between the different components of the right, some of which are of greater importance (the right's core) than others (the right's periphery). Verhey gives the example of freedom of the press, guaranteed under paragraph 7(1) of the Gw, which includes both the right to impart information (the right's core) and the indispensable but nevertheless subordinate right of distribution (the right's periphery).²⁵³ Under this method of enquiry, greater restrictions could be tolerated with respect to the components that lie at the periphery of the right and less with respect to those components that form the core of the right. Although this method of analysis was generally rejected as an independent ground for limitations during the Constitutional Reform of 1983, commentators and courts still refer to it as a useful method of analysis.²⁵⁴

The possibility to limit the rights guaranteed under the ECHR is set out for each right. Under Articles 8 and 10 of the ECHR for example, restrictions on the exercise of the right to privacy and freedom of expression are admissible under three similar cumulative conditions. First, the limitations must be 'prescribed by law'. This condition has been interpreted rather broadly as requiring the existence of a 'material law', that is, of a rule whose content is accessible, foreseeable, and open to judicial control.²⁵⁵

²⁵¹ Verhulp 1997, p. 27.

²⁵² Alkema 1978, p. 256.

²⁵³ Verhey 1992, p. 154.

²⁵⁴ See: Opinion of the Solicitor General Franx to HR, 3 November 1989, *NJ* 1991/168 (*Woonstichting Sint Joseph*).

²⁵⁵ Voorhoof 1995, p. 17; European Court of Human Rights, decision of 28 March 1990, *NJ* 1991, No. 739 (*Groppera Radio AG and Others*); *Margareta and Roger Andersson v. Sweden*, of 25 February 1992, Series A No. 226-A, p. 25, para. 75, where the Court wrote: '... the expression ... requires firstly that the impugned measures should have a basis in domestic law. It also refers to the quality of the law in question, requiring that it be accessible to the persons concerned and formulated with sufficient precision to enable them - if need be, with appropriate legal advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. A law which confers a discretion is not in itself inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity,

Second, limitations must be ‘necessary in a democratic society’, condition which has been interpreted as requiring the satisfaction of three elements, namely that the limitations pursue a ‘pressing social need’, that they be ‘proportionate to the legal aim pursued’ and that they be ‘relevant and sufficient’.²⁵⁶ Although the achievement of a ‘pressing social need’ might not be required inside a private relation, the element of ‘proportionality’ could on the other hand be of particular significance, especially in contractual situations. Third, the limitations must be adopted for the pursuit of specific purposes, among which is ‘the protection of the rights and freedoms of others’. This objective could certainly play a role were a court to balance all the individual interests concerned by a particular case. Generally, States enjoy a certain ‘margin of appreciation’ in the evaluation and application of the different requirements set out in the ECHR.

United States

Assuming that state action is found to exist in particular circumstances so as to subject the actions of the private actor to the constitutional restrictions, the next step is to enquire whether certain restrictions are admissible on the exercise of a particular right protected under the American Bill of Rights. For the purpose of this study, I focus on the freedom of speech guaranteed under the First Amendment. In the United States, the extent to which prior restraints or limitations on the exercise of the freedom of speech are acceptable under the First Amendment has raised considerable controversy over the past century.²⁵⁷ The initial controversy came largely from the formulation of the First Amendment itself, which states in absolute words that ‘Congress shall make no law... abridging the freedom of speech’. While the ‘absolutist’ view has long been abandoned in legal literature and case law, the question remains today of how and where to draw the line between acceptable and non-acceptable prior restraints on freedom of speech.²⁵⁸ The main difficulty in defining a single standard for judicial review of freedom of expression issues is that the First Amendment freedoms play a variety of roles in protecting each individual’s interest in self-fulfilment as well as the society’s interest in robust public debate regarding public interest issues. A number of tests have emerged from the decisions of

having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference.’

²⁵⁶ See: *Tolstoy Miloslavsky V. The United Kingdom*, European Court of Human Rights, 13/07/1995, Series A No. 316-B.

²⁵⁷ Rotunda and Nowak 1992, vol. 4, p. 21.

²⁵⁸ Abraham and Perry 1998, p. 154.

the Supreme Court, which take different approaches to determining the proper standard of judicial review for various types of free speech problems.²⁵⁹

One of the tests developed by the Supreme Court is the category approach. In considering First Amendment challenges under this test, courts must first determine whether the regulation in question is content-based or content-neutral.²⁶⁰ Content-based restrictions limit or suppress speech because of its content, either because of the viewpoint it conveys or because of a specific subject matter. Typical examples of content-based restrictions on speech are regulations relating to the distribution of obscene material, and prohibitions on speech advocating the violent overthrow of the government. Such content-based restrictions must be supported by a compelling governmental interest and must be narrowly tailored to further that interest. Otherwise, there would be an inherent risk that the government might seek not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or to manipulate the public debate through coercion rather than persuasion.²⁶¹ This type of speech restriction is subject to strict judicial scrutiny and is rarely upheld, unless the restricted speech falls within a recognised category of 'low-value' speech, such as express incitement, commercial speech, or obscenity.

By contrast, content-neutral restrictions are subject only to intermediate scrutiny, because in most cases they pose a less substantial risk of removing certain ideas or viewpoints from the public dialogue. When the government regulates speech only within a certain context, or employs regulations that govern only the time, place, or manner of speech, the court may follow a more lenient standard of review. Examples of content-neutral restrictions on speech are the regulations pertaining to the posting of signs on public property, or the use of sound trucks in residential areas.²⁶² Content-neutral restrictions on free speech will generally be upheld if they pass a proportionality test. In other words, such restrictions must serve to promote a substantial governmental interest that would be achieved less effectively, in the absence of regulations, and they must not substantially burden more speech than is necessary to further that interest.²⁶³ A third category of

²⁵⁹ See: Rotunda and Nowak 1992, p. 24 and case law examined there.

²⁶⁰ Netanel 2001, p. 26 and f.

²⁶¹ *Turner Broadcasting System, Inc., et al. v. Federal Communications Commission et al.*, 512 U.S. 622 (1994).

²⁶² Netanel 2001, p. 28.

²⁶³ *Turner Broadcasting System, Inc., et al. v. Federal Communications Commission et al.*, 520 U.S. 180 (1997); *Turner Broadcasting System, Inc., et al. v. Federal Communications Commission et al.*, 512 U.S. 622 (1994).

speech-burdening regulation consists of general regulations such as antitrust laws, taxes, and labour laws that do not target speech, but that nevertheless impose incidental burdens on speech. Despite such burdens, these regulations raise in principle no First Amendment review and are subject only to the same rational basis scrutiny as regulations of general applicability that impose no identifiable burden on speech. In recent years, legal scholars have come to include in this last category government regulations of speech that are considered to fall outside the kinds of media and social practices that the First Amendment traditionally protects, such as laws imposing criminal sanctions for blackmail, perjury, criminal solicitation, or fraud. As the Supreme Court admitted itself, deciding whether a particular regulation is content based or content neutral is not always a simple task.²⁶⁴ The question of whether copyright laws are to be considered as content-based, content-neutral or general regulations is addressed in section 4.2.2.3 below.

3.2.2.3 *Waiver of fundamental rights*

Even if constitutional rights are in principle given an – albeit *indirect* – horizontal application, it does not take away the fact that waivers of fundamental rights are not unusual. Employees are often required, for example, to put up with a contractual provision prohibiting the distribution of writings without the employer's prior authorisation. Employees may also be restricted in their freedom to join a particular association, or to take part in particular meetings, and some contracts may even give the employer the right, in specific circumstances, to access their employees' home or workplace. Employees are not the only ones who are asked to surrender their rights, however. A number of other classes of individuals regularly give up their right to privacy or their freedom of expression in exchange for some advantage. Then, to what extent does the principle of private autonomy allow an individual to waive the protection of her fundamental right under constitutional law?

Europe

In principle, an individual may, in pursuance of her private autonomy, enter into engagements regarding her freedom, in a way that the State could not impose unilaterally. The respect of private autonomy – and thereby the individual's self-fulfilment and her human dignity – demands that individuals

²⁶⁴ *Turner Broadcasting System, Inc., et al. v. Federal Communications Commission et al.*, 512 U.S. 622 (1994).

be guaranteed a considerable degree of freedom to enter into obligations.²⁶⁵ In application of the principle of private autonomy, a party may therefore agree to certain restrictions on the protection or the exercise of her right.²⁶⁶ Let me illustrate this point with one example, that of the author's moral right, which embodies in copyright law the author's fundamental right to personality. In France, where the protection of the author's personality right is a paramount element of the *droit d'auteur* regime, moral rights are expressly declared to be inalienable.²⁶⁷ Following this principle, an absolute renunciation of the author's moral right would certainly be held invalid.²⁶⁸ However, the waiver of some attributes of an author's moral right is possible. For instance, the transfer of an author's adaptation right implies a partial renunciation to exercise the right of integrity, to the extent necessary for the adaptation of the work to another medium.²⁶⁹ With respect to audiovisual works, the waiver of the author's right of integrity would also be acceptable under the French CPI, provided that such a waiver is necessary to ensure the completion of the works. However, there would be no valid waiver if the core of the moral right, i.e. the author's right to personality, were affected.²⁷⁰ As for any other type of contract, parties to a contract providing for the waiver of the author's moral right have the obligation to negotiate in good faith and are bound by all the consequences that equity, custom or law give to the obligation, depending on the nature of the contract.²⁷¹

Similarly, although the Dutch Copyright Act does not expressly provide so, moral rights are generally considered inalienable under Dutch copyright law, as part of the author's personality right. However, this does not preclude the possibility for an author to contractually agree not to object to the performance of actions, which, without the agreement, would violate her moral right.²⁷² In practice, the Dutch Act explicitly allows the waiver of certain attributes of the moral right but not of others. Hence, the author may legally waive her right to oppose the communication of her work without acknowledgement of her name or other indication as author, as well as her right to oppose certain alterations of the work.²⁷³ However, she may not

²⁶⁵ Maunz and Zippelius 1998, p. 158.

²⁶⁶ In the Netherlands, see: Verhey 1992, p. 317; and Kranenburg 1958, p. 499; in Germany, see: Schmalz 1991, p. 40; Schaffner 1940, p. 31.

²⁶⁷ French CPI, art. L. 121-1; and Lucas and Lucas 2001, p. 308.

²⁶⁸ Strowel 1993, p. 497.

²⁶⁹ Colombet 1997, p. 114.

²⁷⁰ Koumantos 1999, p. 99.

²⁷¹ Gautier 1999, p. 185 referring to art. 1134 and 1135 of the French Civil Code.

²⁷² Van Lingem 1998, p. 113.

²⁷³ Dutch Copyright Act, art. 25(3).

waive her right to oppose any distortion, mutilation or other impairment of the work that could be prejudicial to her name or reputation or to her dignity as such. The reasoning behind this distinction is that it should be possible for an author to lawfully waive certain attributes of her moral right, in particular those attributes which are the most significant for the exploitation of her work but relatively the least significant for her name and honour.²⁷⁴ The possibility for an author to renounce by contract certain components of her moral right would be limited, according to Spoor and Verkade, only by the general provisions of the Dutch Civil Code.²⁷⁵ If a waiver were prejudicial to the author's name, reputation, or dignity, such a waiver would most likely be invalidated for running afoul of the general principles of objective good faith, and of public order and good morals.²⁷⁶

Under German copyright law as well, the author's moral right is deemed inalienable.²⁷⁷ Like in France and in the Netherlands, a complete renunciation of one's moral right would certainly be held invalid, whereas a contractual commitment not to exercise one's right could be acceptable. The boundary lies in the distinction between a full renunciation and a partial waiver. Here, also, the possibility for an author to partially waive her moral right is justified by considerations of efficiency in the exploitation of her works. The main criterion retained by commentators and the courts for the validity of such a waiver is that the core of the moral right not be affected.²⁷⁸ Although both literature and jurisprudence are silent in this respect, I see in this requirement an implicit reference to Article 19(2) of the GG, according to which a basic right may not be infringed upon in its 'essential content'. Osenberg maintains that if a contractual clause led to a total renunciation of the author's moral right or to a serious encroachment upon a substantial personal interest of the author, it would run afoul of Article 138 of the BGB, as contrary to good morals (*Sittenwidrig*).²⁷⁹ Arguably, to hold the waiver of a moral right invalid under Article 138 of the BGB is nothing else than to let the author's fundamental right to personality guaranteed under Articles 1(1) and 2(1) of the GG have *indirect* effect in a private relationship.

²⁷⁴ Gerbrandy 1988, p. 306.

²⁷⁵ Spoor and Verkade 1993, p. 304.

²⁷⁶ In France: Gautier 1999, p. 185 referring to art. 1134 and 1135 of the CC; in the Netherlands: Spoor and Verkade 1993, p. 304; and in Germany: Osenberg 1979, p. 21.

²⁷⁷ Osenberg 1979, p. 17; Dietz 1968, p. 129.

²⁷⁸ Dietz 1999b, p. 255; Hertin 1998, p. 148.

²⁷⁹ Osenberg 1979, p. 21.

United States

Under American Constitutional law, the principle of private autonomy allows an individual to waive the protection of her fundamental rights. To hold such a waiver of right valid is to recognise that the enforcement of contracts enables individual self-governance, i.e., the right for anyone to choose to live her life in a particular way. Contrary to their continental European counterparts, who examine the scope of the waiver to make sure that the essential content of the right is not affected, United States courts usually concern themselves with the validity of the individual's assent given at the time of the waiver.²⁸⁰ The criteria for a valid waiver of right are not entirely clear. In criminal cases for example, the courts generally require that the waiver be made 'voluntarily, knowingly and intelligently'.²⁸¹ The standard may not be so stringent with regard to the waiver of First Amendment rights. In *Curtis Publishing Co. v. Butts*, the Supreme Court was 'unwilling to find waiver in circumstances which fall short of being clear and compelling'.²⁸² Later on in *Snepp v. United States*, a former employee of the Central Intelligence Agency, who had agreed not to divulge classified information without authorisation and not to publish any information relating to the Agency without pre-publication clearance, breached a fiduciary obligation when he published a book about certain Agency activities without submitting his manuscript for prior review. The majority of the Supreme Court held in favour of the Agency, saying that 'when Snepp accepted employment with the CIA, he voluntarily signed the agreement that expressly obligated him to submit any proposed publication for review'.²⁸³

3.2.2.4 'Horizontal working' in contractual relationships

The nature of the relationship between individuals – i.e., whether the relationship is contractually or non-contractually based – is an important factor in the determination of whether fundamental rights are to have an effect inside private relations. The idea underlying this distinction is that the horizontal effect of constitutional rights should be weaker in contractual relationships, since parties are able to exercise their free will through the conclusion of contractual arrangements.²⁸⁴ The basic assumption behind this

²⁸⁰ Garfield 1998, p. 354 and f.

²⁸¹ See: *Moran v. Burbine*, 475 U.S. 412 (1986), at p. 421.

²⁸² *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), p. 145.

²⁸³ *Snepp v. United States*, 444 U.S. 507 (1980), p. 509 fn. 3.

²⁸⁴ Brenninkmeijer 1982, p. 183.

position is that parties enter into contract *voluntarily*, which is generally not the case of non-contractual relations, where individuals are often confronted with an encroachment upon their fundamental rights *unwillingly*. Arguably, the horizontal effect of rights can be meaningful in contractual relationships as well, knowing that the degree of assent, which normally characterises a voluntary transaction, can vary significantly from one contractual situation to another.²⁸⁵

Europe

Neither Rivero nor Rigaux have considered the distinction between contractual and non-contractual relationships in their discussion about the application of fundamental rights in the private sphere under French constitutional law. In fact, the most interesting discussions on this issue have been conducted in Germany and the Netherlands in the context of the debate on the *direct* or *indirect* horizontal effect of constitutional rights. The theoretical debate that took place in Germany during the 1960's was to a large extent predicated by the distinction that commentators did or did not make between a contractual and a non-contractual relationship. On the one hand, proponents of an *indirect* application of rights, like Dürig, feared that a *direct* application of constitutional rights would conflict with the inherent characteristics of the private law system, whereby the freedom of each individual to voluntarily waive specific rights would be eliminated²⁸⁶ Dürig was later criticised for failing to distinguish contractual from non-contractual situations, thereby ignoring the striking resemblance between an encroachment committed by the State and one committed by another individual in a non-contractual situation.²⁸⁷ On the other hand, proponents of a *direct* application, like Nipperdey and Leisner, accepted the possibility for contracting parties to rely on the principle of freedom of contract and private autonomy to justify a waiver of one party's constitutional rights. For them, the freedom of contract was not unlimited. Consequently, contracting parties could be able to invoke the principle of private autonomy to restrict the exercise of specific rights as long as both parties were in an equal bargaining position. And, if the parties' freedom of contract could be restricted, for example, to preserve free competition, then such freedom should be limited *a*

²⁸⁵ Verhey 1992, p. 175.

²⁸⁶ Stern 1988, § 76, p. 1543.

²⁸⁷ Leisner 1960, p. 320.

fortiori to safeguard the individual's fundamental rights in private relationships.²⁸⁸

As Maunz and Zippelius point out however, a party's autonomy to enter into commitments regarding her freedom should be respected only as long as the individual is legally and materially in a situation to contract freely.²⁸⁹ Where her freedom is actually restricted or where there is a risk that the balance of interests unreasonably sways in favour of a more powerful contracting partner, it may be necessary to let the imperilled constitutional right have an effect on the private relation. Private autonomy is also limited by the fact that an individual may not relinquish the basis of her autonomy, i.e., her dignity, or the dignity component present in each specific constitutional right. This coincides with the requirement of Article 19(2) of the GG, according to which a basic right may not be infringed upon in its 'essential content'. But where a restriction does not affect the rights' essential content, there is no clear answer as to whether such a restriction is lawful or not. The courts must therefore balance all interests and consider such factors as the nature of the fundamental right concerned,²⁹⁰ the respective bargaining position of the parties²⁹¹ and the effect of the restriction on the party.²⁹² In application of the 'reciprocal effect' principle, constitutional rights must be interpreted broadly, and restrictions restrictively. Moreover, restrictions must pass a proportionality test: they must serve the purpose for which they are imposed; they must not go further than what is necessary to achieve that purpose; and they must be proportional to the underlying interest. For example, the German Constitutional Court once declared null and void, as contrary to good morals under Article 138 of the BGB, a contract of suretyship that imposed such burdensome financial obligations on one party as to encroach upon her dignity and her right to freedom, guaranteed under Article 1(2) and 2(2) of the GG. The amount of money owed under the contract was indeed so considerable that the contracting party would have been repaying it for the rest of her life. Although the party had signed the contract, the Court considered that the other contracting party, a bank in that case, had deliberately exploited the inexperience or the weakness of her client to serve her own interests.²⁹³

²⁸⁸ Id., p. 325.

²⁸⁹ Maunz and Zippelius 1998, p. 158.

²⁹⁰ See: BVerfGE 101, 361 (*Caroline von Monaco II*); and BVerfGE 35, 202 (*Lebach*).

²⁹¹ BVerfGE 81, 242 (*Handelsvertreter*), at p. 254; BVerfGE 89, 214 (*Bürgschaftsverträge*), at p. 233.

²⁹² See: BVerfGE 30, 173 (*Mephisto*), at p. 199.

²⁹³ BVerfGE 89, 214 (*Bürgschaftsverträge*), at p. 233.

A distinction is often made between cases where consent is expressed inside individual agreements and those where consent is presumed given under a standard form agreement. Negotiated agreements are thus examined according to the general rules of contract law, laid down in §§ 133, 138 and 242 of the BGB, while standard form contracts are subject to the stricter requirements of the AGBG.²⁹⁴ The German Supreme Court has often ruled on the validity of restrictive contractual clauses in the area of privacy protection, more particularly in the context of the processing of personal data by private businesses. In a case concerning the alleged assent of an individual to the processing of his personal data, the German Supreme Court left open the question of the validity of consent expressed in a standard form contract, but did point out that:

‘It is unclear however to what extent such authorisation can be expressed inside standard form contracts. When the user generally makes the conclusion of a particular contract dependent on a standard authorisation, the risk arises that a client about to conclude a contract be refused the opportunity to make his own true decision and that his authorisation be reduced to a pure formality. Therefore an analysis conducted according to the content control provision of § 9 of the AGBG can be particularly significant.’²⁹⁵

The validity of such a restrictive contractual clause is therefore to be determined by weighing the interest of the party whose constitutional right is affected against that of the party who imposes the restriction.²⁹⁶

In the Netherlands, the validity of a contractual clause that restricts a party's fundamental rights has also been examined. Like in Germany, the Dutch courts must conduct a balance of interest on the basis of such factors as the purpose of the contractual provision, the constitutional right involved, the seriousness of the encroachment on that right and the proportionality between the intended purpose and the resulting encroachment. The parties' respective position of power during the negotiation of a contract constitutes a central element in the discussion on the horizontal effect of constitutional rights in contractual relationships. Indeed, the powerful party's behaviour may influence the degree of voluntariness with which the weaker party will accept a restrictive clause as part of the contract.²⁹⁷ As Brenninkmeijer

²⁹⁴ Schneider-Danwitz 1993, p. 55.

²⁹⁵ BGH 95, 362 (368), at footnote 229.

²⁹⁶ Alkema 1978, p. 256; Brenninkmeijer 1982, p. 183; and Asser-Hartkamp 1997, p. 44.

²⁹⁷ Rimanque and Peeters 1982, p. 21; Dirix 1982, p. 57; and Boukema 1966, p. 143.

points out, the parties' respective bargaining position will be taken into consideration not only in cases where a clause is thought to run afoul of public order and good morals, but also where that clause is believed to be contrary to the principle of objective good faith or to constitute an abuse of rights.²⁹⁸ Moreover, if a court has doubts concerning the proportionality between the objective pursued by the contract and the effect on the exercise of the right, it may decide in situations characterised by unequal bargaining power to put greater weight on the weaker party's interest.²⁹⁹

An early decision of the Court of Arnhem involved the breach of a lease agreement according to which the tenant was compelled to become a member of the Protestant Church and to uphold its objectives; where failure to do so would lead to the rescission of the lease.³⁰⁰ When the tenant changed his religious beliefs and joined the Jehovah's witnesses, the lease was cancelled. The Court held such a clause null and void on the grounds that it ran afoul of public order and good morals and that it violated the tenant's freedom of conscience and religion. In the *Boycott Outspan Aktie* case, freedom of expression of a political advocacy group came into conflict with the freedom of contract of newspaper publishers.³⁰¹ An anti-apartheid pressure group wanted to call the Dutch population to boycott South-African oranges with the publication of an illustration showing a white hand pressing the head of a black man on an orange press, with the slogan: 'Don't squeeze a South-African'. Before publication, the ad was found to overstep the norms of good taste and decency set by the advertising board, a self-regulatory organisation known as the *Reclame Code Commissie*. As a result, no newspaper or periodical could publish the ad without breaching the contractual conditions of membership to the board. The Court of Amsterdam recognised that 'freedom of expression is restricted as soon as a concrete expression in the author's chosen formulation or form is hindered.'³⁰² Consequently, 'the illustration should have been rejected only if it had been considered very tasteless or indecent by an overwhelming majority of the population living in the country and if the readers had disallowed the newspaper or periodical in which it was placed.' This was not the case in the circumstances and the ban on the advertisement was therefore unlawful.

The Dutch Supreme Court also examined the proportionality of a restrictive contractual clause in the *Mensendieck* case. Under the terms of her employment contract, a schoolteacher was prohibited from providing a

²⁹⁸ Brenninkmeijer 1982, p. 183.

²⁹⁹ Verhulp 1997, p. 41.

³⁰⁰ Hof Arnhem (Pachtkamer), 25 October 1948, *NJ* 1949, p. 331.

³⁰¹ Hof Amsterdam, 30 October 1980, *NJ* 1981, No. 422 (*Boycott Outspan Aksie*).

³⁰² *Id.*, § 9.

certain form of education if she did not successfully complete her training. Not only did the clause itself restrict the teacher's freedom to provide education, but the contract was of undetermined duration, so that the restriction could have been applicable for the teacher's entire life. The Supreme Court observed that 'in assessing whether such a clause comes into conflict with public order and good morals, attention should be drawn to the interest served by the contract as well as to the question of whether that interest is so important as to justify a restriction of such a measure on the freedom to provide education referred to by the Court'.³⁰³

In the *Woonstichting Sint Joseph* case,³⁰⁴ the Dutch Supreme Court had to rule on the validity of a stipulation contained in by-laws annexed to a residential lease, in which a housing corporation prohibited tenants from installing parabolic antennae on the roof of its high-rise apartment building. The tenants were given access to the broadcast programs retransmitted via a central antenna system instead. Despite the prohibition, a couple of tenants went ahead and installed an antenna on the roof of the building as a result of which the building sustained structural damage. In court, the tenants argued that they could receive more signals with a parabolic antenna than with the central antenna system and challenged the validity of the stipulation on the ground that it infringed their fundamental right to receive information, as guaranteed under Article 10 of the ECHR. The judge ruled that the central antenna system constituted a reasonable alternative for the installation of a parabolic antenna and that considering the architectural construction of the roof and the nature of the building the prohibition was 'completely justifiable'. The Supreme Court confirmed the judgement and estimated that in the circumstances, the housing corporation's by-laws were not contrary to good faith or unreasonably prejudicial to the tenants.

The validity of contract-based actions between private parties has also been raised on a few occasions before the European Court of Human Rights and the European Commission on Human Rights. For example, the Court applied Article 11 of the ECHR, which proclaims the right to free assembly and to join a union, to the private sphere in a case of wrongful dismissal for trade-union activities.³⁰⁵ In *Van der Heijden v. The Netherlands*,³⁰⁶ the Commission declared admissible an action between a private employer and its employee who had been dismissed for membership of a political party whose objectives were opposed to those of his employer (a foundation

³⁰³ HR, decision of 31 October 1969, NJ 1970, No. 57 (*Mensendieck- arrest*).

³⁰⁴ HR, decision of 3 November 1988, NJ 1991/168 (*Woonstichting Sint Joseph arrest*).

³⁰⁵ See: *In the case of Young, James and Webster v. The United Kingdom*, European Court of Human Rights, 13 August 1981, Series A, No. 44.

³⁰⁶ Application No. 11002/84, DR 41, p. 264. See: Clapham 1993b, p. 196.

concerned with the welfare of immigrants). The case arose out of a court decision, which had upheld the termination of the employee's contract. The commission found that the interference was justified for 'the protection of the rights of others'. According to Voorhoof, Articles 8 and 10 of the ECHR could certainly be applied in the private sphere, if they were invoked in similar circumstances.³⁰⁷

United States

In the United States, no court has ever ruled specifically on whether the enforcement of a contractual restriction on a person's rights guaranteed under the Bill of Rights can constitute a state action. The United States Supreme Court once suggested that such a contractual restriction should not be immune from judicial scrutiny. Indeed, in writing the opinion for the majority of the Supreme Court in *Associated Press v. United States*, Justice Black declared that:

'It would be strange indeed however if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. (...) That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. *Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.*³⁰⁸ (Emphasis added)

The subsequent judgement of the Supreme Court in *Cohen v. Cowles Media Co.*³⁰⁹ raised some doubts on the issue. The majority of the Court seemed to imply that the application of First Amendment is triggered under the state action doctrine only in cases where the State itself defines the content of publications that would generate liability and not when the parties

³⁰⁷ Voorhoof 1995, p. 59.

³⁰⁸ *Associated Press v. United States*, 326 U.S. 1 (1945), at p. 20.

³⁰⁹ *Cohen v. Cowles Media Co.*, 501 U.S.663 (1991).

themselves determine the scope of their legal obligation.³¹⁰ In this case, petitioner Cohen, who during the 1982 Minnesota gubernatorial race was associated with one party's campaign, gave court records concerning another party's candidate for Lieutenant Governor to the respondent publisher's newspapers after receiving a promise of confidentiality from their reporters. Nonetheless, the papers identified him in their stories and Cohen was fired from his job. He filed suit for damages against the respondents. Since the contract cause of action brought by Cohen was deemed inappropriate for these particular circumstances, the Supreme Court ruled instead on the issue of promissory estoppel. Such a cause of action, although private, involves state action within the meaning of the Fourteenth Amendment, and therefore triggers the First Amendment's protections, since promissory estoppel is a state law doctrine creating legal obligations never explicitly assumed by the parties that are enforceable through the Minnesota courts' official power.

Admittedly, a contract that restricts an individual's fundamental rights could also be challenged under state contract law as being against public policy. Court decisions on this subject are scarce and inconsistent, and doctrinal comments are few and far between. Under Article 178(1) of the Restatement (Second) of Contracts, a contract may be held unenforceable on grounds of public policy, if legislation so provides, or if the interest in the enforcement is clearly outweighed in the circumstances by public policy against its enforcement. A court may thus be justified in refusing to enforce an agreement that violates public policy, whether that public policy is explicit in the legislation or whether the court simply determines based on its own analysis, that the promise, if enforced, would harm the public welfare.³¹¹ While legislation is the simplest way to determine that a contract violates public policy, such legislation is rare. State statutes prohibiting certain post-employment confidentiality clauses and federal legislation prohibiting discrimination in employment provide two of the rare examples. In the absence of a specific enactment enunciating the public policy, judges must rely on other relevant legislation, case law, and their own perception of the public welfare.³¹² While it has long been accepted that contracts in restraint of trade are unenforceable on grounds of public policy, no court has ever declared a contract unenforceable on grounds of public policy as violating a party's freedom of speech.

The reluctance of American courts to declare a contract term unenforceable on grounds of public policy or on the ground that it violates a

³¹⁰ Bunker 2000, p. 36; and Garfield 1998, p. 350.

³¹¹ Bunker 2000, p. 34.

³¹² Garfield 1998, p. 297.

provision of the Bill of Rights is somewhat comparable to the situation that exists under continental European constitutional law. Although court decisions giving horizontal effect to constitutional rights remain exceptional, it seems to be generally accepted that such horizontal effect should be weaker in contractual relationships than in non-contractual situations. The reason for this difference of treatment rests on the premise that at the time of conclusion of the contract parties are able to exercise their own free will, so as to accept restrictions on their freedoms voluntarily. When confronted with restrictive contractual terms, continental European courts conduct a balance of interest on the basis of such factors as the purpose of the contractual provision, the constitutional right involved, the seriousness of the encroachment on that right and the proportionality between the intended purpose and the resulting encroachment.³¹³ As I shall examine in more detail in subsection 4.2.2.3 below, the question is whether and to what extent the user's constitutional rights might have an effect in private relations with respect to the contractual licensing of copyrighted material.

3.2.3 ABUSE OR MISUSE OF RIGHTS

In continental European law, the grant of a subjective right to one person automatically implies imposing a limit on other people's freedom, insofar as they have a duty to respect that right.³¹⁴ In some cases however, the exercise of a subjective right will not only impose a duty of respect on other people, but might also cause these people prejudice. While these negative consequences may be considered to some extent unavoidable, the question arises whether they could be circumscribed within certain limits. Indeed, a blind application of the rule of law would undeniably lead to unjust results for society. In continental Europe, one of the main instruments of control over the exercise of private rights is the doctrine of abuse of rights. Since this doctrine can be applied in so many different circumstances and since it has connotations of moral, equity and public order, its contours are difficult to define. The most controversial issue regarding the scope of application of the doctrine has been to determine where the threshold lies beyond which the exercise of a right becomes abusive. Must one look for the criteria of abuse in a person's intention to cause harm or damage or in the diversion of the right from its social function? While this debate has already been going on for many years, particularly among French and Dutch authors, it does present interesting elements for my own discussion.

³¹³ De Meij, Hins, Nieuwenhuis, Schuijt 2000, p. 83.

³¹⁴ For the definition of a subjective right, see section 2.3.1 *supra*.

During the nineteenth century when individual sovereignty exercised within the sphere of autonomy defined by a subjective right was accepted as the main tenet of the legal system, writers like Planiol contested the idea that a subjective right might be the object of abuse. For them, there was a contradiction in terms: how could someone exercising a right within the boundaries set by law, abuse it at the same time? That subjective rights were limited was incontestable. It was the legislator's task to set the proper limits to those rights. Once the law defined the powers attached to a right, right holders could not be held liable for exercising these rights within their limits. If there was abuse, it was because there was no right: abuse started only where rights ended. Although this line of argument might appear infallible, already at the turn of the twentieth century, the idea that a subjective right could be abused was no longer disputed.³¹⁵ This change in mentality occurred with the movement of socialisation of the law that began in the early 1900's and that also prompted the adoption of rules with respect to competition and to the protection of weaker parties in contractual relations.

Perhaps the most convincing reply to the contention of the nineteenth century commentators rests on a distinction between the *internal* and *external* limits to a right. Hence, *external* limits determine the powers that are granted and refused with respect to the subjective right. These powers are described objectively according to the nature or the object of the right. For example, a landowner has the right to build on her own land, but must refrain from encroaching upon a neighbour's property. There are also *internal* limits to a subjective right, which put restrictions on the exercise of the right. For example, to say that the landowner has a right to build on her land does not mean that she may build anything any way she wants. If she constructs a useless chimney with the sole purpose of hindering the neighbour, she oversteps her right, without exceeding its *external* boundaries. The abuse of a subjective right therefore occurs within the framework that delimits the types of prerogatives recognised as belonging to the holder. The legislator rarely defines the *internal* limits to a subjective right, and generally fixes only the *external* limits of the right. One must therefore look for such *internal* limits in the general principles of law, and in the spirit of the legal system.³¹⁶

Assuming that every subjective right is indeed circumscribed by *external* and *internal* limits, the next question to address concerns the criteria of abuse in their exercise. What elements can best allow a court to determine the start of abuse in the accomplishment of acts relating to the exercise of a right? Discussions on this issue have followed a similar path in France and in

³¹⁵ Eggens 1946, p. 7.

³¹⁶ Ghestin and Goubeaux 1990, p. 679.

the Netherlands, where several criteria have emerged from jurisprudence and literature, but none of which has ever achieved unanimity. The criteria of abuse of rights are thus generally based on either one of three conceptions. The first and most common explanation for the doctrine of abuse of rights rests on the concept of fault in civil liability. A person commits a fault that can be assimilated to abuse if, in the exercise of the prerogatives conferred by law, she does not adopt the behaviour of a reasonable and prudent person.³¹⁷ The fault may be intentional or not. It is to be appreciated objectively by comparing, in the abstract, the holder's behaviour with that of a person who exercises her right in a normal fashion. Although this conception is probably the one that courts most often follow, it is not entirely satisfying. First, abuse of rights can be found in civil liability cases only if there is proof of fault and of a prejudice. In reality, not all acts of abuse entail either a fault or a prejudice.³¹⁸ Second, the argument is circular: while there is certainly an element of fault in an abuse of rights, to say that abuse results from fault is to answer to the question with a question and to see a cause in something that is merely a consequence. In fact, this conception does not resolve the initial question of what constitutes an abuse of rights and adds nothing to an action brought under the general rules of civil liability.³¹⁹

The holder's intention to harm is at the basis of the second explanation for the doctrine of abuse of rights. This conception, advocated in particular by authors, like Dabin,³²⁰ introduces a moral element in the assessment of abuse. According to this understanding, even if a right holder exercised her right within the bounds defined by law, the character of her act would be altered if its only purpose were to cause prejudice to another person. The harmful act would, as such, be lawful because exercised within the limits of the right, but would in fact be vitiated because of the wrongful intent of its holder. A theory that makes the intention to cause harm the main criterion of abuse is too narrow, for it cannot take account of the many acts that may be considered abusive without being coloured by an intention to cause harm. As some commentators ask, why should the limits to the exercise of a subjective right only be set by morality?³²¹ Courts and commentators have thus attempted to express the theory in more flexible terms, saying that the holder of a subjective right will abuse her right if she acts without a 'serious and legitimate interest'. This only shifts the problem, since the question remains,

³¹⁷ Eggens 1946, p. 8; and Ghestin and Goubeaux 1990, p. 692.

³¹⁸ Van der Grinten 1984, p. 380.

³¹⁹ Ghestin and Goubeaux 1990, p. 694.

³²⁰ Dabin 1952, p. 293.

³²¹ Eggens 1946, p. 11; and Ghestin and Goubeaux 1990, p. 698.

under this formulation as well, of what must be understood by a 'serious and legitimate interest'.

The third explanation proposed for the doctrine of abuse of rights, and undoubtedly the most relevant to my discussion, originates in the writings of Jossierand.³²² This early twentieth century French scholar based his conception of the doctrine on the idea that all subjective rights fulfil a social function and that rights should therefore be exercised in compliance with their function. According to this conception, a social finality is attached to all prerogatives, including to the most 'selfish' rights of all: property rights. Such prerogatives are granted to individuals not merely for the benefit of their own self-interest, but even more so for that of the community as a whole. The exercise of subjective rights contributes to the goals of the community in the sense that, by awarding individuals the advantages that derive from these rights, society makes each individual an advocate of the general interest. Hence, every subjective right must tend towards the goal for which it has been granted. Any exercise of a right that is incompatible with the purpose for which it was conferred would amount, under this conception, to an abuse of rights.³²³ In other words, the doctrine of abuse of rights is a direct application of control over the compliance of the exercise of a right with its social finality.³²⁴

The theory of the social function of rights has not been exempt from criticism however. The main objection was inspired by natural rights theory and held that to accept a social function to a subjective right is to deny the holder's fundamental freedom to decide how to exercise her right, which is by definition at her exclusive disposal.³²⁵ According to these critics, the 'finalist' theory is itself incompatible with the notion of abuse, whereas if the prerogatives were only granted in the general interest, to act pursuant to another purpose would be in fact to act without a right. There is of course an element of illegality in the diversion of a right from its social purpose, but this illegality is no different from that of exercising a right with the intent to harm. The illegality manifests itself in the exercise of the prerogatives granted by law, and as such constitutes an abuse. Moreover, for the proponents of the social function theory, a 'finalist' conception of subjective rights does not exclude a 'personalistic' element respectful of individual autonomy. There is in principle no contradiction in recognising the existence of subjective rights and controlling their exercise under the doctrine of abuse

³²² Jossierand 1939, § 292, p. 396.

³²³ Van der Grinten 1984, p. 374.

³²⁴ Ghestin and Goubeaux 1990, p. 699.

³²⁵ *Id.*, p. 700; and Dabin 1952, p. 291.

of rights. However, rather than controlling the exercise of rights according to moral principles or to the notion of fault, this conception of the doctrine focuses on the compliance of the exercise with the rights' social function, thereby substantiating the existence of *internal* limits to subjective rights. Consequently, even if one does not agree with every aspect of Josserand's thesis, the 'finalist' conception of rights provides, in my opinion, the most satisfactory explanation for the doctrine of abuse of rights.³²⁶

Europe

In practice, the doctrine of abuse of rights has been developed in France pursuant to Article 1383 of the Civil Code on civil liability and to Article 544 of the Civil Code, which states that 'property is the right to enjoy and dispose of things in the most absolute fashion, provided that their use not be prohibited under the laws or the regulations'. While the law gives no indication as to what criteria should be followed for a finding of abuse, a survey of the jurisprudence reveals that the doctrine of abuse of rights has been applied on the basis of either one of the three criteria mentioned above to all sorts of situations.³²⁷ This doctrine is thus meant to apply under French law to any type of act, juridical or non-juridical, accomplished for the implementation or the exercise of rights.³²⁸ Indeed, the legislator has in some cases expressly provided that the exercise of particular rights should be subject to control for abuse. As I shall demonstrate in greater detail in section 4.2.2.4 below, this is the case for example in the field of copyright.

In the Netherlands, Article 3:13 of the NBW expressly provides that the holder of a right may not exercise it to the extent that it be abused. Interestingly, the NBW incorporates as non-exhaustive examples of circumstances under which abuse of rights may be presumed the three conceptions of the doctrine of abuse of rights discussed above, including the use of a right for a purpose other than that for which it was granted.³²⁹ This last criterion is in fact a codification of a requirement developed by the

³²⁶ Ghestin and Goubeaux 1990, p. 704; Okma 1045, p. 184 and ff.; and Van der Grinten 1984, p. 368.

³²⁷ Ghestin and Goubeaux 1990, p. 719.

³²⁸ Dabin 1952, p. 237.

³²⁹ See: Mackaay and Haanappel 1990, art. 3:13(2) of the NBW which states: '2. Instances of abuse of right are the exercise of a right with the sole intention of harming another or for a purpose other than that for which it was granted; or the exercise of a right where its holder could not reasonably have decided to exercise it, given the disproportion between the interest to exercise the right and the harm caused thereby'.

Supreme Court.³³⁰ These criteria have been introduced into the law to emphasise the idea that a rights holder must not lose sight of the interest of others and of society in the exercise of her own rights. This requirement of consideration towards the interests of others is particularly manifest under the last example given in Article 3:13(2) of the NBW, according to which the holder of a right must take into account any disproportion that may exist between the interest to exercise the right and the harm caused thereby.³³¹ This requirement is comparable to that which exists under the principle of *redelijkheid en billijkheid*. Like the principle of *redelijkheid en billijkheid*, the doctrine of abuse of rights is not confined only to the area of patrimonial law, and may be invoked in other areas of the law to the extent that this is not incompatible with the nature of the legal relationship involved.³³² It is therefore not excluded that an obligation flowing from a contract might not be enforced under the doctrine of abuse of rights, if the exercise of the right through contractual agreement were to be considered abusive in the particular circumstances of a case.³³³

In contrast to France and the Netherlands, a doctrine of abuse of rights could only develop in Germany under the general principle of *Treu und Glauben* laid down in Article 242 of the BGB.³³⁴ Admittedly, Article 226 of the BGB on *Schikaneverbot* does sanction certain types of abuses of rights. But the provision, which states that ‘the exercise of a right is illicit, if its only purpose is to cause prejudice to another’, has been judged too narrow to allow a broad application. Indeed, under this provision the holder’s intent to cause prejudice must be assessed according to objective criteria. In other words, courts are asked when examining a particular case to determine whether the exercise of a right can objectively bring its holder any other benefit than merely to cause harm.³³⁵ Any recognisable interest in the exercise of a right rules out the application of Article 226 of the BGB. Thus, not only is the objective proof of an intention to harm almost impossible, but instances of abuse of rights do not always involve malicious intent. However, considering the broad application given in jurisprudence to the principle of *Treu und Glauben*, the latter principle has come to encompass most instances of abusive exercises of right, including those envisaged by Article 226 of the BGB. Not surprisingly, Article 226 of the BGB has had little or no practical relevance throughout the years. Nevertheless, where

³³⁰ *Buma-Brinkmann*, HR, decision of 24 May 1968, *NJ* 1968, 252.

³³¹ See: HR, decision of 21 May 1999, *NJ* 1999, p. 507.

³³² NBW, art. 3:15.

³³³ Van der Grinten 1984, p. 376.

³³⁴ Okma 1945, p. 36.

³³⁵ Palandt 2000, p. 214.

abuse of rights is found to occur, the existence of the right itself remains untouched. Only the abusive exercise of a right will be declared unacceptable and the enforcement of the right will be denied as long as the abuse persists. In addition, the holder may be held liable for damages incurred as a consequence of the abuse. Like in France and in the Netherlands, however, the doctrine of abuse of rights is also applicable to all areas of the law, whether it is pursuant to Article 226 or Article 242 of the BGB.

Thus, unlike the prohibition set out under the European rules on competition concerning anti-competitive behaviours such as abuse of a dominant position, the civil law doctrine of abuse of rights requires no evidence of a dominant position in the market or of a constraining effect on trade. A finding of abuse of rights will rest on either one of the three criteria discussed above, that is, on the concept of fault in civil liability, on the holder's intention to cause harm or on the incompatibility of the exercise with the purpose for which the right was conferred. Unlike the rules on competition law or the norms of public order, the doctrine of abuse of rights puts no explicit limit on the parties' freedom of contract. However, knowing that the courts are empowered to control the exercise made of property rights under the doctrine of abuse of rights, rights owners may feel somewhat constrained in their freedom to make contractual arrangements with respect to these rights.

United States

Although the American common law knows of no legal equivalent to the civil law notion of abuse of rights – or to the concept of subjective right – the U.S. courts have developed over the last sixty years a doctrine of misuse whose criteria of application could be said to resemble in certain respects those of Josseland's social function of rights theory. The doctrine of misuse has its origin not in property, tort, or contract law, but rather in antitrust law and in the equitable doctrine of 'unclean hands'.³³⁶ Under the doctrine of 'unclean hands', the courts have traditionally refused to enforce patents or copyrights, where a defendant could demonstrate that the plaintiff had engaged in an unconscionable practice that in some measures affected the equitable relations between the parties in respect of something brought before

³³⁶ The principle of the doctrine of unclean hands is that one who has defrauded the opposing party will not be heard to assert her own rights in equity. See: Abromats 1991, p. 636, fn 36.

the court for adjudication.³³⁷ Misuse will be found where the intellectual property holder's own conduct is so contrary to law or public policy as to bar recovery in an infringement suit. Thus contrary to the civil law doctrine of abuse of rights the American doctrine of misuse is not a principle of general application. It constitutes an equitable defence that is admissible only in the context of a patent or copyright infringement action when the rights owner has engaged in certain sorts of misconduct in licensing or enforcing her right.³³⁸

The doctrine of misuse was first articulated by the Supreme Court in a patent related case. In *Morton Salt Co. v. G.S. Suppiger Co.*,³³⁹ the licensee of a patented salt tablet dispenser refused to comply with a contractual obligation to purchase all of its salt tablets from the patent owner. The tablets themselves were not a patented item. Morton was thereby using its patent to restrain competition in the sale of an item, which was not within the scope of the patent's privilege. The Supreme Court held that it was against public policy to condition the licence on acceptance of obligations relating to unpatented items. The patent owner had thus misused his patent by extending his legal monopoly into a market for unpatented products, and therefore under the doctrine of 'unclean hands', the patent should not be enforced. Basing its decision on public policy grounds, the Supreme Court found it further unnecessary to determine whether the patent owner's actions violated the antitrust laws.³⁴⁰ Following the *Morton Salt* decision, courts and commentators have debated whether findings of patent misuse should be based on a public policy rationale or whether a violation of antitrust law must be established to give rise to the application of the misuse defence. Although the case law is inconsistent, the trend is to require evidence establishing antitrust violation.³⁴¹

While the Supreme Court has consistently reaffirmed the viability of the patent misuse doctrine, it never expressly extended the doctrine to copyright matters. However, it did lend support to the judicial development of a copyright misuse defence in two antitrust cases involving the tying of

³³⁷ Hanna 1994, p. 404.

³³⁸ Lemley 1999, p. 152.

³³⁹ 314 U.S. 488 (1942).

³⁴⁰ Susman 1988, p. 303.

³⁴¹ Abromats 1991, p. 637. In fact, Congress has restricted the scope of the patent misuse defence by expressly conditioning its availability upon a finding of market power, thus mandating an antitrust examination. See: Pub.L. No. 100-703, 102 Stat. 4672 (1988) codified at Title 35 U.S.C., § 271(d); see also: Hanna 1994, p. 416.

motion picture films.³⁴² Despite the Supreme Court's implicit approval of a copyright misuse doctrine, courts and commentators have for a long time questioned the very existence and viability of a copyright misuse defence. Doubts have persisted largely because of the fact that copyright affords protection of a more limited strength than patent rights, whereby competitors can freely develop competing and even identical works. Some authors thought that in view of the lesser protection and therefore lesser market power secured through copyrights, the latter rights should be treated less harshly than patent rights.³⁴³ As Ringsred points out, 'while copyrights may generally be less susceptible to anticompetitive abuse than patents, they also are granted much more readily. Perhaps in view of the lower standards for copyrightability, even minor abuse should not be tolerated – particularly when the degree of originality in the underlying work is slight'.³⁴⁴ As a result of this debate, the courts have been reluctant to admit the defence of copyright misuse. Some courts have altogether denied the defence of copyright misuse,³⁴⁵ while others have implicitly recognised its availability in appropriate circumstances, but have rejected it on the merits.³⁴⁶ Before 1990, only one case actually upheld a defence of misuse so as to bar recovery on a copyright infringement claim.³⁴⁷

The recognition by the courts of a copyright misuse doctrine is thus a recent trend that followed the decision of the Court of Appeals for the Fourth Circuit in *Lasercomb America Inc. v. Reynolds*.³⁴⁸ Since the beginning of the 1990's, the doctrine has received greater attention, particularly in cases involving the licensing of copyrights on computer software and the blanket licensing of musical performing rights. In the *Lasercomb* case, the Court of Appeals for the Fourth Circuit expressly admitted the defendant's defence of misuse to a copyright infringement claim. Acknowledging the fact that much

³⁴² *United States v. Paramount Pictures Inc.*, 334 U.S. 131 (1948); and *United States v. Loew's, Inc.*, 371 U.S. 38 (1962).

³⁴³ Susman 1988, p. 315; Note 1991, p. 1299; and R. Nimmer 1999, p. 11-21.

³⁴⁴ Ringsred 1996, p. 185.

³⁴⁵ *Hutchinson Telephone Co. v. Fronteer Directory Co.*, 4 U.S.P.Q. 2d 1968 (D.Minn. 1987); *Rural Telephone Service Co. v. Feist Publications, Inc.*, 663 F. Supp. 214 (D.Kan. 1987); and *Orth-O-Vision, Inc. v. Home Box Office*, 474 F. Supp. 672 (S.D.N.Y. 1979).

³⁴⁶ See for example: *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951); *United Artists Associated, Inc. v. NWL Corporation*, 198 F. Supp. 953 (S.D.N.Y. 1961); *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852 (5th Cir. 1979); *Broadcast Music, Inc. v. Moor-Law, Inc.*, 527 F. Supp. 758 (D. Del. 1981), *aff'd without opinion*, 691 F.2d 490 (3rd Cir. 1982).

³⁴⁷ *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed sub nom.* 177 F.2d 515 (8th Cir. 1949).

³⁴⁸ 911 F.2d 970 (4th Cir. 1990).

uncertainty surrounded the existence of the doctrine of copyright misuse, the Court believed, however, that a misuse of copyright defence is 'inherent in the law of copyright, just as a misuse of patent defence is inherent in patent law'.³⁴⁹ The Court was persuaded that in view of 'the origins of patent and copyright law in England, the treatment of these two aspects of intellectual property by the framers of [the] Constitution, and the later statutory and judicial development of patent and copyright law', parallel public policies underlie the protection of both types of intellectual property rights. Accordingly, the Court considered that these parallel policies called for the application of the misuse defence to copyright as well as patent law.

Despite the increasing volume of copyright misuse cases, this defence remains an exceptional remedy whose scope and rationales are still vague. Opinions are divided concerning the proper basis of a finding of misuse: some hold that misuse claims must be analysed under an antitrust standard,³⁵⁰ while others suggest that the inquiry should centre primarily on copyright policy. According to the latter view, the doctrine of copyright misuse would rest on the principle that the courts should not assist the expansion of a copyright beyond its statutory bounds by enforcing an improperly broadened copyright.³⁵¹ In its *Lasercomb* decision, the Court of Appeals for the Fourth Circuit expressed this principle as follows:

'The grant to the author of the special privilege of a copyright carries out a public policy adopted by the Constitution and laws of the United States, 'to promote the Progress of Science and useful Arts, by securing for limited Times to Authors... the exclusive Right...' to their 'original' work. But the public policy which includes original works within the granted monopoly excludes from it all that is not embraced in the original expression. It equally forbids the use of copyright to secure an exclusive right or limited monopoly not granted by the Copyright Office and which it is contrary to public policy to grant.'³⁵²

In the aftermath of the *Lasercomb* decision, a number of courts and commentators would seem to favour a public policy approach to the doctrine

³⁴⁹ *Id.*, at p. 973.

³⁵⁰ See: *Bellsouth Advertising & Publishing Corp. v. Donnelley Information Publishing, Inc.* 933 F.2d 952 (11th Cir. 1991); *CBS v. ASCAP*, 562 F.2d 130 (2d Cir. 1977); Arar 1981, p. 1312; Susman 1988, p. 322; Abromats 1991, p. 666; and R. Nimmer 1999, p. 11-21.

³⁵¹ Lemley 1999, p. 153.

³⁵² *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970 (4th Cir. 1990), at p. 977.

of copyright misuse.³⁵³ The main argument for relying on public policy rather than antitrust standards is to hold that the criteria of antitrust law alone cannot fully protect the public interest, which may be harmed even if the rights owner's conduct does not threaten to undermine competitive conditions. Licence restrictions that remove ideas from the public domain should be subject to judicial control even if they do not enable licensors to restrict economic competition or secure monopoly power.³⁵⁴

Thus, insofar as it is based on grounds of public policy, the American defence of copyright misuse could be said to resemble the civil law doctrine of abuse of rights, considered under Josseland's social function of rights theory. However, both doctrines have the common feature that the use of a right in a manner that runs afoul of public policy or of the social function of the right is not uniformly accepted as a basis for abuse. Dutch civil law forms an important exception to this caveat, where the Dutch legislator has expressly indicated that the exercise of a right for a purpose other than that for which it was granted may constitute an instance of abuse of rights. By contrast, courts outside of the Netherlands might require, either the proof of a fault or of the intent to cause harm or that of an antitrust violation, in place of or in addition to the establishment of an exercise incompatible with the purpose for which the right was granted. As discussed in subsection 4.2.2.4 below, even if it is admitted in principle, the main difficulty in applying the public policy or social function theory of abuse of rights is to determine what is in fact the public policy objective or the social function pursued by a particular right and subsequently, to ascertain what type of behaviour would violate these social objectives.

3.2.4 CONCLUSION

In summary, the principle of freedom of contract, as best exemplified by the classic contract model, still constitutes today one of the theoretical cornerstones of the western legal system. Like any other freedom, however, the freedom of contract is not absolute. A number of limits have always been admitted either for the purpose of maintaining public order and good government, of preserving good morals within society or of ensuring that private relationships take place in conformity with the principles of good

³⁵³ *Practice Management Info Corp. v. American Med. Ass'n*, 121 F.3d 516 (9th Cir. 1997); *DSC Communications Corp. v. DGI Technologies*, 81 F.3d 597 (5th Cir. 1996); *Tamburo v. Calvin*, No. 94- C 5206, 1995 U.S. Dist. LEXIS 3399, *16-18 (N.D.Ill, March 17, 1995); *qad, Inc. v. ALN Assocs.*, 770 F. Supp. 1261, 1267-69 (N.D. Ill, 1991); Lemley 1999, p. 153; Ringsred 1996, p. 196; Hanna 1994, p. 445; and Note 1991, p. 1304.

³⁵⁴ Note 1991, p. 1303.

faith and reasonability. History has shown that, notwithstanding these traditional limits, an unbridled freedom of contract would lead to a deterioration of market conditions, insofar as more powerful enterprises would be tempted to monopolise or dominate the market by imposing contractual restrictions on their competitors, suppliers and consumers. By prohibiting or controlling certain anti-competitive behaviours, the rules on competition are designed to safeguard free competition, which is deemed beneficial to society as a whole. The foundations of the principle of freedom of contract have been further challenged throughout the years by the generalised use of the standard form contract model, where the autonomy of will of parties enjoying equal bargaining power has essentially become a fiction. To compensate for the decline in the parties' autonomy and bargaining power, legislators have adopted a series of protective measures for the benefit of particular categories of weaker parties, such as workers, authors and consumers. Continental European legislatures and courts have raised the level of protection one grade higher by regulating the form and content of standard form contracts.

To some extent, the growing importance of constitutional rights as a limit to freedom of contract can be said to share at least one of the basic rationales behind the development of the civil law doctrine of abuse of rights. Indeed, both types of limits rest on the view that no fundamental freedom or subjective right should be exercised in a manner that conflicts with the concept of objective good faith or with the freedoms and rights of others. Although nothing would preclude the limits set by constitutional rights from protecting the fundamental freedoms of groups of individuals rather than those of a single individual, the doctrine of abuse of rights has received on the basis of Jossierand's writings a more explicit and direct social dimension. As mentioned above, Jossierand's social function of subjective rights would seem to coincide with the American copyright misuse doctrine, provided that the latter is examined in terms of the compliance of a copyright contract with public policy objectives. In both cases, rights owners must refrain from exercising their right, through contract or otherwise, in a way that would violate the purpose for which the right has been granted.

By contrast, constitutional law has in private relationships the function of establishing a boundary between the parties' respective claims. Such a boundary is determined by the nature of the private relationship as well as by the nature of the constitutional rights involved. Sometimes, the judge must choose between two conflicting freedoms, of which one or both may have been laid down in constitutional law. For example, in a conflict opposing one party's freedom of contract to another party's constitutionally protected freedom, a court would have to weigh the interest that the contract purports to

serve against that of the constitutional freedom affected by that contract. In this case also, constitutional law fixes the boundary.³⁵⁵ In this sense, the social consequences that may follow from the constitutional protection of fundamental rights, like the enhancement of individual autonomy or of democracy, should not be confused with the constitutional rights' basic function. Indeed, I believe that the protection of constitutional rights should always stand above the implementation of any of the legislator's public policy objectives.

Every limit imposed on the principle of freedom of contract therefore reflects the legislator's or the court's effort to balance all 'legitimate interests' at hand. The achievement of a balance between the divergent interests of individuals or of groups of individuals constitutes one of the lawmakers' main preoccupations in their decision-making process.³⁵⁶ Such a balance of interests can only be attained by weighing general and particular interests against each other. When a specific decision or legal rule is the result of this weighing process, it is then deemed to be in 'the public interest'.³⁵⁷ In this sense, the general limits on the freedom of contract discussed in this section can be considered to be in 'the public interest', since they are clearly the result of such a weighing process. The same remark would essentially hold true with regards to the limitations on copyright, which, as observed in section 2.3 above, are also the result of a weighing process between all interests at hand. If the adoption of limitations on copyright is in 'the public interest', do private contracts that purport to limit their application violate 'this public interest'? To what extent are individuals bound, in their private relationships, to respect the legislator's conception of 'the public interest' with respect to copyright matters? These issues are discussed in greater detail in the following sections of this book.

³⁵⁵ Dommering 1982, p. 20.

³⁵⁶ Jellinek 1919, p. 69 where the author writes: 'Das Gemeininteresse ist vielmehr ein auf Grund der herrschenden Zeitanschauungen und speziellen Verhältnisse eines jeden Staates, vielfach aus dem Widerstreit der individuellen Interessen gezogenes Gesamtinteresse, welches dem individuellen sogar fremd und feindlich gegenüber treten kann, oft sogar gegenüber treten muss'.

³⁵⁷ Id., p. 3; and Evans 1949, p. 27.

Chapter 4

Intersection between copyright rules and freedom of contract

The analysis of the nature of the copyright limitations and of the principle of freedom of contract brings me to the heart of the matter, that is, to the question of whether and to what extent contracting parties may depart from the statutory limitations on copyright. This question raises fundamental issues. On the one hand, freedom of contract dictates that parties should be free to conclude any agreement relating to the use of copyrighted material that they perceive to be in their best interest. On the other hand, the copyright regime pursues several objectives that consist not only in protecting the author's moral rights and rewarding her for her intellectual work, but also in promoting the creation and dissemination of new works to the public. Statutory limitations on copyright therefore form an integral part of any copyright system. The question is therefore whether the copyright owner's freedom of contract can be limited under the rules of copyright law or the general rules of law in their transactions with users of protected material. Put another way: under what circumstances would a limit on the freedom of contract be justified when contractual arrangements expand copyrights?¹

In the last step of my research on the mandatory character of copyright limitations, I analyse how copyright and contract rules interact in the context of copyright contracts. In the first section, I present a brief overview of the contracts that are concluded for the use of copyrighted material following the classic contract model and following the standard form contract model. The survey shows that, while rights owners continue the age-old practice of negotiating licences of use with publishers and other categories of producers, they have also taken up the practice of marketing their works to end-users subject to the terms of a standard form contract. Standard form contracts play an increasing role in the mass-market distribution of copyrighted works, particularly in the digital networked environment. In the second section, I

¹ Elkin-Koren 1997, p. 105.

examine the limits to freedom of contract that might prevail over contracts that attempt to limit the application of copyright limitations. I focus on the limits set by the copyright regime itself as well as by the general principles of law, like the norms of economic and protective public order, the constitutional rights and the doctrines of abuse or misuse of rights.

4.1 Contracts for the use of copyrighted material

4.1.1 CLASSIC CONTRACT MODEL

Contracts are an essential instrument for the exploitation of economic rights in copyrighted works. Authors rarely possess the sufficient technical and financial resources to commercially produce, distribute, and communicate their own works to the public. In order to bring their creations to the market, they often have no other choice but to come into contact with those who might be willing to exploit and distribute these works, such as book, sound recording and software publishers, radio and television broadcasters, or movie producers.² These organisations all represent distinct categories of users of copyrighted material, whose purpose it is to reproduce, distribute or communicate the work to the end-user.³ The relationships between authors and users are usually governed by individual contracts, in which the licensing of rights in favour of the user constitutes one of the key provisions. Indeed, without some form of licence, the user would not be legally empowered to reproduce, distribute, or communicate the protected subject matter to the public, unless of course, a statutory limitation covered their activity. Historically, copyright contracts have stayed close to copyright's statutory contours, whether with respect to the contract's bargained-for subject matter, to the rights granted or to the duration of protection envisaged. Apart from the expected payment of royalties and related financial obligations, these contracts have imposed few obligations not contemplated by copyright law itself.⁴

In principle, authors and users are free to negotiate the content of their agreement, so as to best suit their needs and to ensure the most efficient exploitation of the work. Users may therefore freely decide whether they wish to benefit from a particular statutory limitation or to give up their right to exercise that limitation. They might waive their right either to gain greater certainty as to the permitted scope of action – thereby avoiding subsequent litigation –, to avoid elaborate administrative duties, or as a bargaining tool in

² Dreier 1998, p. 635.

³ Dreier 2001, p. 307.

⁴ Goldstein 1997, p. 867.

exchange for other more favourable conditions. The statutory limitation on ephemeral recordings by broadcasting organisations offers an interesting example. Ephemeral recordings of protected works have become very important for broadcasting organisations, since a vast majority of programmes is pre-recorded instead of being broadcast live. In practice, the right to make ephemeral recordings is often regulated on a contractual basis between the rights owner and the broadcasting organisation, along with other conditions of use of the programme, such as the number of broadcast permitted per programme and the price for each repeat broadcast.⁵ Another instructive example is the exchange of news segments between radio and television producers. Makers of radio and television commentaries and news reports mostly rely on contractual arrangements with press agencies to obtain rapid, secure and high quality images, sounds or texts of news reports.⁶ In these two instances, the user generally finds it commercially more advantageous to pay royalties in exchange for greater possibilities of use, rather than restricting herself to making the free use authorised under the statutory limitation. Contractual arrangements between publishers and libraries have also come to play an important role in determining the permitted scope of action of libraries, particular with respect to digital material.⁷

Negotiated contracts between rights owners and users generally follow the classic contract model. Indeed, most if not all terms of use included in these contracts are usually negotiated extensively between the parties, who find themselves in relatively equal bargaining positions. It is also fair to assume that both parties are fully aware of their respective rights and obligations under copyright law, so that the waiver by the user of the exercise of a statutory limitation is neither unreasonable nor surprising. At this stage, it is reasonable to hold that in deference to the principle of freedom of contract and to certainty of contracts, such agreements relating to the use of copyrighted material should be enforced. Nevertheless, the question of whether freely negotiated contract terms that depart from the legislative copyright balance are valid and enforceable under copyright policy and public order norms is examined in subsection 4.2 below.⁸

4.1.2 STANDARD FORM CONTRACT MODEL

A copyright agreement follows the classic contract model to the extent that it is negotiated voluntarily and in good faith between relatively equal

⁵ Ruijsenaars 1999, p. 707.

⁶ Vecht 1992, p. 103.

⁷ Krikke 2000, p. 156; and Institute for Information Law 1998, p. 25-26.

⁸ Goldstein 1997, p. 868.

contracting parties. The underlying premise to the conclusion of any contract of this sort is that transaction costs are not so high relative to the value of the desired use as to prevent parties from reaching an agreement. Transaction costs are typically involved in the identification of potential buyers and sellers, in the negotiation of a deal, in the evaluation of performance and in the enforcement of the agreement.⁹ In this sense, the transaction costs associated with the negotiation of a contract between rights owners and such well-identifiable categories of users as producers, distributors, educational institutions or broadcasters, are low enough to allow both parties to reach a satisfactory agreement concerning the use of copyrighted material. Where a copyrighted work, like a book, a video, a sound recording, or a CD-ROM, is distributed on the mass-market however, it proves impracticable for rights owners to conclude a contract with end-users because transaction costs are too high.¹⁰ The market failure that results from the prohibitive transaction costs associated with the identification of potential contracting parties and the enforcement of contracts explains in great part the absence of any direct relationship between rights owners and end-users and the former's reliance on the rules of copyright law for remedy in case of infringement.

Nevertheless, book publishers and record producers have long developed the practice of printing 'notices' or 'licences' inside the cover of books or on the label of sound recordings, spelling out the conditions of use of the work. While their legal effect is highly uncertain, such notices typically warn the reader that:

'This publication is protected by international copyright law. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of the publishers'.¹¹

The impossibility of negotiating an agreement with every potential end-user also explains why producers of computer programs, who initially protected their products as trade secrets, have developed the practice of attaching standard form contracts to their mass-market programs. 'Shrink-wrap' licences have thus been omnipresent in mass-market computer software transactions already for many years.¹² Retailers usually sell off-line mass-market digital information products along with the producer's standard contract terms written on a piece of paper and wrapped in transparent plastic.

⁹ Merges 1997, p. 116.

¹⁰ Goldstein 1997, p. 866.

¹¹ Notice appearing inside books published by Kluwer Law International.

¹² Samuelson and Opsahl, 1999, p. 387.

Purchasers of digital information products are expected to read the licence terms before tearing open the plastic wrap and using the product. If the user does not agree with the terms printed on the paper, she is expected to return the unopened package to the retailer and ask for a refund of the purchase. Other examples of standard form contracts in the field of digital information products include licences appearing on the screen each time the program starts running, licences printed on the outside of the box containing the product, simply inserted somewhere inside the box or with the owner's manual accompanying the product.¹³

Digital networked technology is revolutionising the mass-market distribution of copyrighted material by bringing substantial corrections to the symptoms of market failure that otherwise prevail in the analogue world. Indeed, the application of technological measures gives rights owners the capacity to control access to their digital works: first, by allowing them to affix conditions of use to each work; and second, by permitting them to prevent further reproductions of those works thanks to anti-copying devices. Moreover, digital tracking systems allow rights owners to monitor the use of their works, while electronic self-help mechanisms permit them to electronically 'enforce' and terminate the contract. The network's interactive nature provides, by reducing transaction costs between owners and potential users, the perfect preconditions for the development of a contractual culture in the digital networked environment.¹⁴ A variety of licensing methods are already or will soon be made possible as the digital networked environment develops, thereby allowing for the use of copyrighted works to be licensed off-line or on-line directly to end-users through individual transactions.

The on-line licence models commonly envisioned in Europe and America involve the licensing of rights on a per-transaction, per-use, per-work or other basis.¹⁵ Although these new licensing models are still mostly at the development stage, users will likely be required in the on-line environment to pay a fee each time they download a work on their personal computer or to pay a certain amount per page read. Today, neither pay-per-use pricing systems nor price discrimination schemes are uncommon forms of exploitation of copyrighted material. Users of protected audiovisual works already face a pay-per-use pricing system, when they subscribe to pay-per-view television services or to video-on-demand services. The legal and business databases such as LEXIS/ NEXIS, Westlaw, and Dialog also offer their services on a pay-per-use basis. The licensing of copyrighted material following a price discrimination scheme, for example between institutional and private users, is a constant practice in the publishing and software

¹³ Lemley 1995, p. 1241; and Schwartz 1986, p. 262.

¹⁴ Goldstein 1997, p. 867.

¹⁵ NII Task Force, White Paper, September 1995, p. 51.

industries.¹⁶ In addition, early experiments like the IMPRIMATUR project¹⁷ have paved the way for recent practical applications in the field of electronic copyright management systems. One promising example of a digital music licensing system is the one that MusicNet is about to launch, whereby MusicNet will licence its technology platform to companies that wish to sell their digital music subscription services under their own brands. MusicNet therefore plans to offer the music catalogues of BMG Entertainment, EMI Recorded Music, Warner Music Group and Zomba.

Under the new on-line contract model, differentiated pricing systems may well become the norm and be expanded to all types of works and on-line uses, like the reading of books and listening to musical works. In other words, users may expect to be charged a fee on-line even for those types of consumptive uses that have always been unrestricted in the analogue world. For some authors, digital technology will ideally allow the formation of customised contracts, which could occur along the following lines:

‘For example, by using a knowledge-based system, several alternatives of terms and conditions could be incorporated in a menu of choices. Contracting partners may select from the possible terms on the menu those clauses that are considered desirable and appropriate, subsequently interact and negotiate on the clauses with each other, and along this line establish a contract of their choice. The tremendous possibilities to store and access information also allow contracting parties to provide each other with additional background information as to the meaning and operation of the relevant terms.’¹⁸

Some commentators believe that consumers may well regain their bargaining power in the on-line environment for two reasons: first, because consumers in the digital networked environment are generally thought to have a higher education and to be better informed¹⁹; and second, because the interactive nature of the digital environment allows them to ‘negotiate’ licence terms with producers and distributors.²⁰ In my opinion, this position

¹⁶ Besen and Raskind 1991, p. 5 where the authors write: ‘Price discrimination allows producers to appropriate a larger share of the social benefits of their innovations and, thus, may permit some innovations that would otherwise not occur. Examples of discriminatory pricing include: charging different individual and library subscription rates for professional journals; establishing licence fees for computer software that vary with the number of users; and setting prices for hardback and paperback versions of a book that do not reflect differences in their cost of production’.

¹⁷ Hugenholtz 2000b, p. 78.

¹⁸ Prins 1996, p. 147.

¹⁹ Giroto and Vorselaars 1997, p. 189.

²⁰ Van Arkel 1999, p. 487.

fails to consider two important aspects of the evolution trend of contractual practices in the digital networked environment. First, users of the Internet may have been at a certain time better educated and better informed than ordinary consumers, giving them greater bargaining power to deal with merchants. In view of the considerable efforts deployed towards the democratisation of the digital networked environment, everyone should expect to soon be able to gain access to the technological tools and skills needed in the new economy regardless of age, education, income, race, ethnicity, disability, or geography.²¹ One can therefore no longer assume that users of the digital environment will remain better educated and better informed. As the digital networked environment becomes more and more popular, all kinds of people will be transacting on the Internet. Many of these people may lack the practical experience and relevant information necessary to negotiate on equal footing with producers or distributors of copyrighted material.

Second, this on-line contract model suggests that users would be able to 'individualise' their contracts with merchants so as best to suit their needs, thanks to the interactive nature of the medium. In other words, the digital networked environment would allow producers and distributors to offer users a choice of terms and conditions for the use of copyrighted material. Unless the user has a modicum of choice in the rights received or alternatively, has the option of turning to a competing product, she may be very reluctant to engage in a distant 'battle of forms' with the other party and feel compelled to accept those terms exactly as they are presented. As Cohen points out, 'in the mass market, consumers are contract takers; they can refuse to buy, or hold out for a lower price, but they generally cannot demand a particular package of contract terms or product characteristics'.²²

Moreover, although digital networked technology significantly reduces the transaction costs associated with the mass-market distribution of copyrighted material, it does not eliminate them entirely.²³ First, negotiating every single clause of an on-line contract with every potential user may be just as burdensome as it is in the analogue world.²⁴ Consequently, even in the digital networked environment, the distribution of copyrighted works is increasingly subject to the terms of standard form contracts. As a result, many digitised literary, visual, or audiovisual works are or will soon be distributed on the mass market in a fashion similar to that of computer

²¹ See for example: U.S. Department of Commerce, *Falling through the Net: Toward Digital Inclusion – A Report on Americans' Access to Technology Tools*, Washington D.C., October 2000.

²² Cohen 1998a, p. 1126; and Elkin-Koren 1998, p. 1183.

²³ Merges 1997, p. 118.

²⁴ Cohen 1998b, p. 483.

programs, i.e., following the terms of a 'click-wrap' licence.²⁵ These electronic standard form contracts are written by the rights owners on the model of the 'shrink-wrap' licence and presented to the user on a take-it-or-leave-it basis. In practice, standard terms appear in various ways on the user's computer screen display. In some cases, the user obtains access to the protected work only once she has given assent, by clicking with the mouse in the appropriate dialogue box or otherwise, to the terms of the on-line screen licence. In other cases, the contract terms are simply made available via a hyperlink located somewhere on the site's home page. For example, the following notice may appear at the bottom of an Internet home page: 'Please click here for legal restrictions and terms of use applicable to this site. Use of this site signifies your agreement to the terms of use'.²⁶ Like the analogue form of the 'shrink-wrap' licence, these electronic licences often contain restrictions on use that go far beyond the bounds of copyright law, by using such language as to practically eliminate the possibility to make a fair use, a quotation or a parody of the work.²⁷

The validity of shrink-wrap licences under contract law has remained uncertain for many years. In principle, standard form contracts are held to be valid, provided that the purchaser of the good or the service is given the opportunity to review the terms of the licence and to give assent before completing the purchase. Assent may be express or may be implied from the party's conduct.²⁸ Does the manner in which assent is presumed to be given under a 'shrink-wrap' or a 'click-wrap' licence raise different issues under the general rules of contract law than other types of standard form contracts? According to which conditions are the simple tearing open of a wrapping on a box, the continued use of a computer program or the clicking of a button on the computer screen sufficient forms of assent on the part of the licensee to be bound by the contractual obligations set out in the licence? This question

²⁵ Hugenholtz 2000b, p. 79; Trompenaars 2000, p. 274.

²⁶ Warner Brothers, On-Line Inc., 'Terms of Use, available at '<http://www.warnerbros.com/terms.html>'.

²⁷ See for example: Walt Disney, Inc., Conditions of Use, site visited on 9 Aug. 2000: <http://disney.go.com/legal/conditions_of_use.html> which state that: 'This site is owned and operated by DISNEY ONLINE (referred to as "DISNEY," "we," "us," or "our" herein). No material from DISNEY.COM or any Web site owned, operated, licensed, or controlled by DISNEY may be copied, reproduced, republished, uploaded, posted, transmitted, or distributed in any way, except that you may download one copy of the materials on any single computer for your personal, noncommercial home use only, provided you keep intact all copyright and other proprietary notices. Modification of the materials or use of the materials for any other purpose is a violation of DISNEY's copyright and other proprietary rights. For purposes of these terms, the use of any such material on any other Web site or networked computer environment is prohibited.'

²⁸ See *supra* section 3.1.2 of this book.

must be addressed first, since the existing relationship between copyright and contract law is founded on a conception of what constitutes a valid contract.²⁹

Europe

In Europe, the question of the validity of shrink-wrap licences for computer software has given rise to surprisingly few court decisions or commentaries. In France, in the absence of any relevant case law, commentators believe that shrink-wrap licences can be held valid under French law, provided that the user is aware that she is assenting to the terms of the licence by tearing open the package.³⁰ In the Netherlands, only one court decision has been reported on the validity of a purchaser's manifestation of assent to the terms of a shrink-wrap licence. In *Coss Holland B.V. v. TM Data Nederland B.V.*,³¹ the District Court of Amsterdam held that the simple fact of tearing a wrap open is not sufficient to generate contractual obligations between the software producer and a user. If this were the parties' intention, then, in the Court's opinion, the buyer would have to be made aware of the terms of the contract before the conclusion of the purchase. In the Court's opinion, the specific terms of the contract would have had to be elucidated beforehand. Otherwise, no valid contract would have been formed. This decision raised some controversy in the legal community most notably because it failed to take account of Article 6:232 of the NBW. This provision states that a party who has accepted the applicability of a set of terms *in toto*, without reading them, is bound by these terms and cannot avail of the excuse that she was not aware of their contents. As a result, the validity of 'shrink-wrap' licences in the Netherlands is still uncertain. In any case, this type of licences would probably be considered valid if customers were aware both of the existence and the content of such licences before completion of the sale.³² As Verkade and Visser have warned, legal consequences should not be inferred too quickly in the on-line environment from the click of the 'yes' button inside a 'click-wrap licence'.³³

German case law is not any richer than French or Dutch law on the issue of the validity of 'shrink-wrap' or 'click-wrap' licences.³⁴ In fact, German courts have so far dealt mainly with the related issue of the validity of a buyer's assent to the standard terms of a contract concluded over a

²⁹ Lemley 1999, p. 122.

³⁰ Girot 1998, p. 7.

³¹ *Coss Holland B.V. v. TM Data Nederland B.V.*, District Court of Amsterdam, decision of May 24, 1995, printed in *Computerrecht* 1997, pp. 63-65; See also Meijboom 1996, nr. 58, p. 2760.

³² See: Trompenaars 2000, p. 272; and Westerdijk and Van der Klaauw 1991, pp. 18-24.

³³ Verkade and Visser 1999, p. 16.

³⁴ See: Schneider 1996, p. 657; Busse 1996, p. 390; Schmidt 1993, p. 715.

videotext system.³⁵ Videotext contracts resemble 'click-wrap' licences insofar as the adhering party is presumed to give assent by entering a combination of numbers on the remote control of her television set in order to proceed with the purchase. To comply with the requirement of the AGB-Gesetz, the party using the standard terms must expressly draw the other party's attention to the existence of the terms and give her the possibility to consult these terms without cost before proceeding with the purchase.³⁶ The courts have repeatedly held that the consultation on the screen of extensive clauses, which cover several videotext pages, does not offer the client a reasonable opportunity to become aware of the terms of the contract.³⁷ The contract must be legible without effort by an average person and must consist of a few short sentences clearly legible on the screen. Authors believe that these criteria could easily be made applicable to contracts concluded on the Internet. Extensive clauses could even be acceptable under Article 2 of the AGB-Gesetz provided that the adhering party has the possibility to print or save them without cost.³⁸

At the European level, two main directives have been adopted concerning the formation and validity of electronic contracts: the first directive regulates distance contracts and the second relates to electronic commerce. The Directive on distance contracts applies to 'any contract concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded'.³⁹ Although strong arguments could be made that the Directive does not apply to licences of copyrighted works, a reading of the entire Directive leads me to believe that goods and services offered on the Internet by means of a 'click-wrap' licence would probably fall under the scope of the Directive. Unless otherwise agreed to by the parties, Article 6(3) expressly removes the right of withdrawal of the consumer with respect to contracts for the supply of audio or video

³⁵ Videotext is a system in which computer-stored information is transmitted over television cables or telephone lines and displayed on home television screens or computer terminals, used for various services such as electronic banking, electronic mail, and home shopping. See: Microsoft Bookshelf '95, inscription under 'videotext'.

³⁶ According to § 24 of the AGBG, this provision does not apply to individuals acting in a professional or commercial capacity or to public legal persons.

³⁷ See for example: Landgericht Freiburg, decision of 7 April 1992, in *Computer und Recht* 1993, p. 433.

³⁸ Palandt 2000, § 2 AGBG, comm. 3(b), p. 2447.

³⁹ 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, Official Journal, L 144, 4 June 1997, p. 19-27, art. 2.

recordings or computer software which were unsealed by the consumer, and for the supply of newspapers, periodicals and magazines. Since the Directive on distance contracts regulates the consumer's right of withdrawal with respect to goods that are typically protected by copyright, one can reasonably presume that the remainder of the provisions also apply to distance contracts that are concluded for the purchase of copyrighted works. As a result, consumers of copyrighted material enjoy, like consumers of any other type of products and services, a certain protection in terms of prior information from the licensor, but benefit from no reflection time once the distance contract is formed.⁴⁰ Similarly, end-users of copyrighted material receive little additional protection under the new Directive on Electronic Commerce.⁴¹ The Directive's main purpose regarding the formation of contracts is to ensure that the legal system of each Member State allows contracts to be validly concluded by electronic means. To this end, service providers have an obligation to provide certain information prior to the conclusion of the contract and contract terms and general conditions provided to the recipient must be made available in a way that allows her to store and reproduce them.⁴²

United States

In the United States, the Restatement (Second) of Contracts provides that consent may be implied from the party's conduct.⁴³ The party engaging in such conduct, however, must know or have reason to know that the other party may infer assent from her conduct. Whether a party has reason to know this is a question of fact, to be determined by the circumstances of each case and by the person involved.⁴⁴ In practice, there is no requirement that the party actually reads or fully understands the terms, but at least that she has an opportunity to review them before the completion of the transaction.⁴⁵ In other words, a standard form contract will be held valid and binding only if

⁴⁰ Arnold 1997, p. 531.

⁴¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on electronic commerce), 17 July 2000, O.J.E.C. L 178/1, art. 9 and ff.

⁴² Id., art. 10(3).

⁴³ Restatement (Second) of Contracts, § 18.

⁴⁴ Restatement (Second) of Contracts, § 19(2), which reads as follows: 'The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents'; and Schwartz, M. (1986), p. 271.

⁴⁵ See: Restatement (Second) of Contracts, § 211(2) which reads as follows: 'Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing'.

the party, having had an opportunity to review the terms of the form, has manifested her assent to it.⁴⁶ The drafters of the Restatement (Second) of Contracts did foresee the possibility that the parties to a contract might attach different meaning to a particular conduct from which assent is to be understood. There is for example no manifestation of mutual assent to a transaction if the parties attach materially different meanings to their manifestations and neither party knows or has reason to know the meaning attached by the other.⁴⁷

For years, the United States courts have held shrink-wrap licences to be unenforceable on the ground that a party cannot be bound by terms that are brought to her attention after the completion of the sales contract.⁴⁸ These courts essentially ruled that a shrink-wrap licence included in a box constituted a proposal for amending the contract of sale that was formed when the consumer paid for the software at the store. Such a licence was therefore not part of the contract of sale to which the consumer had given assent before she opened the shrink-wrap. Opinions were divided, however, following the controversial decision of the Court of Appeals for the Seventh Circuit in *ProCD v. Zeidenberg*, which not only dealt with the question of the enforceability of shrink-wrap licences under state contract law, but also with the question of pre-emption under the federal Copyright Act.⁴⁹ In this case, the plaintiff sought to enforce a mass-market software licence agreement on the use of a CD-ROM containing non-copyrightable telephone listings. It was submitted in evidence before the Court that every box containing the consumer product declared that the software came with restrictions stated in an enclosed licence. This licence, which was encoded on the CD-ROM disks as well as printed in the manual and which appeared on a user's screen every time the software ran, limited the use of the application program and listings to non-commercial purposes. The licence also gave the purchaser the right to return the software for a refund if the terms were unacceptable. Defendant Zeidenberg disregarded the terms of the licence and subsequently made the listings available on the Internet at a lower price. In his defence, Zeidenberg argued that the shrink-wrap licence was unenforceable because he was unaware of its contents at the time of the sale.

At first instance, the District Court accepted the argument of the defence and held the licence unenforceable on the ground that the purchaser could not know of its contents before completion of the sale. Delivering the

⁴⁶ Restatement (Second) of Contracts, § 211 (1).

⁴⁷ Restatement (Second) of Contracts, § 20(1)(a).

⁴⁸ See: *Vault v. Quaid*, 847 F. 2d 255, 270 (5th Cir. 1988); *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F. 2d 91 (3rd Cir. 1991); *Arizona Retail Systems, Inc. v. Software Link Inc.*, 831 F. Supp. 759 (D. Ariz. 1993).

⁴⁹ *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) [hereinafter 'the ProCD decision'].

opinion of the Court of Appeals, Judge Easterbrook reversed the District Court's decision and enforced the licence. On the question of enforceability, the Court of Appeals admitted that Zeidenberg was unable to know the contents of the licence at the time of purchase, but considered that he had nevertheless been made aware of the presence of the terms inside the box. In Judge Easterbrook's opinion, '[t]ransactions in which the exchange of money precedes the communication of detailed terms are common'. The Judge further ruled that while 'a contract can be, and often is, formed simply by paying the price and walking out of the store, the UCC permits contracts to be formed in other ways. ProCD proposed such a different way, and without protest Zeidenberg agreed'. Since Zeidenberg kept the product even after inspecting the package, learning of the licence and trying out the software, he manifested assent to the terms of the contract and was therefore bound by the licence.

Shortly after delivering the *ProCD* decision, judge Easterbrook wrote the opinion of the Court of Appeals for the Seventh Circuit in *Hill v. Gateway 2000, Inc.*,⁵⁰ and extended *ProCD* to a non-shrink-wrap case. Judge Easterbrook upheld the enforceability of an arbitration clause included in a 'money now, terms later' type of standard form contract relating to the purchase of hardware components. This aspect of the *ProCD* and the *Hill* decisions received severe critiques. Enforcing the terms of a licence communicated after the transaction has occurred departs from the traditional focus of the common law on offer and acceptance, according to which the agreement is completed at the time that the parties conclude the deal.⁵¹ In other words, in the case of a software purchase in a store or via telephone order, the contract containing the licence agreement would only reach the customer after the transaction has taken place and would in principle not form part of the original agreement.⁵² Indeed, a district court in Kansas specifically rejected the *ProCD* precedent and refused to enforce the arbitration clause of a standard licence inserted in a box and sent with a computer after the transaction occurred, holding that the terms of the licence were not part of the contract.⁵³

Following the *ProCD* decision, other courts have held 'shrink-wrap' licences enforceable on the question of manifestation of assent. For instance, the Court of Appeals of the State of Washington upheld the validity of a limitation of remedies clause included in a software licence that was printed on the outside of each sealed envelop containing the software, as well as in

⁵⁰ *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997).

⁵¹ Lemley 1999, p. 120; Lemley 1995a, p. 1283.

⁵² Schwartz 1986, p. 273.

⁵³ *Klocek v. Gateway Inc.*, 104 F.Supp.2d 1332 (D.Kan. 2000).

the user's manual and the introductory screen display.⁵⁴ In perhaps the first judicial pronouncement on the subject, the U.S. District Court for the Northern District of California enforced a 'click-wrap' licence and held defendants bound by Terms of Service posted on a website as a result of their act of clicking on a button 'I agree'.⁵⁵ Although a 'click-wrap' offers a better possibility to manifest assent to the terms prior to the conclusion of the transaction, both of these last cases expressly followed the *ProCD* decision, confirming that the users' conduct manifested their assent to the terms of the licence and that they were bound by all terms that were not illegal or unconscionable. Similarly, the appellate division of the Superior Court of New Jersey enforced the forum selection clause included in an on-line subscriber agreement, noting that the plaintiffs 'were given ample opportunity to affirmatively assent to the forum selection clause'.⁵⁶

The *ProCD* decision also had a major impact on the drafting of several key provisions of the Uniform Computer Information Transactions Act (UCITA).⁵⁷ Not only does the UCITA purport to validate most electronic standard form contracts, it also incorporates much of *ProCD*'s conception of contract formation and of manifestation of assent. On the issue of the manifestation of assent, paragraph 208(1) of the UCITA facilitates the adoption of the terms of a record, including a standard form by manifesting assent.⁵⁸ However, 'if a party adopts the terms of a record, the terms become part of the contract without regard to the party's knowledge or understanding of individual terms in the record, except for a term that is unenforceable.'⁵⁹ For the purposes of the Act, a person manifests assent to contractual obligations if, acting with knowledge of, or after having an opportunity to review the record or term or a copy of it, she intentionally engages in conduct or makes statements with reason to know that the other party may infer assent from the conduct or statement.⁶⁰ With respect to mass-market licences, section 209(1) states that a party adopts the terms of a mass-market licence only if she agrees to the licence, such as by manifesting assent, before or during the party's initial performance or use of or access to the information. If the licensee is unable to review the mass-market licence before she has to pay the fee and if she disagrees with the licence after having had an opportunity to review, she is then entitled to return the product and obtain

⁵⁴ *M.A. Mortenson Company, Inc., v. Timberline Software Corporation*, 998 P.2d 305 (Wash. 2000).

⁵⁵ *Hotmail Corporation v. Van Money Pie Inc., et al.*, (N.D. Cal., 1998) 7 *U.S.P.Q.*2d 1020.

⁵⁶ *Caspi v. The Microsoft Network, L.L.C., et al.*, 732 A.2d 528 (N.J.A.D. 1999).

⁵⁷ National Conference of Commissioners on Uniform State Laws, 'UCITA', St-Augustin (Fl.), August 4, 2000.

⁵⁸ See also: UCITA, § 613 on Contracts involving publishers, dealers, and end-users.

⁵⁹ UCITA, § 208(3).

⁶⁰ UCITA, § 112.

refund from the licensor. In the case of transactions occurring on the Internet, a licensee will be given sufficient opportunity to review the terms of a standard form licence if the licensor makes the terms available for review before delivery of the information or payment of the fee, whichever occurs first, and does not actively prevent the printing or storage of the standard terms for archival or review purposes by the licensee.⁶¹

In practice, the UCITA confirms the legal validity of the ‘money now, terms later’ type of standard form contracts that was involved in the *ProCD* and *Hill* decisions, but more importantly, the UCITA puts the legal burden on the licensee to return the product if she disagrees with the terms. The provisions also confirm that in most instances, a simple act like tearing open a plastic wrapping or installing a program on a computer will constitute a valid manifestation of assent on the part of the licensee, even if she has not read or understood the terms of the licence. In principle, this proposed mode of contracting poses no real problem for on-line licences, where the terms can easily be made available for review before the completion of the transaction.⁶² It certainly creates difficulties for off-line licences that are sent along with the product after the transaction has taken place and to which the licensee binds herself by accomplishment of a simple gesture, unless of course she returns the product if the terms turn out to be unacceptable. As Lemley explains in relation to software transactions, there may exist several factors that will prevent a licensee from returning the product:

‘Even if we accept the notion of blanket assent uncritically, a significant percentage of the consumers purchasing the software may be unable to return it for a refund. A second group may choose not to return the software because they believe the shrinkwrap licence is unenforceable – a commonly held belief among software consumers and one with significant support in the current case law. A third group may choose not to return the software because it is simply too much effort, or because they need the software right away and cannot afford to wait and select a different brand. A final group may object to particular terms in a licence, but may be unwilling to reject the software as a whole, perhaps because they cannot find an equally attractive alternative that does not require a shrinkwrap licence.’⁶³

I find the last reason particularly convincing. Whether in the off- or on-line environment, licences for the use of copyrighted material are usually presented on a take-it-or-leave-it basis. The licensee may agree with most

⁶¹ UCITA, § 211.

⁶² Elkin-Koren 2001, p. 200; and Trompenaars 2000, p. 274.

⁶³ Lemley 1995a, p. 1289 (footnotes omitted).

terms in the licence, but since she is given no opportunity to indicate her disagreement with one of the terms and since this particular term may be universally used throughout the market, she decides to proceed with the transaction anyway. Furthermore, industry practice often makes it almost impossible for an individual customer to return the product if she finds the terms unacceptable. Indeed, most software retailers refuse to accept any returns of software once the package has been opened.⁶⁴ Some retailers will let the buyer exchange the software after the package has been opened, but only for the same software title. The same retailer policy applies to software preloaded onto computer components. Returning the product to the software manufacturer is no easy task either. Most licences refer the buyer to the retailer or the computer manufacturer without giving any further indication on how to return the software to the manufacturer if the buyer is unable to return the product to the retailer.⁶⁵ These all too common situations make it simply unrealistic to believe that the licensee's conduct constitutes any form of 'agreement' to the terms of the standard licence.⁶⁶

The UCITA's conception of contract formation and manifestation of assent therefore represents a serious break from the doctrinal foundations of United States contract law. Were the rules of the UCITA to be extended beyond American soil, they would certainly come into conflict with continental European contract law. Both of these systems rest on the principle of the parties' mutual assent to contractual relationships, where assent must also be manifested in the context of standard form contracts. The fact that the UCITA basically eliminates the obligation of the licensor to provide the terms for review before completion of the transaction, and that it reduces the standard of assent necessary to form a contractual relationship, represents the biggest departure from the principle of freedom of contract. The UCITA's validation of 'shrink-wrap' and 'click-wrap' licences also puts a strain on the principle of the relative effect of contracts, also known in the United States as the principle of privity. Let me recall that in principle a contract creates rights and duties exclusively between the parties to the agreement, while copyright law creates rights opposable to everyone. Considering that shrink-wrap licences are meant to bind anyone making use of the product, it is difficult to draw the boundary between rights created by a standard form contract and those granted under copyright law.⁶⁷

The provisions on standard form contracts included in the UCITA gave rise to strong opposition, mainly from consumers' rights organisations and

⁶⁴ Hawkins 1997, at § 51

⁶⁵ Lemley 1995b, p. 317.

⁶⁶ Reichman and Franklin 1999, p. 907.

⁶⁷ Reichman and Franklin 1999, p. 910; Cohen 1998a, p. 1129; Elkin-Koren 1997, p.102; and Merges 1997, p. 126.

academic circles. This explains the cautious attitude of the state legislatures towards the implementation of the Act into state contract law.⁶⁸ In view of the general tendency to recognise ‘shrink-wrap’ and ‘click-wrap’ licences as valid and enforceable under contract law, rights owners now have the power to condition every use of copyrighted material to the terms of a standard form contract. In practice, copyrighted material is increasingly made available on the Internet under specific terms of use, which are often much narrower than what copyright law would otherwise allow. Is this kind of restrictive private ordering valid and enforceable under copyright policy and public order norms?⁶⁹ How far can parties contractually circumvent the limitations on copyright? Does the fact that most of these licences are presented as contracts of adhesion have any influence on their validity or enforceability? Are some of these restrictive clauses more likely to be considered unconscionable, unreasonable, or abusive if they appear in a non-negotiated contract rather than in a fully negotiated contract?

4.2 Limits on freedom of contract

As I have established in chapter 2 of this book, users benefit from an ‘objective right’ and a ‘privilege’ – recognised in continental European law and in United States law, respectively – to make use of copyrighted works in the particular circumstances defined in the relevant copyright act. In continental Europe, this ‘objective right’ is the recognition in positive law of the importance awarded by the legislator to specific ‘legitimate interests’ of private individuals in making certain unauthorised uses of copyrighted material. Under American law, by contrast, a ‘privilege’ is granted to the user whenever the legislator considers that it will contribute to the fulfilment of public policy objectives. The ‘objective rights’ or the ‘privileges’ granted under the limitations on copyright have save for a few exceptions, not been declared mandatory by the legislator. Consequently, there is in principle nothing to prevent contracting parties from determining the content of their respective obligations, even in a manner that derogates from the statutory limitations.

Whereas continental European legal theory dictates that one cannot overlook the ‘legitimate interests’ behind a legislative measure, the holder of such an interest has a right to see it taken into consideration when it comes

⁶⁸ To date, the UCITA has been adopted in two states: in Maryland (HB19, signed on April 25, 2000) and in Virginia (S372, signed on March 14, 2000). Legislation is pending in the states of Arizona, Delaware, District of Columbia, Illinois, Maine, New Hampshire, New Jersey, Oklahoma, Oregon and Texas. See:

<<http://www.ucitaonline.com/whathap.html>> site visited on 1 July 2001.

⁶⁹ Goldstein 1997, p. 868.

into conflict with someone else's subjective right.⁷⁰ The same holds true for the 'privileges' granted under United States law, which may not be disregarded when 'important public policy objectives' are at stake. Admittedly, the weight given to the 'legitimate interests' of users or to the 'public policy' dimension of a 'privilege' varies in importance from one limitation on copyright to another. The user's 'objective right' or 'privilege' is thus only as strong as the 'legitimate interest' or the 'public policy objective' behind it. When called upon to resolve conflicts between rights owners and users, courts must therefore weigh all the 'legitimate interests' and the 'public policies' against each other in their interpretation of the obligations flowing from the contracts.

Let me now examine the potential limits on the parties' freedom of contract with respect to the use of copyrighted material. I study the limits set by the copyright regime in Europe and the United States. Besides the mandatory provisions of the computer programs and database directives, European copyright law in fact offers little guidance for the determination of the validity of a contract that restricts the lawful exercise of a limitation on copyright. In the United States, by contrast, conflicts arising between federal copyright law and state contract law may find a solution under the Constitutional Supremacy Clause or paragraph 301 of the U.S. Copyright Act. A review of the relevant case law shows that the interpretation given to these two provisions is often unclear and inconsistent. As a result, I must turn to the study of the general limits of the freedom of contract, as applied to agreements that restrict the use of copyrighted material beyond the bounds of copyright law. I investigate the grounds upon which courts weigh the interests of users and rights owners against each other, through the application of the norms of economic and protective public order, of constitutional rights as well as of the notion of abuse or misuse of right.

4.2.1 LIMITS SET BY COPYRIGHT LAW

4.2.1.1 Europe

The regulation of contractual practices in the field of copyright is not unusual in continental Europe. In several countries, publisher's agreements and contracts signed for the production of sound and audiovisual works are subject to specific rules of form and content.⁷¹ Where specific legislation has

⁷⁰ Gervais 1961, p. 246-247.

⁷¹ See: French Intellectual Property Law, art. L. 132-1 and ff.; Publishers' Act (*Gesetz über das Verlagsrecht*), of 19 June 1901 (RGBl. S. 217, as subsequently modified); Belgian Copyright Act, art. 20 and ff.

not been enacted, courts are often called in to alleviate the imbalance that could result from the strict application of the principle of freedom of contract. A number of provisions put in place to regulate copyright contracts are aimed at protecting the author, while other provisions are designed to facilitate the sound or film producers' task and thereby, to protect their financial investments. Besides these few regulated contracts, no further legislative intervention has traditionally been deemed necessary either to redress inequalities of bargaining power or to protect the interests of particular categories of users that might otherwise benefit from a limitation on copyright. Indeed, most statutory limitations are directed to institutional users, like public libraries, archives, schools, businesses, and governments.⁷² But for a few exceptions, continental European copyright law is therefore silent on the issue of the mandatory character of the statutory limitations. The legislator's approach may have to change, however, considering that rights owners increasingly market their works to end-users subject to the terms of a licence of use that set aside the limitations specifically adopted for the benefit of individual end-users.

The lawmakers of the European Union did intervene in contractual relations between rights owners and end-users, with the adoption in 1991 of the Computer Programs Directive. Article 9(1) of the Directive expressly 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'.⁷³ Verstrynge⁷⁴ explains the motives behind the explicit recognition of the mandatory character of the limitations as follows:

'Obviously, it makes no sense to give the user the freedom under the Directive to perform certain acts without authorisation if the rightholder can immediately retrieve control by contractual means. This implies that contractual control in Europe might be less effective than in the United States or Japan from the rightholder's point of view. However, given the fact that licensing is often the only means by which a user can obtain software, the Commission and the Council have found it appropriate to limit the parties' freedom of contract in certain ways'.⁷⁵

⁷² Hugenholtz 2000a, p. 8.

⁷³ 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'.

⁷⁴ Mr. Verstrynge is the former Head of the Copyright Unit of the European Commission.

⁷⁵ Verstrynge 1992, p. 12.

Verstrynge essentially suggests that, aside from the growing practice of licensing computer programs to users, no significant contractual practice concerning the use of other copyrighted material had developed at that time to justify a clarification as to the imperative character of other limitations. In view of the growing practice of marketing mass-market databases subject to contractual terms of use, the European Community adopted a similar provision under the Database Directive. Article 15 states that ‘any contractual provision contrary to Articles 6 (1) and 8 shall be null and void’. Article 6(1) provides that ‘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 authorisation of the author of the database’. Article 8 allows the lawful user of a database to extract and/or to re-utilise for any purposes whatsoever insubstantial parts of the contents of a database protected under the *sui generis* right.⁷⁶

The computer programs and the database directives have been implemented in various ways by the Member States. In France, while the provisions of the Computer Programs Directive have been incorporated almost word for word in Article L. 122-6 and 122-6-1 of the CPI, the law implementing the copyright provisions of the Database Directive is much stricter than the text of the directive itself. Article L. 122-5, 5° of the CPI states that, once the work is lawfully disclosed, the author shall not object to ‘the acts necessary for access to the contents of an electronic database for the purposes and within the limits of use foreseen by contract.’⁷⁷ This provision differs in three important respects from the text of Article 6(1) of the Directive. First, where the Directive allows a lawful user to perform without authorisation those acts that are necessary for *access* to and *normal use* of the contents of the database, the French provision only allows those acts that are necessary for access to the contents and not those that are necessary for the ‘normal use of the contents’ of the database. Second, it subordinates the performance of the same acts necessary for access to the ‘purposes and within the limits of use foreseen by contract’. In other words, not only the acts necessary for the ‘normal use of the contents’ simply cannot take place without authorisation of the rights holder, but even those acts necessary for access to the contents are limited by the licensor's contractual restrictions.

As Hugenholtz points out, ‘since the lawfulness of a use may stem both from the law (e.g., a statutory exemption) and from contract, the French exemption appears to be in conflict with the Directive’.⁷⁸ What if the database is marketed without being subject to the terms of a licence? Could the lawful user then fall back on the provisions of the Directive and perform the acts

⁷⁶ Gaster 1999, p. 186.

⁷⁷ Act of 1st July 1998, art. 3.

⁷⁸ Hugenholtz 2000d, p. 198.

necessary for *access* to and *normal use* of the contents of the database without authorisation of the rights holder? Presumably yes, since French judges must interpret these specific provisions in conformity with the Directive. Third, the logical consequence to the French legislator's position is that the limitation on the rights holder's copyright has not been declared imperative, contrary to Article 15 of the Directive. By contrast, Article L. 342-3 of the CPI incorporates word for word the limitation of Article 8(1) of the Directive concerning the extraction and re-utilisation of insubstantial parts of the contents of a database protected under the *sui generis* right, including mention of the fact that a contract clause to the contrary shall be null and void.

In the Netherlands, the provisions of the Copyright Act vary slightly from those of the Computer Programs Directive, giving the lawful user of a copy of a computer program a small advantage. For instance, Article 5(1) of the Directive provides that: 'in the absence of specific contractual provisions, the acts (...) shall not require authorisation by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction.' In comparison, the implementing article in the Dutch copyright act reads as follows:

'Unless otherwise agreed, the reproduction of a work as referred to in Article 10, paragraph 1, sub 12° by the lawful acquirer of a copy of said work, where this is necessary for the use of the work for its intended purpose, shall not be deemed an infringement of copyright. *Reproduction, as referred to in the first sentence, in connection with loading; displaying or correcting errors cannot be prohibited by contract.*'⁷⁹ (Emphasis added)

Thus, while rights owners are free to regulate by contract the running, transmitting or storing of a computer program, they may not prohibit lawful acquirers from performing such acts as the loading, displaying or correcting of errors. The last sentence makes it clear that, in view of the unprecedented expansion of the copyright protection, the Dutch legislator wanted to guarantee a minimum right of the lawful acquirer of a copy of a computer program to perform those acts that are necessary for the normal use of the computer program. In this sense, it is somewhat surprising to note that the Dutch Implementation Act has not transposed Article 9(1) of the Computer Programs Directive, which expressly proclaims the mandatory character of the provisions permitting the lawful user to conduct a black-box analysis or a decompilation of the computer program. In the Explanatory Memorandum to

⁷⁹ Dutch Copyright Act, art. 45j; see: Spoor and Verkade 1993, p. 103; and Van Lingen 1998, p. 64.

the Implementation Act, the Dutch government did indicate that the limitations on the exclusive right, such as those laid down in Articles 45*k*, 45*l*, and 45*m* of the Act, were imperative. However, according to the government, there was no need to specify this in the Act.⁸⁰ Although it would certainly have been clearer to spell it out in the Act, the mandatory character of these provisions cannot be ignored by the Dutch courts, since they too must interpret these provisions in compliance with the Directive. By contrast, the mandatory limitations of the Database Directive have been incorporated into the Dutch Copyright Act without any variation.⁸¹

In Germany, the provisions of the Computer Programs Directive have been incorporated in Articles 69*a et seq.* of the Copyright Act, including the Article 69*g*(2) which states that 'any contractual provisions contrary to Article 69*e* or to the exceptions provided for in Article 69*d* (2) and (3) shall be null and void'. Commenting on the limitations introduced on the basis of the Computer Programs Directive, Lehmann points out that users of computer programs have under the new law even fewer rights than users of any other category of copyrighted works. In view of the particularly broad scope of the newly created exclusive rights on computer programs, the German legislator deemed it necessary to adopt certain imperative measures to guarantee the user of a computer program a minimum right to use it.⁸² Hence, whereas Article 5(1) of the Directive applies to the lawful *acquirer* of a computer program, the German provision applies more generally to the lawful *user* of a program. This right of the lawful user to perform certain acts necessary for the use of the computer program according to its intended purpose has not been declared mandatory. Nevertheless, the German government maintained at the time of its adoption that this right should be interpreted in the light of Recital 17 of the Directive, which suggests that certain acts of use cannot be prohibited but that their exercise may be regulated by contract. In other words, it was the German government's position that Article 69*d*(1) of the Copyright Act possessed a certain imperative core, whose contour and meaning was left to the appreciation of the courts. Contrary to the provisions of the Computer Programs Directive, those of the Database Directive have been implemented without any change in the German Copyright Act, including the right of the lawful user of a database to perform the acts necessary for the purposes of access to and normal use of the contents of the database. As Lehmann does with respect to

⁸⁰ Verkade 1992, p. 95.

⁸¹ Wet van 8 juli 1999, houdende aanpassing van de Nederlandse wetgeving aan richtlijn 96/9/EG van het Europees Parlement en de Raad van 11 maart 1996 betreffende de rechtsbescherming van databanken, *Staatscourant* 1999, p. 303, art. II. See: Hugenholtz 1996b, p. 134; and Verkade and Visser 1999, p. 138.

⁸² Lehmann 1995, p. 547.

Article 9(1) of the Computer Programs Directive, Gaster refers to Article 15 of the Database Directive, as implemented in Article 55a of the German act, in terms of a minimum right of the lawful user of a database.⁸³

This survey of the implementing provisions of the two directives shows that, although the European drafters sought to guarantee certain imperative rights to the lawful users of computer programs and databases, the margin of appreciation left to national legislatures in the implementation of their obligations under the Directives has resulted in varying degrees of 'imperativeness'. There is one noticeable exception to this portrait, however. Although Belgian law lies beyond the scope of my study, it is worth pointing out that Belgium is the only Member State of the European Union, where almost all statutory limitations on copyright have been expressly declared mandatory. The act of 1998 implementing the Database Directive not only introduced in Belgian law all *mandatory* and *optional* limitations in favour of the lawful *user* of a database that were permitted under the Directive, but it also proclaimed the mandatory character of most other limitations included in the Copyright Act. Article 23*bis* of the copyright act, which was adopted without any kind of debate, simply states that 'the exceptions provided in Articles 21, 22, 22*bis* and 23(1) and (3) are mandatory'.⁸⁴ These provisions deal among other things with the right to quote, the right to make reproductions for the purposes of private use, news reporting, and parodies, as well as the right to make an incidental use of a work and the right to lend a work to the public. Surprisingly few comments have been made so far on this important legislative modification, other than to say that it will certainly have a considerable impact in practice where rights owners used to set the statutory limitations aside.⁸⁵ It is of course too early to tell what consequences may follow for rights owners and users alike from the adoption of this provision. But it will undeniably affect the parties' freedom of contract in areas such as the making of quotations, private representations and private copies, news reports, reproductions for education and research purposes, caricature and parodies, and the public lending of literary works.

As the Belgian legislator probably came to realise, the practice of licensing copyrighted material to end-users is no longer limited exclusively to computer programs and databases. More and more works of all kinds are distributed to the mass-market under conditions set by contractual agreements, particularly in the on-line environment. One might have expected that, in light of these developments, the European Community would address the issue of the relationship between the rules of copyright law

⁸³ Gaster 1999, p. 188.

⁸⁴ Loi transposant en droit belge la directive européenne du 11 mars 1996 concernant la protection juridique des bases de données, *Moniteur Belge*, 31 August 1998, art. 23 bis.

⁸⁵ Strowel, A., *Journal des Tribunaux*, 1999, p. 297-304 n° 24.

and contract law and clarify the weight to give limitations on copyright. The new Directive on Copyright in the Information Society merely touches on the subject. Recital 45 states that ‘the exceptions referred to in Article 5(2) and (3) must not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law’. Another reference to contractual agreements can be found in Article 6(4) of the Directive. This provision states that, where interactive on-demand services are governed by contractual arrangements, right holders have no obligation to provide the beneficiaries of the limitations listed in the Article with the means to benefit from them either voluntarily or by way of agreements with other parties. It is worth pointing out, however, that Article 6 on the protection of effective technological measures proved to be the most controversial of the entire Directive.⁸⁶ After numerous amendments, the final text of Article 6 is far from being a model of clarity. Consequently, it remains to be seen how the Member States will implement this provision into national law and, in the light of these new provisions, how the courts will view the relationship between the rules on copyright and contract law.

Apart from the provisions of the two European Directives and the Belgian enactment, national laws are silent on the issue of the contractual overridability of the majority of copyright limitations. Considering the various manners in which the imperative provisions of the two directives have been implemented at the national level, I believe that the legislator's silence could be interpreted either way, i.e., as providing arguments for or against the imperative character of limitations on copyright. Generally speaking, limitations on copyright have been adopted as an express recognition by the legislator of the ‘legitimate interests’ of users.⁸⁷ However, whether the limitations embodying such ‘legitimate interests’ are to be considered imperative or not is likely to depend on a number of factors, including the lawmakers' conception of the overall objectives pursued by the copyright regime. The imperative or default character of the limitations must therefore be determined by examining the legislator's intent, as revealed in the legal commentaries and the jurisprudence.

In France, Gaubiac maintains that, despite the absence of specific provision in the CPI, nothing would prevent a user from waiving her right to exercise the statutory limitations. He adds in the same breath that in principle rights owners may not prohibit users from using their works within the framework of the statutory limitations. This would in his opinion negate the principles of freedom of expression, free criticism, the need for information, the demands of the public domain and the respect for the user's right to

⁸⁶ Koelman 2000, p. 272.

⁸⁷ See subsection 2.3.2 *supra*.

privacy.⁸⁸ This view contrasts with the position defended by authors like Lucas, which emphasises the natural law foundations of the French *droit d'auteur* regime and which considers limitations on copyright to be mere exceptions to the principle of protection of the author's rights. In Lucas' opinion, limitations on copyright confer no right on the user, except perhaps with respect to the making of one back-up copy of a computer program.⁸⁹ It follows from this conception that limitations are not to be considered imperative unless expressly declared so by the legislator. In fact, this common reluctance of French commentators to recognise imperative limitations on copyright has found an echo in the legislature, in the context of the implementation of the provisions of the Database Directive.

The same reluctance can also be inferred from a decision of the Court of Appeal of Paris.⁹⁰ In this case, the national association of phonogram producers (SNEPA) sued the Société Radio France for the unlawful broadcast of phonograms produced by some of its members. Since neither the copyright act nor the Geneva and the Rome Conventions on neighbouring rights were applicable, the plaintiff based its action on the non-compliance with a condition appearing on the label of every phonograph record and which read as follows: 'All rights of the record producer and of the owner of the registered work are reserved. The reproduction, lending, or distribution of this phonogram for public performance or radio transmission without permission is forbidden'. SNEPA contended that the 'label clause' (*clause etiquette*) imposed a use restriction on the contracting partner of the record producer, the violation of which would give rise to an award of damages. This 'label clause' applied to anyone who purchased the records, which the Société Radio France did not contest having done. Without even questioning the binding nature of such 'label clauses' under contract law, the Court of Appeals basically decided that since the purpose of such clauses can only be to point to the rights of the copyright owners or to those of phonograph producers under the Geneva or the Rome Conventions, the members of the SNEPA could not reserve rights that they did not have. If the case had involved an author or a composer – instead of a phonogram producer – whose work had been protected by copyright law, would the court have found that the 'label clause' was a valid basis for a claim of damages?

According to Cohen Jehoram, it would seem that in the Netherlands 'private parties are free to contractually do away with – between them –

⁸⁸ Gaubiac 1999, p. 229.

⁸⁹ Lucas and Lucas 2001, p. 254; and Lucas 1998, p. 171.

⁹⁰ Court of Appeals of Paris, decision of 2 March 1979 (*Syndicat National de L'Édition phonographique et audiovisuelle (S.N.E.P.A.) v. Société Nationale de Radiodiffusion Radio France*), in *RIDA* 1979/101, p. 131 or *IIC* 1981/04, 587.

statutory restrictions to copyright'.⁹¹ Cohen Jehoram, like Gaubiac, bases his opinion on the silence of the legislator in this respect. In my opinion, the silence of the Dutch legislator should not be construed as a definite indication that the limitations on copyright are only default rules from which contracting parties can freely depart. The implementation of the provisions of the Computer Programs Directive concerning the right of the lawful user to make a 'black-box' analysis or a decompilation of a computer program offers the most obvious example of this assertion. For, although these limitations have not been expressly declared mandatory, the Explanatory Memorandum to the Implementation Act clearly shows that the Government considered them to be imperative. Of course, this approach of the Dutch legislator does contrast with the one later followed in the implementation of the Database Directive, where the relevant limitations have been expressly declared mandatory. However, the fact that the legislator has not deemed it necessary to declare the limitations relating to computer programs mandatory might suggest that the other limitations provided under the Dutch Copyright Act must also be regarded as imperative. This position could find some support in the fact that, contrary to the French *droit d'auteur* system, which is based primarily on the natural rights theory, the Dutch copyright system also purports to meet objectives of intellectual and cultural usefulness to society.⁹² Limitations thus form an integral part of the balance of interests established by the Dutch copyright system, from which contracting parties should not derogate, least of all in standard form contracts.

The latter view would seem to roughly coincide with the approach taken by the Dutch courts when interpreting contracts that attempt to derogate from such copyright rules as the exhaustion doctrine or the limitations on copyright. The Dutch Supreme Court's decision in the *Leesportefeuille* case⁹³ offers one example of a court's assessment of a restrictive contractual clause relating to the exhaustion doctrine. In this case, a magazine publisher had put a notice in his publications prohibiting the legal acquirer from re-using the printed material in subsequent 'reading portfolios', known as *leesportefeuilles*. The defendant disregarded the notice, published a portfolio and distributed it to his clients. The plaintiff filed suit on the grounds of copyright infringement. The Dutch Supreme Court found in favour of the defendant, considering that the plaintiff's copyrights were exhausted as soon as he had made his magazines available to the public and had therefore no right to restrict the user's subsequent actions. The notice prohibiting further reproduction was contrary to the exhaustion doctrine found under the Dutch

⁹¹ Cohen Jehoram 1999, p. 311.

⁹² Spoor and Verkade 1993, p. 8; Van Lingen 1999, p. 18; Quaedvlieg 1996, p. 7.

⁹³ *De N.V. Drukkerij «de Spaarnestad» v. Leesinrichting 'Favoriet'*, HR, 25 January 1952, NJ 1952, No. 95.

Copyright Act. Relying on its ruling in the *Leesportefeuille* case, the Dutch Supreme Court rendered a similar decision in *Stemra v. Free Record Shop*.⁹⁴ Like in the earlier case, the producers of sound recordings, whose interests were represented by the collective society Stemra, had printed a notice on each CD that forbade purchasers from further transferring the CD to others. The Court reiterated the principle expressed in its earlier decision, saying that once a work is lawfully made available to the public, the further distribution of the work to third parties, through rental for example, does not constitute an act of making available to the public in the sense of the Copyright Act.

In a recent case, the District Court of The Hague rendered one of the few known European decisions where the relationship between a contractual restriction on use and a statutory limitation on copyright is briefly analysed.⁹⁵ The case involved the posting on a student's website of parts of a commercial CD-ROM containing Dutch legislation. The plaintiff, a Dutch publisher, sued for copyright infringement. In support of his claim, the publisher argued that the student had breached the contract that was clearly printed on the product's packaging and that prohibited 'any unauthorised downloading or any other kind of copying of the CD-ROM'. The District Court admitted as a common practice the fact that producers of data and sound supports inscribe such statements on their products (as producers of gramophones did in the past) and that the restrictions included therein are usually broader, sometimes much broader, than what the law provides.⁹⁶ The Court considered that there is for the buyer of a CD-ROM little reason to see in such a statement anything more than a warning about the existence statutory limitations on use. The defendant could and might therefore have understood the statement in such a way that the word 'unauthorised' meant nothing else than 'legally unauthorised'. In other words, the Court interpreted the contract clause as aiming only at the limitations provided under the Dutch Copyright Act, rather than at any other broader limitation flowing from the contract.

In Germany, Dietz observes that, like French or Dutch law, the German Copyright Act contains no provision regulating the possibility for contracting parties to contractually limit a party's exercise of the statutory limitations on copyright.⁹⁷ If contracting parties were to agree to such a clause, the failure to comply by the debtor of the obligation would give rise to an action for breach of contract but never to an action for copyright infringement. In support of this contention, Dietz points to certain limitations

⁹⁴ *Stichting Stemra v. Free Record Shop B.V.*, HR 20 November 1987, *NJ* 1988, p. 280, *AA* 1989/38, p. 941-948 with comment from H. Cohen Jehoram.

⁹⁵ *Vermande v. Bojkovski*, District Court of The Hague, decision of March 20, 1998, in *Informatierecht/AMI* 1998, pp. 65-67.

⁹⁶ *Id.*, p. 67.

⁹⁷ Dietz 1999, p. 268-69.

included in the Copyright Act, whose text would seem to suggest that contracting parties may engage in negotiations, not to set the limitations aside but rather to determine their conditions of exercise. Article 46 of the Act provides for example that the making of a compilation for educative or religious purposes can only proceed after the rights holder has been notified of the user's intention to exercise her faculty. The rights holder may refuse the reproduction and distribution of such a collection if the work no longer corresponds with her convictions, and if as a result the exploitation of the work no longer is desired. According to Dietz, since this obligation to inform is meant to allow the rights holder to control whether the conditions of exercise of this limitation are fulfilled, parties should have some leeway to negotiate. Another example would be Article 54(d) of the German Copyright Act, which expressly provides that the legal rates of remuneration for private copying apply, unless otherwise agreed to by the parties. However, the fact that parties may conclude agreements with respect to the exercise of a limitation does not automatically imply that they may agree to restrict or eliminate such a limitation.

I believe that since the German copyright regime is bound under Article 14(2) of the *Grundgesetz* by the constitutional principle of *Sozialbindung*, strong arguments could be made in favour of the recognition of the copyright limitations' imperative character. As I have mentioned earlier in this book, the economic rights granted on a work under the German copyright regime are generally construed as property rights protected under Article 14(1) of the GG.⁹⁸ However, Article 14(2) of the GG expressly states that private property rights must also serve the public interest.⁹⁹ Indeed, it is consistent with the established case law of the Constitutional Court to hold that the fundamental guarantee of the author's exclusive right to profit from the economic value of her copyright does not mean that every possible forms of exploitation are guaranteed.¹⁰⁰ In determining the content and limits of the copyright protection, the legislator must not only safeguard the economic proceeds generated by the exploitation of her intellectual property of the rights owner, but it must also adopt adequate measures to allow an appropriate and reasonable use of the work in compliance with the nature and the social component of the right.¹⁰¹ In other words, the legislator has received the task under the Constitution to weigh the interests of the rights

⁹⁸ BverfGE 31, 229, decision of 7 July 1970 (*Kirchen- und Schulgebrauch*) in *GRUR* 1972/08, p. 481; BverfGE 31, 270, decision of 7 July 1970 (*Schulfunksendungen*) in *GRUR* 1972/08, p. 487; BverfGE 49, 382 decision of 25 October 1978 (*Kirchenmusik*) in *GRUR* 1980/01, p. 44.

⁹⁹ Melichar 1999, p. 737.

¹⁰⁰ BverfGE 31, 229 (*Kirchen- und Schulgebrauch*) in *GRUR* 1972/08, p. 483.

¹⁰¹ *Id.*, p. 481.

owners against those of the users in order to define the contours of the copyright protection and its limitations.

A number of arguments have been put forward in support of the ‘social character’ of the rights owner’s exclusive right under the German copyright system.¹⁰² A first argument holds that limits on the author’s rights are justified by the fact that authors do not create their work in an isolated environment, but as members of society. They build on foundations laid down over previous decades and centuries and which are a part of the cultural public domain.¹⁰³ As a result, it is only just and appropriate that the legislator take account of this fact when defining the scope of the copyright protection. Similarly, Kirchhof has argued that while an author is entitled to take part financially in the repeated use and success of her work, the copyright system should also accommodate the fact that a thought, an idea, or an artistic form only has effect when the public can fully embrace the intellectual creation.¹⁰⁴ Moreover, when an author decides to publish a work, it is with the intention to allow as many people as possible to enjoy it. In other words, works are meant to be communicated to the public, thereby bringing the ‘social character’ of the intellectual work to the fore.¹⁰⁵ Perhaps the strongest argument in favour of the ‘social character’ of the copyright protection rests on public interest concerns. This argument holds that copyright must find its limits in the legitimate interest of the public in having unhindered dissemination and use of intellectual goods and that copyright must not serve as an impediment to the intellectual development of society.¹⁰⁶ Consequently, if the German legislator has deemed it appropriate to limit the scope of copyright protection to take account of the public interest, there would be no reason in principle why private parties should be allowed to derogate one way or another from the legislator's intent.

Rights owners have tried on a few occasions to circumvent the application of the exhaustion doctrine or to restrict the application of certain limitations by means of a notice affixed to the work itself or inserted in an accompanying licence.¹⁰⁷ Probably the most significant series of cases on this issue concerned a restriction imposed by a rights holder on a user’s right to rent a work. A record producer brought a copyright infringement action against a store for renting second-hand sound recordings contrary to the notice that appeared on the label of each record and which read: ‘All

¹⁰² Pahud 2000, p. 118.

¹⁰³ BverfGE 31, 229 (*Kirchen- und Schulgebrauch*) in *GRUR* 1972/08, p. 481;

¹⁰⁴ Kirchhof 1988, p. 36; and BverfGE, decision of 29 June 2000, 1 BvR 825/98 (*Germania*), *AfP* 2000/5, p. 451.

¹⁰⁵ Pahud 2000, p. 120; and Leinemann 1998, p. 68.

¹⁰⁶ Pahud 2000, p. 124.

¹⁰⁷ BGH, decision of 6 July 2000 – I ZR 244/97 (*Microsoft OEM Licence*).

copyrights and performing rights reserved. No lending! No unauthorised reproduction, rental, performance or broadcast!’ At first instance, the District Court of Munich held that the plaintiff could not prevent, not even through express contractual stipulation, the rental of recordings brought to the market with her consent.¹⁰⁸ In the court’s opinion, this consequence derived from the law and not from legal transactions. Indeed, Article 17(2) of the Copyright Act provides that, as soon as the original or copies of a work are brought to the market with the consent of the rights holder, the further distribution of the work is unrestricted. However to compensate for the loss of control flowing from the exhaustion of the distribution right, rights holders are entitled under Article 27(1) of the Act to the payment of an equitable remuneration for the public lending or the rental done without direct or indirect commercial motive. The Court concluded that the legal compromise reached by the legislator between the interests of the rights holder and those of the public should not be reversed, modified or suspended by the courts, even less in the absence of an imperative reason for doing so.

Both the Supreme Court¹⁰⁹ and the Constitutional Court¹¹⁰ confirmed the District Court’s decision. Relying on the parliamentary history of the relevant provisions of the German Copyright Act, the Supreme Court opined that if a rights holder were able to restrict the further distribution of a work sold or brought to the market with the rights holder’s consent, it would impede the free circulation of goods in an unacceptable manner. The possibility to restrict the effects of the exhaustion doctrine through a unilateral notice would have run counter to the principle of exhaustion and its intended effect. According to the Court, this interpretation did not stand in the way of the possibility granted under Article 32 of the Act to license the exploitation right in terms of place, time or content. However, it did not follow from Article 32 that the further distribution of the work could be restricted either by inserting a limitation in the licence of use or by making a reservation at the time of the distribution of the work to the public. As soon as the conditions of Article 17(2) of the Act were met, the distribution right was exhausted independently of any restriction in a licence of use. In other words, once the work has been brought to the market with the rights holder’s consent, the further distribution of a work was in principle subject to no restriction. A restriction could in principle only have had an effect if it had pertained to the mode of distribution. As clearly appeared from the

¹⁰⁸ LG München, decision of 9 June 1983, (*Vermietung von Tonträgern*) in *GRUR* 12/1983, p. 763.

¹⁰⁹ BGH, decision of 6 March 1986 (*Schallplattenvermietung*) in *GRUR* 1986, p. 736 with note from Hubmann.

¹¹⁰ BVerfGE decision of 3 October 1989, 1 BvR 775/86 (*Vermietungsvorbehalt*), in *GRUR* 1990, p. 183 and in *Computer und Recht* 1990/8, p. 537 with note from Hoeren.

Explanatory Memorandum to the Bill on the Copyright Act of 1965, the legislator did not intend to permit a restriction on the distribution right, so as to limit the use of a lawfully produced and distributed work to certain types of uses, such as private uses.¹¹¹ As the Court further explained, the distribution right does not include the power to monitor the use made of a lawfully produced and distributed work. Moreover, the rights owner had a right to an equitable remuneration under Article 27(1) of the Copyright Act for the public lending and rental of her works. No right of remuneration would have been necessary if the rights holder could, with the sale of each book or recording, legally reserve such rights as the public lending and rental and make the sale dependent on the payment of a remuneration. In the Court's opinion, the remuneration right provided under Article 27 of the Act did not constitute an exception to the author's exclusive right of distribution, but rather an exception to the exhaustion of that right, which in principle takes effect with the sale of the work.

At the request of the record producer, the Constitutional Court was asked to review the Supreme Court's decision on the ground that it violated Article 14(1) of the GG.¹¹² The Constitutional Court reiterated its view that the fundamental guarantee of the author's exclusive right to profit from the economic value of her copyright does not mean that every possible form of exploitation is guaranteed.¹¹³ For the Court, this principle developed in the 'Kirchen- und Schulgebrauch' case with respect to copyright also applied to neighbouring rights, like those of record producers. Considering the nature and 'social character' of copyrights and neighbouring rights, the legislator was in the Court's opinion only obligated to guarantee a reasonable exploitation of the work, which is guaranteed as a rule, when the holder is put in a position to satisfy her economic interests at the first act of distribution. The record producer's argument, according to which the rental of recordings only led to the making of home copies, thereby severely affecting their economic interests, failed to convince the Court. The latter recalled that the legislator, in drawing up the copyright and neighbouring rights regimes, had to establish a proper balance between the conflicting interests of authors, performing artists, record producers and the general public. The main reason for allowing the public to make home tapings was that the private use of a protected work could not legally or actually be prevented once that work had been brought to the market through an act of distribution. The abrogation of the author's right to prohibit the use of her work rested on considerations related to the citizen's private sphere and the protection of her home, since the

¹¹¹ See: Hubmann 1984, p. 499.

¹¹² BVerfGE decision of 3 October 1989, 1 BvR 775/86 (*Vermietungsvorbehalt*), in *GRUR* 1990, p. 183 and in *Computer und Recht* 1990/8, p. 537 with note from Hoeren.

¹¹³ BverfGE 31, 229 (*Kirchen- und Schulgebrauch*) in *GRUR* 1972/08, p. 483.

control or prevention of private uses would not have been possible without unreasonably encroaching upon the user's domestic life.¹¹⁴ Whether the legislator was obligated to compensate the partial abrogation of the record producer's right through the recognition of a remuneration right remained an open question. In the Constitutional Court's view, even if such an obligation was to be inferred from Article 14(1) of the GG, the legislator had satisfied it by granting the record producer a remuneration right for the home taping of sound recordings.

Admittedly, none of the three instances dealt with the specific question of whether a notice printed on the label of a work can have legal effect on the purchaser of a copyrighted work. However, one can reasonably argue that the reasons given in all three instances point to the imperative character of the limitations. Most convincing was the Supreme Court's insistence that the legislator did not intend to permit a restriction on the distribution right, so as to limit the use of a lawfully produced and distributed work to certain types of uses. As Hubmann argued, a right to use for private purposes could never be licensed because the author has no such right. In the commentator's opinion, the legislator did not reserve for the author the private use of a work, such as the private performance, the private lecture, or the communication of a work to a private circle, but has left these private acts free. Even the reproduction of works for private purposes is to a large extent authorised under Article 53 and 54 of the Act. Therefore, the author can only license the right to make those uses that have been reserved to her by the legislator.¹¹⁵

The fact that the German Copyright Act establishes definite boundaries within which copyrighted works are to be used is nowhere more obvious than in the *elektronischer Pressespiegel* case.¹¹⁶ It follows from this decision that neither rights owners nor users may restrict or expand the scope of application of the statutory limitations to their own advantage. Let me recall that the publisher of the *Berliner Zeitung* brought an action against the collective rights society VG-Wort, complaining that the society's collection of remuneration from third parties for the compilation of electronic press reviews was unlawful. The Court of Appeal of Hamburg concluded that the VG-Wort could not purport to collect the remuneration due under Article 49(1) of the Act for press reviews in electronic form, since the limitation did not apply in that case. In doing so, the Court considered that even if the legislator's intent behind the adoption of Article 49(1) of the Copyright Act

¹¹⁴ See: BGH, decision of 18 May 1955 – Aktz.: I ZR 8/54 (*Grundig Reporter*) in *GRUR* 1955/10, p. 492; and BGH, decision of 29 May 1964 - Aktz. : Ib ZR 4/63 (*Personalausweise*), in *GRUR* 1965/02, p. 104.

¹¹⁵ Hubmann 1984, p. 499.

¹¹⁶ OLG Hamburg, 6 April 2000 (*elektronischer Pressespiegel*), in *AfP* 2000/3, p. 303. This case is further analysed in section 2.2.2. *Isupra*.

was to promote the free flow of information, it did not authorise the collecting society to restrict the scope of the copyright protection – from an exclusive right to a remuneration right – with respect to electronic press reviews. The Court expressed the concern that several limitations included in Article 45 *et seq.* would be expanded on the very same grounds. It would otherwise unreasonably encroach upon the rule/exception relationship established by the legislator in the section of the Act concerning the limitations on copyright and upon the balance reached in the Act between the interests of the authors and the public. In other words, the copyright balance must be respected and no one may derogate from the legislator's intent one way or another.

Along the same lines, it is worth pointing out that the Swiss Federal Tribunal has recently recognised the imperative character of the limitations included in the Swiss Copyright Act.¹¹⁷ In this case, the Swiss collecting society ProLitteris brought a copyright infringement action against the Art and History Museum of Geneva, for the unauthorised reproduction inside a catalogue and a brochure devoted to an upcoming exhibition of works of art and photography that were part of ProLitteris' repertoire. The plaintiff based its action on an agreement concluded with the Museum in 1995, according to which the Museum would pay remuneration for the reproduction of works from the society's repertoire according to the applicable tariff. In its defence, the Museum invoked Article 26 of the Swiss Copyright Act, which reads as follows: 'A work forming part of a collection accessible to the public may be reproduced in a catalogue issued by the administrators of the collection; the same shall apply to the issue of fair and auction catalogues.' Moreover, the tariff on which ProLitteris relied contained an exemption according to which no remuneration was owed for the reproduction of works realised in conformity with the requirements of Article 26 of the Copyright Act. In fact, the Museum did agree to pay for the reproduction of works in brochures, but refused to pay for those in catalogues. The Tribunal was asked to determine whether the exemption applied, considering the agreement signed and considering that some of the works reproduced had been brought together for the purpose of a temporary exhibition.

At the outset, the Federal Tribunal confirmed the lower court's premise that the rules of the Copyright Act are imperative. According to the Tribunal, the collecting society could not put forward claims of remuneration that were incompatible with imperative legal provisions. In addition, it was out of the question to introduce an obligation of remuneration by means of an approved tariff for activities that are not legally subject to the payment of remuneration. The Tribunal concurred with the lower court's ruling that the Copyright Act does not allow derogation from the tariff. Furthermore, the Tribunal agreed

¹¹⁷ Fed. Trib., 1st Civ. Chamb., decision of 17 October 2000, No. 4C.113/2000.

that the agreement signed by the parties in 1995 did not allow the plaintiff to succeed: if the society could not apply the tariff *praeter legem*, it could *a fortiori* not put forward a contractual claim that was not authorised by the tariff, which must respect the imperatives of the Copyright Act. As a result, the Tribunal held that any supplementary conventional performance would be illicit and null *ab initio*.

4.2.1.2 United States

Contrary to continental European law, the American legal system does not generally regulate contractual relations dealing with the exploitation or the utilisation of copyrighted works. Like in continental European copyright law however, limitations on the exclusive rights, such as the fair use doctrine or the library exemptions, are believed to be overridable by contract.¹¹⁸ In practice, a non-infringing use under the U.S. Copyright Act may not be transformed into an infringement, but it may constitute a breach of the licence agreement. Although such contracts might very well be enforceable under state contract law, the question arises whether they conflict with potentially overriding federal copyright policy issues. Indeed, the analysis of the enforceability of such contracts is somewhat complicated by the federal structure of the United States Constitution, where copyright law falls under the power of Congress while contract law falls under state power. In effect, a contractual cause of action that is otherwise enforceable under state contract law can be pre-empted by federal copyright policy either under the express pre-emption clause of section 301 of the U.S. Copyright Act or under the general Supremacy Clause of the U.S. Constitution.¹¹⁹ In order to determine whether contracts that purport to restrict user privileges are enforceable as a matter of federal copyright policy, I first examine the general workings of the pre-emption doctrine, then turn to the specific case of restrictive contractual provisions. As I shall demonstrate in the pages below however, the general doctrine of pre-emption offers no clear guidelines concerning the enforceability of contracts that purport to vary the rights and obligations set forth in the Copyright Act.¹²⁰

¹¹⁸ NII Task Force, White Paper, September 1995, p. 49-50.

¹¹⁹ U.S. Constitution, art. VI, § 2. Note that the Supreme Court has recognised at least two other circumstances giving rise to implied pre-emption: field pre-emption, in which Congress has adopted a scheme so pervasive that the states have been left no room to supplement it, and conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility. Although not entirely irrelevant, these forms of pre-emption present less interest for my study.

¹²⁰ Lemley 1999, p. 116; and O'Rourke 1995, p. 479.

When Congress amended the Copyright Act in 1976, it provided for the pre-emption of state law claims that are interrelated with copyright claims in certain ways. Under Section 301 of the Copyright Act, federal copyright law expressly pre-empts all state ‘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’.¹²¹ Two requirements must be met for a state-created right to be pre-empted under Section 301. First, the rights must deal with a fixed work of authorship that comes within copyright subject matter, and second, they must be equivalent to any of the exclusive rights granted under Section 106 of the Copyright Act. For the purposes of my discussion, I assume that the first criterion is met and that the subject matter covered by a licence agreement comes within the scope of copyright protection. Since both criteria are cumulative under Section 301, there would otherwise be no need for me to enquire into the enforceability of a contract that purports to reduce or eliminate the federal limitations on copyright.

As to the second criterion, the courts generally consider that a right is not ‘equivalent’ to any of the rights specified in Section 106 if it incorporates an ‘extra element’ beyond those necessary to prove copyright infringement.¹²² In essence, a right – whether contractual or legal – is ‘equivalent to copyright’ if it is infringed by the mere act of reproduction, performance, distribution or display of the work. If, under state law, the act of reproduction, performance, distribution or display infringes the state-created right, then such right is pre-empted by federal copyright law. However, if qualitatively other elements are required instead of or in addition to these acts in order to constitute a state-created cause of action, then the right does not lie within the general scope of copyright and there is no pre-emption.¹²³

In the case of a breach of contract cause of action, courts and commentators have struggled with the extent to which an ‘extra element’ might make the contract claim qualitatively different from a claim of copyright infringement, so as to avoid pre-emption. On this point, the legislative history behind the adoption of section 301 brought perhaps more confusion than it gave answers. History suggests that Congress did not intend all contract actions to be pre-empted by the Act. Originally, Congress planned to include a list of illustrative examples of actions that would not be pre-empted by the federal copyright legislation. An early draft of Section

¹²¹ See: Karjala 1997, p. 525; and Founds 1999, p. 104.

¹²² See: *Baltimore Orioles v. Major League Baseball Players Ass'n*, 805 F.2d 663, 674 (7th Cir. 1986); and Covotta and Sergeeff 1998, at p. 45.

¹²³ Nimmer, D. 1998, p. 1-13.

301 enumerated 'breach of contract' among the examples of causes of action that are not pre-empted, along with other private causes of action such as invasion of personal rights or a breach of trust or confidentiality, unfair competition, and misappropriation. The list of examples was deleted from the final version of Section 301, as enacted, because of the Justice Department's concern over the inclusion of the act of misappropriation in the list.¹²⁴ The House Report that was adopted contemporaneously to the adoption of the Copyright Act 1976 states that 'nothing in the Act is meant to derogate from the rights of parties to contract with each other and to sue for breaches of contract'. As a result of the withdrawal of the list from the enacted provision, courts and commentators have often been caught speculating about the legislator's intent on the pre-emption of breach of contract claims.

In the *ProCD* decision, the Court of Appeals for the Seventh Circuit adopted a rather straightforward approach in its evaluation of the 'extra element' test.¹²⁵ After recognising the enforceability of the shrink-wrap licence under contract law, Judge Easterbrook turned to the issue of pre-emption under Section 301 of the Copyright Act. With respect to the first requirement, the Court of Appeals approved the District Court's conclusion that ProCD's telephone listings were 'within the subject matter of copyright' even if, 'after Feist, they are not sufficiently original to be copyrighted'.¹²⁶ The Court of Appeals reversed the District Court's ruling on the second requirement of the pre-emption test under Section 301. It held that ProCD's shrink-wrap licence, which placed a 'home use' restriction on a non-copyrightable CD-ROM compilation of telephone data, was not pre-empted on the ground that the rights created by contract are distinct from the rights granted under the Copyright Act. In deciding this case, the Court relied on three earlier decisions, all of which involved a negotiated contract between two parties rather than a mass-market shrink-wrap licence.¹²⁷ Judge Easterbrook concluded as follows: 'But whether a particular licence is generous or restrictive, a simple two-party contract is not 'equivalent to any of the exclusive rights within the general scope of copyright' and therefore

¹²⁴ See: *Frontline Test Equipment, Inc. v. Greenleaf Software*, Western District of Virginia, Civ. Action No. 97---139-C, June 3 1998; Rice 1992, p. 602-604; and O'Rourke 1995, p. 518.

¹²⁵ *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

¹²⁶ See: *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991) where the Supreme Court held that a compilation of telephone data is outside the scope of copyright protection because of a lack of originality.

¹²⁷ The cited cases are: *National Car Rental Sys., Inc. v. Computer Assocs. Int'l Inc.*, 991 F.2d 426 (8th Cir.) *cert. denied*, 510 U.S. 861 (1993); *Taquino v. Teledyne Monarch Rubber*, 893 F.2d 1488 (5th Cir. 1990); and *Acorn Structures, Inc. v. Swantz*, 846 F.2d 923 (4th Cir. 1988).

may be enforced'.¹²⁸ This assertion basically implies that no contract term can ever be pre-empted under Section 301, because contracts are simply 'not equivalent' to copyright rights.

The drafters of the UCITA followed the Court of Appeals' pre-emption analysis in the *ProCD* decision. During the greater part of the drafting process, the drafters contended that the pre-emption doctrine would 'seldom apply to contracts since a contract deals with the relationship between parties to an agreement, while property law in the Copyright Act deals with interests good against persons with whom the property owner has not dealt'.¹²⁹ In view of the vehement opposition from consumer organisations and academic circles, the drafting committee eventually expressed its view in somewhat more neutral terms. As a result, Subsection 105(a) of the UCITA provides in laconic fashion that 'a provision of this Act which is preempted by federal law is unenforceable to the extent of the preemption'. With this provision, the UCITA essentially leaves the issue of the federal pre-emption of breach of contract claims dealing with intellectual property rights to the appreciation of the courts. Nevertheless, in its Official Comments, the drafting committee still maintains that 'limitations on the information property rights of owners that may exist in a copyright regime, where rights are good against third parties, may be inappropriate in a contractual setting where courts should be reluctant to set aside terms of a contract'.¹³⁰

However, the position of the UCITA drafting committee on the issue of pre-emption was reached without regard for the strong reactions brought forth by the *ProCD* decision. The most important critique, which remained unaddressed by the committee, relates to the decision's failure to consider the possibility that the plaintiff's cause of action might have been pre-empted under the general Supremacy Clause of the U.S. Constitution.¹³¹ Indeed, even if a particular cause of action survives a Section 301 pre-emption analysis, it must still be evaluated for consistency with constitutional concerns. The federal Supremacy Clause proclaims that '[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof (...) shall be the Supreme Law of the Land'.¹³² According to this form of pre-emption analysis, a particular cause of action may be pre-empted if its enforcement would stand as an obstacle to the accomplishment of the full

¹²⁸ *ProCD v. Zeidenberg*, 86 F.3d at 1455.

¹²⁹ Uniform Commercial Code Art. 2B: Software Contracts and Licences of Information, NCCUSL and ALI Council Draft, August 1998, p. 38.

¹³⁰ NCCUSL, UCITA Official Comments, June 2000, § 105, comm. 1.

¹³¹ Founds 1999, p. 104; Nimmer, D. 1998, p. 1-20; Samuelson and Opsahl 1998, p. 177; Covotta and Sergeeff 1998, p. 51; Karjala 1997, p. 525.

¹³² U.S. Constitution, art. VI, § 2.

purposes and objectives of Congress.¹³³ The principle that a State may not ‘substantially interfere’ with the balance struck by the copyright regime between protection and unauthorised use has been recognised by the Court of Appeals for the Fifth Circuit in an early shrink-wrap licence case.¹³⁴ In that case, the Court of Appeals pre-empted a Louisiana Act that gave effect to shrink-wrap licence use restrictions, noting the following among the ‘numerous conflicts’ between this statute and the Copyright Act:

‘(1) while the License Act authorizes a total prohibition on copying, the Copyright Act allows archival copies and copies made as an essential step in the utilization of a computer program (...); (2) while the License Act authorizes a perpetual bar against copying, the Copyright Act grants protection against unauthorized copying only for the life of the author plus fifty years (...); and (3) while the License Act places no restrictions on programs which may be protected, under the Copyright Act, only ‘original works of authorship’ can be protected.’

The Court concluded that, because Louisiana's License Act touched upon the area of federal copyright law, its provisions were pre-empted and Vault's license restrictions prohibiting the decompilation or disassembly of its licensed program were unenforceable. In so holding, the Court emphasised that these license restrictions could not be enforced because they impermissibly interfered with the privileges of copying and adaptation accorded to purchasers of computer software by Section 117 of the Copyright Act.¹³⁵ Remarkably, the Court of Appeals for the Fifth Circuit ignored the pre-emption analysis of Section 301 of the Copyright Act. Without referring to the Supremacy Clause the Court relied solely on patent-related cases in which the Supreme Court had held that ‘[w]hen state law touches upon the area of these federal statutes, it is ‘familiar doctrine’ that the federal policy ‘may not be set at naught or its benefits denied by the state law’.¹³⁶ While this shortcoming might have compromised the precedential value of the *Vault* decision, commentators generally agreed with its end result and welcomed the expansion of this form of pre-emption analysis to copyright matters.

¹³³ D. Nimmer 1998, p. 1-10 and ff.; Karjala 1997, p. 539; Found 1999, p. 114 citing *Hines v. Davidowitz*, 312 U.S. 52 (1941) at p. 67.

¹³⁴ *Vault Corp. v. Quaid Software Ltd*, 847 F.2d 255 (5th Cir. 1988) [hereinafter ‘*Vault* decision’].

¹³⁵ Note that *Vault's* reliance on section 117 as sanctioning a right to decompile was rejected by the Court of Appeals for the Ninth Circuit in *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (1992) at p. 1520.

¹³⁶ *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp. v. Day-Brite Lighting Inc.*, 376 U.S. 234 (1964); and *Bonito Boats, Inc. v. Thunder Craft Boats Inc.*, 489 U.S. 141 (1989).

Thus, if one applies the principle of *Vault v. Quaid* to the *ProCD* decision, one cannot but conclude that the breach of contract cause of action should have been pre-empted under the Supremacy Clause, since the plaintiff was attempting to restrict the distribution of mere facts that Congress and the Supreme Court had decided to leave in the public domain.¹³⁷

In practice, licensors not only attempt to extend their control by contract over non-copyrightable subject matter, but also seek to take away the privileges of the user recognised under the Copyright Act. In recent years, prohibitions on the reverse engineering of computer programs have become a common feature in fully negotiated and non-negotiated contracts. These prohibitions are typically meant to apply even in cases where the reverse engineering is necessary to achieve interoperability. Some licences for the use of copyrighted material on the Internet contain all-encompassing prohibitions on use that read as follows:

‘[e]xcept as expressly authorized by [the rights owner], you agree not to sell, license, rent, modify, distribute, copy, reproduce, transmit, publicly display, publicly perform, publish, adapt, edit, or create derivative works from such materials or content. Notwithstanding the above, you may print or download one copy of the materials or content on this site on any single computer for your personal, non-commercial use, provided you keep intact all copyright and other proprietary notices’.¹³⁸

This type of provision in fact leaves little or no room for any copying that might be considered fair use under Section 107 of the Copyright Act, including, for example, any reproduction made for purposes such as criticism, comment, news reporting, teaching, scholarship, research, or parody. This provision would probably conflict with Section 110 of the Act, which expressly allows certain public performances to take place without the prior authorisation of the rights owners, for instance in the course of face-to-face teaching activities of a non-profit educational institution. Moreover, if the copyrighted content involved a computer program, this provision would

¹³⁷ Nimmer, Brown and Frischling 1999, p. 63; and Karjala 1997, p. 540.

¹³⁸ America On-line Inc., AOL.COM Terms and Conditions of Use, posted at: <<http://www.aol.com/copyright.html>>, and visited on 11 September 2000. But compare the terms of use of the affiliate company CompuServe Inc., which read as follows: ‘The documents and information on this Web site are copyrighted materials of CompuServe Interactive Services, Inc. and its information providers. Reproduction or storage of materials retrieved from this service is subject to the U.S. Copyright Act of 1976, Title 17 U.S.C.’ posted at: <<http://www.compuserve.com/compuserve/terms.asp>> and visited on 11 September 2000.

conflict with Section 117 of the Act, which gives owners of a copy of a program the right to make both archival copies and copies necessary to run the program.¹³⁹ Is this type of provision enforceable under the pre-emption doctrine?

In light of the controversial precedent established by the *ProCD* decision and of the ambiguous position adopted under the UCITA, the question of whether contract clauses that purport to restrict the user privileges under Sections 107 to 121 of the Copyright Act are to survive federal pre-emption remains uncertain and opinions are divided on the matter. Is a contractual prohibition to reverse engineer a computer program or to quote a book the equivalent of a right granted under Section 106 of the Copyright Act? If not, does such a contractual prohibition stand as an obstacle to the accomplishment of the full purposes and objectives of copyright law? Let me first consider the pre-emption analysis of Section 301 of the Copyright Act. As mentioned earlier, a contractual right is 'equivalent' to an exclusive right granted under Section 106, if it is infringed by the mere act of reproduction, performance, distribution or display of the work. To avoid pre-emption, the contract claim must possess an 'extra element' that makes it qualitatively different from a claim of copyright infringement.

Chapter 2 of this book demonstrates that the scope of the exclusive rights enjoyed by a copyright owner is not only circumscribed by the provisions of Section 106, but also by the limitations set out in Sections 107 to 120 of the Copyright Act. These limitations carve out a number of acts from the copyright owner's control that relate to the reproduction, performance, display or distribution of a work. In Hohfeldian terminology, Section 106 of the Copyright Act grants owners a bundle of 'rights' on their respective works and imposes a corresponding 'duty of respect' on the users. Under the statutory limitations however, users have a 'privilege' to use copyrighted material, while copyright owners have a 'no-right' to object to their lawful use of such copyrighted material. A licence that forbids a user to accomplish any of the acts otherwise allowed under the statutory limitations essentially removes the 'privilege' and restores the 'duty of respect' of the user with regard to acts of reproduction, performance, display and distribution. This contractual 'duty of respect' of the other party does not differ in nature from the 'duty' that arises under Section 106 of the Copyright Act.¹⁴⁰ Consequently, I believe that when a licence prohibits the reverse engineering of a computer program or the making of a reproduction for the purposes of quotations or parody, to take but these examples, it does reserve rights between the parties that are equivalent to those of Section 106 of the

¹³⁹ Lemley 1999, p. 131.

¹⁴⁰ For a discussion on the distinction for purposes of the pre-emption analysis between rights created by contract rather than by state law, see: Rice 1992, p. 609 and f.

Copyright Act. Even if the rights under the contract are equivalent to those of Section 106, is there an 'extra element' present in a licence for use that makes the contract claim qualitatively different from a copyright infringement claim?

With regard to the 'extra element' in a cause of action for breach of contract, the exchange of promises by the parties to a negotiated contract has been found to constitute an 'extra element' that is sufficient to distinguish contract rights from exclusive copyright rights.¹⁴¹ Since that 'extra element' rests on the existence of a promise between contracting parties, a number of commentators have suggested that a distinction should be made between negotiated agreements and shrink-wrap licences.¹⁴² In the case of negotiated agreements, when a licensor and a licensee negotiate with a view to concluding a bargain, they usually understand the nature of their respective rights and obligations, including those rights that the licensee agrees to forego.¹⁴³ In principle, neither party would enter the agreement if the bargain were not favourable to each of them in the circumstances. Consequently, the rights and obligations being enforced would not exist but for the parties' agreement. On this basis, some courts have held that the presence of a 'promise' by the licensee not to engage in the prohibited acts constitutes the 'extra element' sufficient to avoid pre-emption.¹⁴⁴ However, the courts have not uniformly followed this line of reasoning. Despite the presence of an 'extra element', a number of courts have refused to pre-empt a breach of contract cause of action, when the act breaching the contract was the same as the act constituting copyright infringement.¹⁴⁵

The question of statutory pre-emption is more delicate when it comes to shrink-wrap licences. Contrary to what Judge Easterbrook maintained, Reichman and Franklin contend that 'when the restored power of the two-party deal in the digital universe is combined with the power to impose non-

¹⁴¹ See for example: *The National Basketball Association v. Motorola*, No. 96-7975, and 96-9123, United States Court of Appeals for the Second Circuit, January 30, 1997; *National Car Rental Sys., Inc. v. Computer Associates*, 991 F.2d 426 (8th Cir. 1993); and *Computer Associates v. Altai*, 982 F.2d 693 (2d Cir. 1992); Karjala 1997, p. 527.

¹⁴² Nimmer, Brown and Frischling 1999, p. 60; Founds 1999, p. 115; Karjala 1997, p. 540.

¹⁴³ O'Rourke 1995, p. 523.

¹⁴⁴ See: *Frontline Test Equip. Inc. v. Greenleaf Software Inc.*, W.D. Va, Civ. Action No. 97-00139-C, June 3 1998 citing *Acorn Structures, Inc. v. Swantz*, 846 F.2d 923 (4th Cir. 1988).

¹⁴⁵ *Wolff v. Institute of Electrical and Electronics Engineers, Inc.*, 768 F. Supp. 66 (S.D.N.Y. 1991); *American Movie Classics Co. v. Turner Entertainment Co.*, 92 F.Supp. 926 (S.D.N.Y. 1996) at p. 931 where the court states: 'a breach of contract claim is preempted if it is merely based on allegations that the defendant did something that the copyright laws reserve exclusively to the plaintiff (such as unauthorized reproduction, performance, distribution, or display); and D. Nimmer 1998, p. 1-19.

negotiated terms, it produces contracts (not ‘agreements’) that are roughly equivalent to private legislation that is valid against the world!¹⁴⁶ Moreover, the standard of assent sufficient to form a valid shrink-wrap licence has been reduced to such an extent under the *ProCD* decision and under the UCITA that mass-market licences generally lack the ‘extra element’ of a ‘bargain’, which might have made the breach of contract claim qualitatively different from a federal copyright infringement claim.¹⁴⁷ It has been argued that although standard form contracts do not embody all (or even most) of the essential characteristics of negotiated agreements, there is a state interest in enforcing such agreements because their enforcement ensures economic efficiency, business stability and confidence in contractual relationships. For some, this state interest in enforcing standard form contracts would suffice, instead of the ‘bargain’ of the parties, to give an ‘extra element’ to the contract claim. As a result, opinions vary: some authors suggest that the lack of real consent on the part of the licensee is such that it simply eliminates any state interest in enforcing this type of mass-market licence, thus eliminates the ‘extra element’.¹⁴⁸ Others maintain that these agreements should be enforced unless they are unconscionable or unless they implicate the social-policy decisions underlying the Copyright Act.¹⁴⁹

This leads me to examine the enforceability of restrictive contractual terms under the Supremacy Clause pre-emption analysis. The U.S. Constitution grants Congress the power to ‘promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries’.¹⁵⁰ The copyright regime is thus designed to strike a balance between providing an incentive to create through the grant of a limited statutory monopoly in the form of copyright and maintaining the free flow of information on which such creativity is built. The fair use doctrine and the other statutory limitations included in the Copyright Act form an integral part of this balancing approach. Consequently, state enforced contracts that attempt to circumvent the fair use doctrine or the other statutory limitations are likely to upset this balance and to stand as an obstacle to the accomplishment of the full purposes and objectives of copyright law.

Here also, a number of commentators believe that the impact on copyright policy differs if the contract that purports to restrict the user's

¹⁴⁶ Reichman and Franklin 1999, p. 911 their argument has been endorsed by other authors, see: Samuelson and Opsahl 1999, p. 390.

¹⁴⁷ Covotta and Sergeeff 1998, p. 49; D. Nimmer 1998, p. 3-34.3; and Karjala 1997, p. 526.

¹⁴⁸ Karjala 1997, p. 528.

¹⁴⁹ Reichman and Franklin 1999, p. 919; Founds 1999, p. 113; and O'Rourke 1995, p. 534.

¹⁵⁰ U.S. Constitution, Art. I., sec. 8, § 8.

statutory privileges is fully negotiated or if it is presented to the user as a standard form contract. O'Rourke contends for example that:

'A private contract in which one party surrenders its fair use rights implicates other contracts only in the sense that state enforcement would signal to other parties that such a provision is acceptable – it would not, of its own accord, compel others to surrender fair use rights. Additionally, the private contract is based on specific consent to a particular transaction. Because of this specific consent and based on the policy considerations identified above, these private contracts do not present the same conflict with federal policy as state legislation. However, it is easy to see why the shrink wrap, which has characteristics of private legislation, has a tougher time surviving a preemption analysis than a negotiated contract.'¹⁵¹

This argument assumes that fully negotiated contracts of this sort would probably not be widespread and that the user would be aware of the fact that, without the contract, she would be entitled to benefit from the fair use defence and from the other statutory limitations. By contrast, shrink-wrap licences would pose a greater threat to the copyright policy objectives, because their end effect is comparable to that of state legislation, insofar as they are omnipresent and purport to bind all users of a work.¹⁵² According to this conception of the Supremacy Clause pre-emption analysis, a contract that purports to restrict the users' right to reverse engineer a computer program, to quote a book or to parody a song would be valid provided that it is bilateral, voluntary and informed.¹⁵³

The analysis of the compatibility between a contract designed to restrict the users' statutory privileges and federal copyright policy occurs on a case-by-case basis. Because the legislator's intent on the particular issue of pre-emption of contracts that circumvent the fair use doctrine and other statutory limitations is so difficult to identify, courts are unable to rely on any clear guidelines to determine the parameters of this form of pre-emption analysis. The reverse engineering of computer programs is perhaps the only exception to the otherwise vague intent of the legislator with respect to the limitations on copyright. In the recently adopted Digital Millennium Copyright Act,¹⁵⁴ Congress expressly addresses reverse engineering in

¹⁵¹ O'Rourke 1995, p. 538, fn 247.

¹⁵² Founds 1999, p. 116.

¹⁵³ Elkin-Koren 1997, p. 107; See also: Founds 1999, p. 116; Karjala 1997, p. 540; *a contrario*: Rice 1992, p. 628.

¹⁵⁴ Act of 28 October, 1998, Pub.L. 105-304, 112 Stat. 2860, codified at 17 U.S.C. § 1201(f) which reads as follows: 'a person who has lawfully obtained the right to use a copy of a

connection with circumvention of technological measures that limit access to copyrighted works. It recognises as a matter of policy that some reverse engineering should not be prohibited where it is needed to obtain the interoperability of a computer program. As a result of the adoption of this provision, the UCITA drafting committee believes, for example, that this policy may outweigh a contract term to the contrary.¹⁵⁵

In practice, the compatibility of a particular contractual arrangement with copyright policy not only depends on the circumstances of each case, but also on the judge's perception of the rationale behind the limitation concerned. If the courts and commentators hold, for example, that the fair use doctrine is predicated solely on market failure considerations, then contractual arrangements that purport to restrict the users' possibility to make fair uses are likely to be held enforceable – unless they contain unconscionable terms – since these contracts are deemed to allow the optimal allocation of resources between the parties.¹⁵⁶ The consequences of this position for the copyright balance can be quite important if the courts systematically choose not to pre-empt contracts of this nature whenever they suspect that a market for the use of the work can form. As Merges explains:

‘Where market development is unlikely, the fair use doctrine should be applied. But where a market could develop if copyrights are enforced, the absence of an initial market should not automatically lead to the implementation of the fair use defense. Indeed, finding fair use would be self-defeating in such a case; the market that might otherwise have been formed would be killed’.¹⁵⁷

As most commentators agree however, this vision of the rationale behind the fair use doctrine gives a much too narrow portrait of reality. Several reasons other than the mere cost of bringing contracting parties together may prevent markets from developing, reasons which justify the existence of limitations on exclusive rights. Section 2.2 of this book clearly shows that limitations, including the fair use doctrine, can be justified on several other grounds such as the protection the users' First Amendment

computer program may circumvent a technological measure... for the sole purpose of identifying and analyzing those elements of the program that are necessary to achieve interoperability of an independently created computer program with other programs, and that have not previously been readily available to the person engaging in the circumvention, to the extent any such acts of identification and analysis do not constitute infringement under this title’.

¹⁵⁵ NCCUSL, UCITA – Official Comments, § 105, comm. 3, p. 20.

¹⁵⁶ See: Ginsburg 2000; Bell 1998, p. 560; O'Rourke 1997; Merges 1997, p. 130; Hardy 1995, § 17; and Gordon 1982, p. 1600.

¹⁵⁷ Merges 1997, p. 130.

rights, competition policy and general public interest in disseminating copyrighted material within educational institutions, public libraries and the like. Not to pre-empt contracts that prohibit fair use or performances in the classroom would be the equivalent of leaving contracting parties to define the contours of public policy. As a result, society as a whole could be affected by a user's agreement not to criticise, to parody, or to improve a work, since it would be deprived of the benefit of new works.¹⁵⁸ Finally, the doctrine of pre-emption is perhaps ill-equipped to deal with the policy issues raised by this form of contracting. In the absence of any relevant case law other than the *Vault* decision, any inquiry into the compatibility of restrictive contract clauses with federal copyright policy under the Supremacy Clause pre-emption analysis remains speculative. In view of the shortcomings of the pre-emption analysis, many commentators suggest that the most appropriate approach would be to analyse enforceability under basic contract law principles, pointing more specifically to the norms of public policy, the doctrine of unconscionability, and the doctrine of copyright misuse.¹⁵⁹

4.2.2 GENERAL LIMITS ON FREEDOM OF CONTRACT

In light of the fact that continental European copyright law provides no general mechanism for solving potential conflicts between copyright and contract law with respect to the use of copyrighted material, the validity of contract clauses that purport to restrict the users' statutory privileges should be tested under the general rules of law. Similarly, even if a particular cause of action based on the breach of a restrictive contract survives pre-emption under American copyright law, the law may still restrict enforcement on grounds of public policy.¹⁶⁰ As set out in section 3.1.2 of this book, numerous mandatory rules of law limiting freedom of contract have been adopted in Europe and the United States. These imperative norms also apply to the formation and the execution of copyright licensing contracts, as they would for any other type of contract.¹⁶¹ As the Official Comments to the UCITA point out, 'the offsetting public policies most likely to be applicable to transactions within this Act are those relating to innovation, competition, fair comment and fair use'.¹⁶² In the following sections, I examine whether and to what extent the norms of economic and protective public order, the user's constitutional rights and the doctrine of abuse of rights may impose separate limits on the parties' freedom of contract with respect to the

¹⁵⁸ Lemley 1999, p. 170.

¹⁵⁹ Founds 1999, p. 113.

¹⁶⁰ Lemley 1999, p. 151.

¹⁶¹ Fisher 1998, p. 1245.

¹⁶² NCCUSL, UCITA – Official Comments, § 105, comm. 3, p. 19.

privileges for users recognised under the copyright act.

4.2.2.1 *Economic public order*

Competitiveness partly depends on the balance that can be achieved between the development and exploitation of new works and the incentives provided to authors under the copyright act in terms of exclusive rights over these works.¹⁶³ The grant of a copyright on a work confers, like any other property right, the right to exclude others from the use of the work, or to set the conditions for its use. Since exclusivity is the essence of copyright protection, copyright holders have as such no affirmative duty to license their rights to others. They are free to determine with whom and under what conditions they will grant a licence for the use of their works. As demonstrated in subsection 3.2.1.1 above, the right to decide with whom they will deal or not deal is a qualified right: it may not be used to lessen or threaten competition.¹⁶⁴ The exercise of an owner's exclusive right may thus be deemed anti-competitive if it either has the effect of unduly restraining trade or, if it results in an abuse of dominant position or unlawful monopolisation.

The question arises whether and to what extent a licence that restricts the use of copyrighted material beyond the statutory privileges might constitute a violation of the continental European rules on competition or of the American Sherman Act. Since the presence of restrictive terms in licences drawn between rights owners and users tend to be a manifestation more of an abuse of dominant position or unlawful monopolisation, rather than a concerted effort to restrict competition, I concentrate in the following pages on the first type of anti-competitive behaviour. Since the continental European rules on competition and the American rules on antitrust display significant similarities in this respect, I analyse the validity of restrictive copyright licence terms under both systems jointly.

Apart from the *PrimeTime*¹⁶⁵ decision in the United States, no other case has to my knowledge given rise in continental Europe or in America to an inquiry into the intersection between the rules of contract law, copyright law and competition in the specific context of a limitation on copyright. Even the enforcement of contractual prohibitions on reverse engineering commonly found in licences written by American software producers, has apparently raised no antitrust concerns in the United States. In fact, contrary

¹⁶³ Leone 1996, p. 30.

¹⁶⁴ Vinje 1993, p. 55; Vermut 1997, p. 29.

¹⁶⁵ *PrimeTime 24 Joint Venture v. National Broadcasting Company, Inc. et al.*, U.S. 2nd Circuit Court of Appeals, Docket No. 98-9392, decision of July 7, 2000.

to the law in force in the European Union, where contracts that prohibit black-box analysis and the decompilation of a computer program for purposes of interoperability are null and void,¹⁶⁶ such prohibitions have until today generally been held enforceable under American copyright law. Litigation on this point has thus been resolved so far on the basis of the copyright fair use doctrine, which permits end-users to decompile a copyrighted computer program in order to achieve interoperability.¹⁶⁷ Admittedly, the American Congress has recently clarified its policy regarding the reverse engineering of computer programs, by stating that the circumvention of technological measures for the purposes of reverse engineering should not be prohibited where it is needed to obtain the interoperability of computer programs.¹⁶⁸ Nevertheless, the courts still enforce contractual prohibitions on the reverse engineering of computer programs.¹⁶⁹ Could such restrictive licence terms or refusals to license interface information raise separate competition or antitrust concerns?¹⁷⁰

Since copyright law does not protect ideas, but only the form in which they are expressed, the recognition of a statutory limitation or a fair use defence allowing the decompilation or reverse engineering of a computer program is designed to allow access to the ideas underlying that program. As I have demonstrated earlier in this book, the decompilation of a program for interoperability purposes is essential for the competitive process in the software industry. Without the possibility to gain access to the unprotected ideas embodied in a computer program, more successful producers may be able to develop a *de facto* standard in the market, thereby driving out present competitors and preventing potential ones from entering the market. In Europe, these considerations led to the adoption of Articles 5, 6, and 9(1) of the Computer Programs Directive, which recognise the imperative nature of the limitations allowing the black-box analysis and the decompilation of computer programs for the purposes of interoperability. In early drafts of the Directive, the European Commission is reported to have emphasised the fact that the rules on competition could be applied in two circumstances: first, in cases where a rights owner tries, by contract or otherwise, to expand the scope of the copyright protection to elements of a computer program which normally receive no copyright protection; and second, in cases where a rights

¹⁶⁶ European Computer Programs Directive, art. 9(1).

¹⁶⁷ *Sega Enterprises Ltd v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992); and *Atari Games Corp. v. Nintendo of America, Inc.*, 975 F.2d 832 (Fed. Cir. 1992).

¹⁶⁸ Digital Millennium Copyright Act, Act of 28 October, 1998, Pub.L. 105-304, 112 Stat. 2860, codified at 17 U.S.C. § 1201(f).

¹⁶⁹ See for example: *Sony Computer Entertainment, Inc. v. Connectix Corp.*, N.D. Cal., No. C-99-0390-CAL, decision of 4/20/99.

¹⁷⁰ Soma, Winfield and Friesen 1994, p. 234.

owner prohibits uses which do not fall under the scope of her exclusive rights.¹⁷¹ The rules on competition were seen as having the function of a safety net. They could play a role for example, where a rights owner attempted to expand the rights granted under Article 4 in a manner that runs afoul of Articles 5 and 6 of the Directive. Such licence terms could not only be considered to fall beyond the scope of the copyright protection, but they could also be seen as an unlawful restriction on competition contrary to Articles 81 or 82 of the EC Treaty.

As Vinje points out, the reverse engineering of computer programs allowed under the Directive will usually yield the necessary information to create interoperable products. Sometimes, however, it may not and the only way to gain access to the required information may be through European competition law.¹⁷² The Computer Programs Directive envisioned this possibility by stating that its provisions are 'without prejudice to the application of the competition rules under Articles 85 and 86 (now 81 and 82) of the Treaty if a dominant supplier refuses to make information available which is necessary for interoperability'.¹⁷³ The drafters of the European Directive thus acknowledged that dominant undertakings could be required under EC competition law to provide necessary information to competitors, whether it is copyrightable or not. Similarly, Recital 47 of the Database Directive states that 'in the interests of competition between suppliers of information products and services, protection by the *sui generis* right must not be afforded in such a way as to facilitate abuses of a dominant position, in particular as regards the creation and distribution of new products and services which have an intellectual, documentary, technical, economic or commercial added value'. Consequently, the provisions of the Database Directive are without prejudice to the application of Community or national laws on restrictive practices and competition.¹⁷⁴

Although the European Court of Justice formulated its findings in very specific terms, the *Magill* decision¹⁷⁵ caused much uneasiness in the software and information industries. In the months immediately following the Court's decision, commentators believed that the *Magill* decision would put the European competition authorities in a much stronger position for requiring

¹⁷¹ Duijvenvoorde 1996, p. 324 where the author refers to the Proposal of 5 January 1989, O.J.E.C. C-91, p. 13.

¹⁷² Vinje 1995, p. 302.

¹⁷³ Computer Programs Directive, Recital 27.

¹⁷⁴ Database Directive, art. 13. Note that earlier drafts of the Proposal for a Directive on the legal protection of databases contained compulsory licence provisions with respect to single source databases. See: Gaster 1999, p. 139 and ff.

¹⁷⁵ *RTE and ITP v. Commission*, European Court of Justice, 6 April 1995, joint cases C-241/91 and C-242/91, *IIC* 1996/27, p. 78.

dominant undertakings to divulge or to license protected interface information to competitors in order to achieve compatibility.¹⁷⁶ Potential areas of application were thought to be hardware compatibility, maintenance and systems integration, and standardisation activities in the field of information technology and telecommunication. The general concern was that copyright owners occupying a dominant position in the market would be required to grant access to their proprietary information any time that this information would be deemed necessary for a competitor to be able to compete on the market. The subsequent jurisprudence of the Court of First Instance in the *Tiercé Ladbroke* case¹⁷⁷ and of the European Court of Justice in the *Bronner* case¹⁷⁸ has presumably put much of the unease to rest insofar as a refusal to license intellectual property rights will be considered abusive only in 'exceptional circumstances'.

In the United States, the relationship between the recognition of a fair use defence for the reverse engineering of a computer program and antitrust law has never been extensively debated or researched. Under Subsection 1201(f) of the Copyright Act, the lawful owner of a copy of a computer program may circumvent technological measures for the sole purpose of identifying and analysing those elements of the program that are necessary to achieve interoperability of an independently created computer program with other programs. It has been argued that a prohibition against reverse engineering could be considered to have an anti-competitive intent because it seeks to inhibit potential competitors.¹⁷⁹ In practice, there may be relatively few instances, where efforts to restrain reverse engineering will actually give rise to antitrust liability. As the relevant case law shows, the evidence necessary to establish an antitrust violation is tremendous. Moreover, like the *Tiercé Ladbroke* and *Bronner* decisions have done in Europe, the *Intergraph* decision has essentially eliminated any possibility for computer producers to obtain interface information from dominant firms under the 'essential facilities' doctrine in the United States.

More generally, could a licence that purports to restrict the user's privileges granted under the copyright act be judged anti-competitive in the sense of the European rules on competition or of the American rules on antitrust? In other words, could a violation of the competition or antitrust rules be found in the refusal of a dominant firm to allow a particular use of a

¹⁷⁶ Vinje 1995, p. 302; Duijvenvoorde 1996, p. 453.

¹⁷⁷ Case T-504/93, *Tiercé Ladbroke SA v. Commission*, [1997] E.C.R. II-923.

¹⁷⁸ Case 7/97, *Oscar Bronner GmbH and Mediaprint Zeitungs- und Zeitschriftenverlag GmbH* [1999] 4 C.M.L.R. 112; also published in the Dutch language in *Mediaforum* 1999/2, p. 53 with comment from E. Loozen and K. Mortelmans.

¹⁷⁹ Soma, Winfield and Friesen 1994, p. 232.

copyrighted work, such as the general prohibition on the ‘making of any reproduction for any purpose whatever’? Considering that the copyright owner can altogether refuse to license her work, how may a lesser restriction on its use form the basis of liability?¹⁸⁰ At the outset, one could argue that a licence that purports to restrict the user's privileges would in principle be protected under American antitrust law by the *Noerr-Pennington* doctrine. As the *Prime Time* case¹⁸¹ shows, however, circumstances may arise where a rights owner's enforcement of the rights granted under the Copyright Act will be found anti-competitive in violation of the Sherman Act. Moreover, there is in European competition law no concept equivalent to the American *Noerr-Pennington* doctrine. Restrictive licence terms are therefore not exempt from scrutiny under competition law.

The first step of an inquiry into an allegation of abuse of dominant position by a copyright holder consists of defining the relevant market for the copyrighted work and of examining whether there exist, actual or potential, substitute products for that work. ‘Substitute products’ are items that may, as a result of a change in price or other conditions, be interchanged easily, such as coffee and tea, or butter and margarine. Whether there are substitutes in the market for a particular good may be dependent either on the presence of competing products or on the inherent characteristics of the good. Indeed, a good will have no substitute if only one firm can produce it in an economically efficient manner, if only one firm possesses the necessary inputs for its production or, as a corollary, if the good itself is so unique that no other good may ever offer a suitable replacement. When there are no substitutes for a good in a given market, then the producer of that good may be said to occupy a dominant position.

In the field of copyright, product substitutability varies depending on the type of work and the type of user involved.¹⁸² Unless there are no other competing products on the market, like in the *Magill* case or the Dutch *Denda*¹⁸³ and *Telegraaf* cases,¹⁸⁴ it can be argued that purely informational works such as telephone or television listings may have close substitutes. By contrast, other types of works, like cultural, artistic, scientific, literary, or educational works, may have such unique attributes of aesthetic beauty or of

¹⁸⁰ Lande and Sobin 1996, p. 267.

¹⁸¹ *PrimeTime 24 Joint Venture v. National Broadcasting Company, Inc. et al.*, U.S. 2nd Circuit Court of Appeals, Docket No. 98-9392, decision of July 7, 2000.

¹⁸² Greaves 1998, p. 381; and Elkin-Koren 1998, p. 1184.

¹⁸³ *Denda Multimedia B.V. en Topware CD-service A.G. v. KPN Telecom B.V.*, Independent Post and Telecommunications Authority, decision of 29 September 1999.

¹⁸⁴ *De Telegraaf v. Nederlandse Onroep Stichting (NOS) and Holland Media Groep (HMG)*, Dutch Competition Authority, decision of 16 February 2000, in *Mediaforum* 2000/3, p. 107 with comment from R. Mahler.

literary, cinematographic, or scientific value, that they can have no substitute. Indeed, for some people a 'Picasso' may be interchangeable with a 'Matisse', a 'John Grisham' with a 'John Le Carré', a *New York Times* with a *USA Today*, but for (most) others they are not. The degree of substitutability between copyrighted works is therefore highly uncertain. This was in fact the position adopted by the United States Supreme Court in *Loews*, where the Court wrote that:

'[E]ach copyrighted film block booked by appellants for television use 'was in itself a unique product'; that feature films 'varied in theme, in artistic performance, in stars, in audience appeal, etc.,' and were not fungible; and that since each defendant by reason of its copyright had a 'monopolistic' position as to each tying product, 'sufficient economic power' to impose an appreciable restraint on free competition in the tied product was present.'¹⁸⁵

From this perspective, every owner of a copyright on a work has the potential to occupy a dominant position or to have monopoly power on the market. Arguably, organisations like copyright collecting societies, electronic copyright management systems, large publishers, software or record producers and information providers, could occupy a dominant position or possess monopoly power in the market for a particular category of protected works. If there were no substitute product for the work or information owned by such an organisation, would this organisation's practice of prohibiting licensees from 'making of any reproduction of the work for any purpose whatever' constitute an abuse of her dominant position? As discussed in subsection 3.2.1.1 above, to amount to a violation of the competition or antitrust rules, a copyright owner must be found either to *abuse* her dominant position in the market or to have acquired or maintained her monopoly power by *improper means*. As the relevant case law shows, however, it can be very difficult to prove abusive conduct on the part of a dominant undertaking or the harm on the competitive market.¹⁸⁶

Moreover, for the 'essential facilities' doctrine to apply there must be a market in which plaintiff and defendant compete, so that a monopolist extends its monopoly to the downstream market by refusing access to the facility it controls. In deciding whether to compel a rights owner to give access to her 'essential facility', a court would first have to establish that there is a secondary market for the copyrighted work or information in question. Unless the user is able to demonstrate that the rights owner's

¹⁸⁵ *United States v. Loews' Inc.*, 371 U.S. 38 (1962), at p. 48.

¹⁸⁶ See subsection 3.2.1.1 *supra*.

control over the work prevents her from effectively competing in that market, no access to the work would be granted. As a result, an action based on the ‘essential facilities’ doctrine would be open only to particular classes of users that compete in a downstream market. For instance, such an action would hardly be available to individual end-users, since they do not ‘compete’ with copyright owners in the sense of the continental European rules on competition or in the sense of the U.S. Sherman Act. Whether an antitrust action would be available to newspaper or book publishers, database, record or software producers, broadcasters and information providers would be essentially a question of fact. The same factual assessment would have to be made with respect to public libraries, archives, and educational institutions, the activities of which compete increasingly often with those of commercial producers and distributors of copyrighted works.

Let me illustrate this point with an example: in *Rosemont Enterprises v. Random House*,¹⁸⁷ when Howard Hughes found out that Random House intended to publish a biography of him that drew heavily on articles published in *Look* magazine, he had Rosemont purchase *Look's* copyright to the articles. Admittedly, this case was decided purely on the basis of the provisions of the U.S. Copyright Act and of the First Amendment. Nevertheless, the Court of Appeals for the Second Circuit found that the public had a significant interest in free dissemination of information about Hughes. Had this case been tried and decided following the rules of antitrust, the Court might have concluded that there existed a secondary market for Random House's biography on Hughes and that Rosemont's control over the articles prevented her from effectively competing in that market.

Next, a court would have to enquire about the ‘indispensable character’ of the work or information held by the dominant undertaking, about the impossibility to duplicate the data or the ideas contained in that work, and about the absence of any other alternative. Of course, the ‘indispensable character’ of a work would have to be assessed on a case-by-case basis. In principle, nothing precludes a copyrighted work from being considered ‘indispensable’. For instance, television programme listings have been recognised as ‘indispensable’ under the continental European rules on competition,¹⁸⁸ just as have newspaper articles under the U.S. Sherman Act.¹⁸⁹ Going back to my illustration, the Court found, in the *Rosemont* case, that ‘while the use of the *Look* articles was necessary for defendant's book, the economic injury to the plaintiff was minimal’. Once expressed in

¹⁸⁷ *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966). This case is discussed in subsection 2.2.1.1 *supra*.

¹⁸⁸ *Magill* case, IIC 1996/27, p. 78.

¹⁸⁹ *Associated Press v. United States*, 326 U.S. 1 (1945), at p. 18.

antitrust terms, the Court might have decided that *the use* of the *Look* articles was 'indispensable' to produce the biography and that Random House had no other alternative but to quote the articles.

In practice, there might certainly be other circumstances where the control over a copyrighted work would prevent competition in a downstream market. A number of commentators have voiced the concern that the access to copyrighted works made available on the Internet will be systematically blocked through the application of technical measures.¹⁹⁰ While obtaining access to a copyrighted work is a pre-requisite to its use, access is not my primary interest here. An author is in principle free to decide whether or not to make her work accessible to the public and under what conditions. However, when the author does decide to make her work accessible, she must do so in a manner that will not hinder competition. The key question is whether a contractual prohibition to quote or to make reproductions of a work for the purposes of comment, criticism or news reporting would amount to the rights owner's 'control' over an otherwise 'indispensable' work, so as to prevent competition in a downstream market? The *Rosemont* illustration offers one possible path for inquiry. Again, no definite answer can be given at this time, leaving this question to be addressed by the courts on a case-by-case basis.

One last difficulty in applying the rules on competition or antitrust to an information monopolist relates to the fact that, in principle, the latter can avoid liability by presenting legitimate business justifications to support her restrictive licensing practice. For instance, the French collecting society SACEM was absolved from antitrust liability by establishing that her practice of refusing to licence parts of her repertoire to discothèques was necessary to fulfil her functions properly.¹⁹¹ Could such business entities as information providers, electronic copyright management systems or publishers successfully argue that restrictive licence terms are justified as a means to carry on business in the digital networked environment?

In the *Rosemont* case, the Court might have had good reasons to conclude that Rosemont publisher together with Howard Hughes had acquired or maintained their monopoly power by *improper means*, so as to harm the competitive market. The *Rosemont* illustration is an extreme example, however, because of the obvious anti-competitive behaviour of the copyright holder, which could not be supported by any reasonable business justification. All in all a user's request to obtain the right to make reproductions for otherwise legitimate purposes under a copyright licence

¹⁹⁰ Hugenholtz 2000b, p. 79; and Elkin-Koren 2001, p. 192.

¹⁹¹ Case 402/85, *Basset v. SACEM*, [1987] E.C.R. 1747; and Case 22/79 *Greenwich Film Productions v. SACEM*, [1979] E.C.R. 3275.

would in my opinion have only remote chances of success in continental Europe and the United States.¹⁹² Indeed, the judicial acceptance of the doctrine of 'essential facilities' may not be the only obstacle to overcome, where at least in the United States, a violation of the antitrust laws by a rights holder is generally not accepted as a valid defence to an allegation of copyright infringement. Whether the evidence of an antitrust violation would be admissible, in this context, as a defence to a breach of contract action remains to be seen. By contrast, in view of the recent case law, an action based on the 'essential facilities' doctrine might perhaps have greater chances of success in the Netherlands than elsewhere.

In many respects, the general criteria of examination developed under the continental European rules on competition and the American antitrust laws are insufficient to address the growing concern about the monopolisation of copyrighted works and information. Some authors suggest that, instead of scrutinising the intent of the monopolist and the harm to the market, the courts should enquire about the motivations that run contrary to the policies behind copyright law.¹⁹³ In other words, the courts should not only sanction those situations in which the copyright owners' anti-competitive behaviour actually harms the market, but also those situations where rights owners enforce their monopolies only to discourage or prevent others from creating their own works. The European Court of Justice did give a hint in this direction when it declared, in the *Magill* case, that 'the copyright was no longer being exercised in a manner which corresponded to its essential function, within the meaning of Article 86 (now Article 82) of the Treaty, which was to protect the moral rights in the work and ensure a reward for the creative effort, while respecting the aims of, in particular, Article 86'.¹⁹⁴ Hence, whenever a publisher occupies a dominant position in the market, it may be in a position to prohibit the creation of new works based on its own works, simply by prohibiting subsequent authors or publishers from making quotations or reproductions for the purposes of criticism, comment, or research.¹⁹⁵ The ultimate result of such a prohibition would be similar to that of a refusal to license, i.e., of withdrawing creative knowledge from the public and of controlling competition from subsequent authors. If the courts were to analyse such licensing practices in relation to

¹⁹² *Denda Multimedia B.V. en Topware CD-service A.G. v. KPN Telecom B.V.*, Independent Post and Telecommunications Authority, decision of 29 September 1999; and *De Telegraaf v. Nederlandse Onroep Stichting (NOS) and Holland Media Groep (HMG)*, Dutch Competition Authority, decision of 16 February 2000, in *Mediaforum* 2000/3, p. 107 with comment from R. Mahler.

¹⁹³ Elkin-Koren 2001, p. 215; Vermut 1997, p. 43; Govaere 1996, p. 149.

¹⁹⁴ *Magill* case, *IIC* 1996/27, at p. 83.

¹⁹⁵ See: Hugenholtz 2000e, p. 361.

the functionality of the copyright regime, they would have better grounds to hold that a general prohibition on the reproduction of copyrighted works violates the rules on competition.¹⁹⁶

4.2.2.2 *Protective public order*

I have established in previous sections of this book that while the digital networked environment offers the perfect conditions for the growth of a contractual culture, the transaction costs associated with the negotiation of every clause of a digital contract remain prohibitive.¹⁹⁷ As a result, shrink-wrap and click-wrap licences are becoming the rights owners' preferred mode of transacting with end-users for the use of their copyrighted works. With the combined use of contract and digital technology, rights owners are now in a position to unilaterally fix the terms of use of their work. Users are in turn presumed to give legally binding assent to the obligations laid down in the contract by a simple gesture, such as tearing open a plastic wrapping around a product or clicking inside a dialogue box on the computer screen.¹⁹⁸ In practice however, end-users often lack the practical experience or the relevant knowledge necessary to express full assent to the terms of the standard form contract. End-users also often lack the bargaining power necessary to influence the content of the contract. As copyrighted works are increasingly being distributed on the mass market subject to the terms of standard form contracts, end-users of protected material are likely to be confronted more and more with contract clauses that attempt to restrict the privileges normally recognised to them under copyright law. The only choice of an end-user is often to refuse to transact under the conditions set out in the standard form contract.

In view of the inequalities of bargaining power, the question is whether and to what extent the rules on consumer protection can be applied to safeguard end-users against the imposition of such restrictive contract clauses. Imposing a duty on rights owners to disclose particular information or to observe specific formalities at the time of the conclusion of the standard form contract does contribute to reducing inequalities between parties, insofar as it compensates for the lack of information or experience on the part of the end-user. However, such procedural requirements would not eliminate the risk that rights owners might abuse their economic and bargaining position by making systematic use of licence terms that are unfavourable to end-users. I am therefore mainly concerned in this section with the question

¹⁹⁶ Govaere 1996, p. 55-56.

¹⁹⁷ See subsections 3.1.1.2 and 3.2.1.2 *supra*.

¹⁹⁸ Trompenaars 2000, p. 272.

of whether certain terms of use included in standard form contracts could be invalidated on the basis of their unfairness or unreasonable character towards end-users of copyrighted material. In other words, could a mass-market licence term that prohibits an end-user from making quotations or reproductions of a protected work for private or educational use, to take only these examples, be held invalid because it is unreasonably burdensome or contrary to the obligation of good faith? Would end-users of copyrighted material be able, as weaker parties to a transaction, to invoke the application of the norms of public order?

Europe

In principle, the provisions of the European Directive on unfair contract terms cover mass-market licences for the use of copyrighted material, provided that the conditions of application are met. Hence, for the Directive to apply, a first condition would be that the other party to such a licence is a ‘consumer’ as defined in the Directive, that is ‘any natural person who, (...), is acting for purposes which are outside his trade, business or profession’.¹⁹⁹ In other words, the rules established under the Directive may offer some level of protection to physical persons, but they would in principle not apply to other categories of users of copyrighted material, such as small businesses, libraries, archives, educational institutions and the like.²⁰⁰ By contrast, the section on abusive clauses of the French Consumer Code is said to apply both to ‘consumers and non-professionals’, an expression which the courts have interpreted rather broadly, so as to include cases where professionals transact within their sphere of activity.²⁰¹ Moreover, the general principle expressed in Article 6:233 of the NBW and in Article 9 of the AGBG has been recognised to apply not only in contractual relations between a professional and a consumer, but also in relations between professionals. Legal persons and professionals, like small businesses, libraries, archives and educational institutions, would therefore be admitted to challenge the fairness of standard contract terms on the basis of these two general provisions.

Second, the Directive provides that assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration for the goods and services rendered. The same requirement exists explicitly or implicitly

¹⁹⁹ Directive on Unfair Terms, art. 2(b).

²⁰⁰ Elkin-Koren 2001, p. 204.

²⁰¹ Sinay-Cytermann 1996, p. 263.

under the national provisions on standard form contracts.²⁰² This exclusion is generally justified by the fact that subjecting the terms regarding price and other essential aspects of a contract to the ‘unreasonably onerous’ test would have the effect of introducing the *iustum pretium* doctrine into positive law. However, neither the Directive nor the national legislation gives any indication of what is to be considered as the ‘main subject matter of a contract’. Standard form contracts usually contain clauses that either deviate from the default rules of contract law or that complete these rules. An example of the first type of clause would be an exoneration of liability clause, whereas an example of the second would be a price-increase stipulation.²⁰³ On the other hand, standard form contracts also contain terms that are essential for the existence of the contract itself, in the sense that they are of such substantial significance that without them the contract would not have been formed or that there would be no proper manifestation of intention. Such essential terms are thus excluded from the definition of a ‘general condition’ included in a non-negotiated contract, thereby escaping judicial review.

Where French legal literature is somewhat laconic on this point, Dutch and German commentators are more forthcoming on the issue. Among the terms that are considered to relate to the main subject matter of a contract under Dutch law are those that govern the price, the quantity, the weight or the quality of the good sold, the scope of coverage of an insurance contract or the duration of a trip in a travel arrangement. As Hartkamp explains, it is in principle not sufficient that the term settles an important matter for the merchant or even for both parties, such as an exoneration of liability clause or a price-increase stipulation. In fact, many of these terms appear in the ‘black’ and ‘grey’ lists of Articles 6:236 and 6:237 of the NBW, which implies that they cannot be considered to pertain to the main subject matter of a contract.²⁰⁴ The ‘essential character’ of a term must be assessed according to objective criteria: parties have in principle no authority to qualify the terms of their contract as ‘essential’, so as to withdraw them from the judicial review provided under Articles 6:233 *et seq.* of the NBW. Under the German AGBG, this principle is expressed in an opposite way: instead of excluding terms that pertain to the main subject matter of the contract, the fair and reasonable test is said to apply only to those terms included in general conditions, which modify or complete the rules of law. However, even if the judicial control over the content of an ‘essential’ term is implicitly excluded,

²⁰² French Consumer Code, art. L. 132-1, 7th par.; NBW, art. 6:231(a); and AGBG, § 8.

²⁰³ Asser-Hartkamp 1997, p. 342.

²⁰⁴ *Ibidem*.

consumers nevertheless benefit from the protection granted under Article 3 of the AGBG against 'surprising clauses'.²⁰⁵

In the absence of any relevant court decision on the issue, it is still unclear whether a term that restricts the privileges normally granted to users under copyright law would be considered as pertaining to the main subject matter of the licence. Elkin-Koren argues for example that 'because the permissions and restrictions actually define the nature of what will be delivered in information transactions, restrictive terms may be exempt from the Directive on the ground that they 'define the product''²⁰⁶ It could be argued, however, that the identification of the work licensed and the number of uses that are authorised in exchange for the payment of the price would constitute the essential terms of a mass-market licence for the use of a work. Hence, the term of a mass-market licence that fixes the extent of the use permitted, would, in the language of Article 8 of the AGBG, merely constitute a term that 'modifies or completes the rules of law'. Indeed, without such a clause, the user of a copyrighted work would be allowed to make any use of the work, as long as such use does not infringe the rights owner's rights in her work.²⁰⁷ A clause that modifies the content of the copyright provisions so as to restrict the scope of action of the user could therefore be open to judicial review as to its fairness to the consumer.

Assuming both that the standard contract is concluded with a consumer and that the term under review does not touch on the essence of the performance, a term will be regarded as unfair under the Directive if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer. The list presented in annex to the Directive is meant to give an indication of the clauses that may be regarded as abusive or unfair. The only clause enumerated in the list that could apply in the context of a licence for the use of copyrighted material, is the one that 'irrevocably bind[s] the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract'. This type of clause relates more to the formation of the contract and to the accuracy of the consumer's assent to the obligations contained therein, than to the fairness of the contractual obligations themselves. In fact, none of the terms appearing in the lists annexed to the French, Dutch or German legislation are likely to apply in the case of a consumer faced with a restrictive copyright licence term. Indeed, the terms listed in the legislation concern for example such presumably unfair clauses as the seller's unilateral termination or

²⁰⁵ Palandt 2000, p. 2458.

²⁰⁶ Elkin-Koren 2001, p. 204.

²⁰⁷ Espagnon 1995, p. 66.

modification of the contract, the amount of punitive damages owed by the consumer for the failure to perform her obligations under the contract, or the unreasonable termination or automatic extension of a contract of undetermined duration.

As a result, consumers and professionals alike must turn to the open norm laid down in the Directive and in Articles L. 132-1 of the French Consumer Code, 6:233 of the NBW and Article 9 of the AGBG. One must realise, however, that the open norm contained in these provisions constitutes in fact a specific application of the general principle expressed in the concepts of *bonne foi*, *redelijkheid en billijkheid* or *Treu und Glauben*. The principle of objective good faith may be thus invoked every time that the specific provisions on abusive clauses cannot be applied, because the other party is not a consumer, because the term has been negotiated or because the term under review relates to the main subject matter of the contract. Under both types of provisions, the fairness of a term is assessed by referring, at the moment of the conclusion of the contract, to all the circumstances that surround its conclusion, to the mutually apparent interests of the parties, to the common usage of the trade, as well as to all other clauses of the contract.²⁰⁸

However, the fact that a term is presented to the other party in a standard form contract rather than in a negotiated agreement constitutes an important factor in a court's finding concerning the unreasonableness of a term. When applying the general principle of good faith expressed in Article 1134 of the CC, Article 6:248 of the NBW or Article 242 of the BGB, courts are required to exercise judicial restraint. A negotiated contract term will therefore be binding upon the parties unless, given all relevant circumstances, its enforcement would be unacceptable according to the criteria of reasonableness and equity. Strong evidence is required to set aside the express terms of a negotiated contract.²⁰⁹ By contrast, a term included in a standard form contract is generally regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the other party. The fact that a term in a standard form contract deviates from a provision of the law has been accepted under Dutch and German law as one indication of the term's unreasonable character. Indeed, Article 9(2) of the AGBG specifies that 'in doubt, an unreasonable disadvantage is to be presumed, when a term is incompatible with the rationale behind the legal provision from which it differs; or when a term restricts the essential rights or

²⁰⁸ French Consumer Code, art. L 132-1 fifth par.; NBW, art. 3:12, 6:233a); BGB, § 157 and AGBG, § 24a(3).

²⁰⁹ Asser-Hartkamp 1997, p. 301; Larenz 1987, p. 134.

obligations that flow from the nature of the contract to such an extent as to endanger the achievement of the contract's purpose.' Moreover, a term may be considered 'surprising' under Article 3 of the AGBG, if it differs significantly from default rules of law.²¹⁰ Whether the fact that a term deviates from a legal provision is an indication of an unreasonable disadvantage depends, of course, on the nature of the relevant legal provision. The indication will be stronger, for example, for a recent legal provision rather than for an old rule; for a legal provision whose rationale is clearly discernible rather than for one whose justification is subsumed in the need for regulation; or where the contract is governed by specific provisions rather than by generally applicable rules.²¹¹ Another relevant factor to consider is whether the legal rules from which the standard term deviates, affords protection to the other party to the contract.

In order to determine whether a licence term that purports to restrict the privileges for users normally recognised under the copyright act is unreasonable or abusive, courts would not only have to consider all the circumstances that prevailed at the time of conclusion of the contract, including all the clauses of the contract and the common usage of trade, but they would also have to inquire about the objectives pursued by the copyright act and the rationales behind the limitations on exclusive rights. Admittedly, the outcome of this type of inquiry may vary significantly from one country to another and from one limitation to another. Considering that to my knowledge, no case has been brought before the courts to challenge the fairness of a restrictive copyright licence term on the basis of the specific provisions on abusive clauses or of the requirement of objective good faith, I can only speculate as to what a court's response might be in such a case.

In France, I believe that courts would not be likely to find such restrictive terms to be abusive under Article L. 132-1 of the French Consumer Code or under Article 1134 of the CC, for two main reasons. First, because the French courts have traditionally taken a rather liberal approach towards consumer protection in general and towards judicial review of presumably abusive clauses in particular.²¹² As discussed in section 3.1.2.2 above, the intervention of the courts was limited for a long time to invalidating only those abusive clauses which had been declared so by decree of the *Conseil d'État* or by non-binding recommendation of the *Commission des clauses abusives*. In this sense, it is interesting to point out that the *Commission* adopted a Recommendation in 1995 concerning contracts proposed by publishers or producers of computer programs designed for use on a micro-

²¹⁰ Palandt 2000, § 3 AGBG, p. 2450.

²¹¹ Asser-Hartkamp 1997, p. 352.

²¹² Ghestin 1993, p. 79; Sinay-Cytermann 1996, p. 263.

computer.²¹³ But the *Commission's* effort was criticised for being too timid and for not addressing the real problems arising from the use of mass-market software licences. At least two types of clauses could have warranted further attention from the Commission: the clause by which the user is presumed to give her consent to the terms by tearing the wrapping around the product and clauses that restrict the user's rights, other than those limitations that derive from copyright law.²¹⁴ Nevertheless, this Recommendation does give an indication as to the position taken by the French authorities as to their role in preventing the use of abusive clauses in standard form contracts. Although the French courts are required to interpret the relevant sections of the French Consumer Code in compliance with the provisions of the Directive on unfair terms, it is doubtful whether they will intervene more frequently or more actively to control the fairness of terms included in standard form contracts, let alone of terms appearing in a negotiated agreement. In that sense, the Directive has certainly had no influence on the courts' assessment of the parties' obligations under the general requirement of *bonne foi*, which as I recall, has not given rise to any significant case law.

More importantly, from an author's rights perspective, however, the French courts may be reluctant to conclude that a restrictive copyright licence term is unfair. Most commentators maintain that the grant of exclusive rights under the French *droit d'auteur* regime is primarily justified by natural law principles. This vision of authors' rights centres on the person of the author and implies a hierarchy of interests favourable to the author.²¹⁵ As a consequence, limitations on authors' exclusive rights are scarce in the French Intellectual Property Code and are mainly seen as exceptions to the general principle of protection, which must receive strict interpretation.²¹⁶ Admittedly, the French authors' rights regime does take certain legitimate interests of users into account either through the recognition of a certain number of limitations on authors' rights, through the limited duration of the protection or through the application of the exhaustion doctrine. In a system where the rights of authors apparently weigh heavier in the eyes of the commentators than those of users and where the judicial control over abusive contract terms is relatively scant, the legitimate interests of users might not readily prevail in a challenge brought on the basis of the principle of *bonne foi* or of section L. 132-1 of the French Consumer Code. Unless legal norms of a higher rank are involved, I believe that a French court would not be

²¹³ Recommendation No. 95-02 concerning contracts proposed by publishers or producers of computer programs designed for use on a micro-computer, *JCP* 95, III, 67625.

²¹⁴ Espagnon 1995, p. 66.

²¹⁵ Lucas and Lucas 2001, p. 34.

²¹⁶ Lucas 1998, p. 171.

likely to view a deviation from the default rules of copyright law whereby the user's actions are restricted beyond what the statute otherwise allows, as creating a significant imbalance in the respective parties' obligations that would justify invalidating the contractual term.

By contrast, the Dutch courts might be more inclined to conclude that a licence that purports to restrict the users' statutory privileges is unreasonable. Dutch private law has gone through a wind of socialisation with the adoption of section 6.5.3 of the NBW and the application of the general principle of *redelijkheid en billijkheid*, whereby parties are required to take each other's legitimate interests into consideration at the time of conclusion of a contract.²¹⁷ Another consequence of the socialisation of private law is that the courts are more prompt than before to intervene regarding the content of contracts, with a view to protecting the weaker party or to level inequalities of bargaining power. This is particularly true in relation to standard form contracts. In the case of a licence term included in a standard form contract that deviates from the privileges normally recognised under copyright law, Dutch courts might be more receptive than the French courts to such arguments as the nature of the contract, the discrepancy with the law, and the bargaining power of the user.

The possible application of the general principle of *redelijkheid en billijkheid* to copyright matters has been examined by two commentators. Gielen was the first to suggest that in certain circumstances, the exercise of intellectual property rights might be contrary to the concept of objective good faith.²¹⁸ He based his remark on Spoor and Verkade's discussion on the desirability of introducing the American fair use doctrine into Dutch copyright law. These authors identify a number of cases, where following the letter of the Dutch Copyright Act the contested act of reproduction were found to infringe the owner's rights, but where such an act would probably have been found lawful, had a fair use defence existed.²¹⁹ Gielen believed in turn that it could not be excluded that a Dutch court might have reached a conclusion similar to the fair use doctrine in some of these cases by applying the general principle of objective good faith. In a subsequent Article, Krikke agreed that there would be reason to make room in the Dutch legal system for the corrective function of the *redelijkheid en billijkheid* principle.²²⁰ This, she added, didn't say what is reasonable and fair under copyright law. Since the issue cannot be decided in the abstract, the courts would have to look in each case at the objectives pursued by copyright law and at the rationales

²¹⁷ Hartlief 1999a, p. 18.

²¹⁸ Gielen 1994, p. 19 and ff.

²¹⁹ Spoor and Verkade 1993, p. 191.

²²⁰ Krikke 1995, p. 110.

behind the limitations on copyright. Contrary to French authors, who insist on the natural rights foundation of the *droit d'auteur* regime, Dutch authors often find it difficult to identify one single objective pursued by the Dutch copyright system.²²¹ In general, copyright law is explained in the Netherlands on the basis of two main considerations, one of justice to the author for her intellectual labour and another of intellectual or cultural usefulness to society. It would therefore not be inconceivable, from a copyright perspective, that the courts apply the *redelijkheid en billijkheid* principle so as to allow the legitimate interests of others to be taken into account, to be assessed along with those of the rights owner and weighed on equal footing.²²²

The anticipated reaction of the German courts to the question of the abusive character of restrictive copyright licence terms would coincide in my opinion with that of the Dutch courts. German private law has also gone through a similar wave of socialisation with the adoption of the AGBG, and the application of the notion of *Treu und Glauben* has also given rise to an important volume of jurisprudence.²²³ The provisions of the AGBG give the courts significant powers of intervention to control the content of terms included in standard form contracts. Since a term that is incompatible with the rationale behind the legal provision from which it differs is to be presumed unreasonable under Article 9(2) of the AGBG, a licence term that purported to restrict the privileges normally recognised to users under the copyright act would certainly be subject to strict judicial scrutiny.²²⁴ Courts would indeed have to examine whether such a departure from the limitations of the Copyright Act would go against the objectives pursued by the copyright system so as to justify the invalidation of the term. In fact, Article 9 of the AGBG has already been applied to invalidate a standard form licence that forbade the acquirer to sell or otherwise alienate a computer program, contrary to the exhaustion doctrine.²²⁵ As has occurred already in a number of copyright infringement cases,²²⁶ the German courts would inquire about the specific objectives of the copyright protection and about the limits of that protection in light of the *Sozialbindung* principle. In light of the case law, it is not excluded that, when weighing all interests at hand, a court might find

²²¹ Spoor and Verkade 1993, p. 8; and see: Grosheide (1986), who identifies seven rationales behind the adoption of the copyright regime.

²²² Krikke 1995, p. 110.

²²³ See: Larenz 1987, p. 129.

²²⁴ Hubmann 1984, p. 496.

²²⁵ Oberlandesgericht Nürnberg, *Computer und Recht* 1990, p. 118; see: Lehmann 1995, p. 565.

²²⁶ See for example: BverfGE, 29 June 2000, 1 BvR 825/98 (*Germania*), *AfP* 2000/5, p. 451; and BverfGE 49, 392 (*Kirchen und Schulgebrauch*) in *GRUR* 1980, p. 44.

that a licence term that purports to restrict the privileges for users normally recognised under the Copyright Act is contrary to the principle of *Sozialbindung* as well as to the notion of *Treu und Glauben*.²²⁷

Since a term that restricts the essential rights or obligations so as to hinder the achievement of the contract's purpose is to be presumed unreasonable under Article 9(2) of the AGBG, a licence term that would prevent a user from utilising the copyrighted work according to the contract's intended purpose would also be subject to judicial scrutiny. Let me take the example of a public library that purchases a videotape or a cassette with the express or implicit intention of lending it to the public, in accordance with Article 27(1) of the Copyright Act. Hubmann has argued that a term in a standard form contract that prohibits a public library from lending the videotape or the cassette to the public would be invalid, as contrary to Article 9 of the AGBG, since it would clearly prevent the library from using the work in the manner intended at the time of purchase.²²⁸ Considering the importance that the Supreme Court recently put on a technical library's right to make reproductions of works for inter-library loan purposes,²²⁹ it would indeed not be inconceivable that a court might conclude that a restrictive licence term that prohibits the public lending of works is invalid. This is, of course, without prejudice to a court's possible finding that the amount of remuneration due for the lending of works is insufficient in the circumstances.

This line of argumentation by no means implies that every term of use that differs from the copyright act would be deemed unreasonable or unfair under Dutch or German law. Courts would have to weigh all interests at hand on a case-by-case basis, taking account of the usage in the field and of all other terms in the contract. Indeed, some interests may weigh heavier than others. As I have concluded in an earlier section of this book, all 'legitimate interests' recognised by positive law must be taken into account whenever a conflict arises between the enforcement of exclusive rights by their owners and the exercise of a limitation by users. Admittedly, the outcome of this judicial weighing process is likely to vary from one contract to the other, according to the value awarded to the 'legitimate interest' behind each one of them. Depending on the circumstances, a contract term that limits a user's constitutional rights may be declared invalid more readily than one that limits, for example, the exercise of a limitation based on industry practice or on market failure considerations. The validity of a licence term that purports to restrict a user's constitutional right is examined in greater

²²⁷ Hackemann 1998, p. 514.

²²⁸ Hubmann 1984, p. 496.

²²⁹ BGH, 25 February 1999, I ZR 118/96 (*Kopienversanddienst*), *GRUR* 1999/08-09, p. 707.

detail in the following section of this book. Besides the specific 'legitimate interests' involved, the respective bargaining power of the parties and the form of the contract are likely to play a significant role in a court's determination of the fairness of a restrictive licence term under Article 6:233(a) of the NBW or Article 9 of the AGBG.

United States

In the United States, the judicial review of terms included in a standard form contract can only occur under the unconscionability doctrine, which has been codified in Section 2-302 of the UCC and more recently in Section 111 of the UCITA. The doctrine of unconscionability has generally been applied more restrictively than the European concept of objective good faith, both with regards to the category of individuals who can invoke it and to the criteria of evaluation.²³⁰ Indeed, as mentioned in section 3.2.1.2 above, the doctrine of unconscionability mainly serves as a consumer protection measure, since it is hardly ever accepted when invoked by professionals. In other words, the doctrine of unconscionability may offer some level of protection to physical persons, but it would in principle not apply to other categories of users of copyrighted material, such as small businesses, libraries, archives, educational institutions and the like.²³¹

Moreover, even in the case of contracts of adhesion, the doctrine of unconscionability will only apply if the weaker party can show that the term in dispute is beyond the reasonable expectations of an ordinary person, or is otherwise oppressive or causes unfair surprise.²³² As O'Rourke points out however, the doctrine of unconscionability is unlikely to assist consumers of copyrighted material, because the inquiry about the reasonable character of a use restriction is often reduced to an assessment of what the buyer's expectations were under all the facts and circumstances.²³³ The determination of the copyright user's reasonable expectations is made on a case-by-case basis and, in the absence of clear legal guidelines, is inherently speculative. Often courts will attempt to objectively determine what the reasonable expectations of the buyer would be given the relevant market. Sometimes, they will reach a conclusion on the buyer's reasonable expectations in the particular circumstances of a case without giving any

²³⁰ Farnsworth 1999, p. 314.

²³¹ Reichman and Franklin 1999, p. 928.

²³² See: *Wilson Pharmacy Inc. v. General Computer Corp.*, Tennessee Ct. App., No. E2000-00733-COA-R3-CV, decision of September 21, 2000.

²³³ O'Rourke 1997, p. 69.

motive.²³⁴ In O'Rourke's opinion, the importance of a market inquiry cannot be overemphasised. As she explains:

'The UCC is based on an economic rationale and clearly contemplates the introduction of relevant market evidence in Code cases. Thus, the market inquiry in the context of contract formation is obviously an appropriate one for a court to make. That market inquiry suggests that the use restriction should be upheld as a matter of contract law. However, just as stating that the shrinkwrap is an enforceable contract says little or nothing about whether that provision should be upheld as a matter of federal copyright law.'²³⁵

Unlike Dutch and German law, the fact that a clause included in a standard form contract deviates from the privileges normally recognised under American copyright law would not appear to be a factor for consideration under the doctrine of unconscionability, not even as part of the user's 'reasonable expectations'. Thus unless the circumstances are such that the restrictive licence term can be considered as oppressive or as causing unfair surprise as a matter of contract law, the restrictive licence term would be held enforceable under the doctrine of unconscionability, irrespective of the copyright policy implications.²³⁶ In other words, the assessment of the fairness of a licence term under the doctrine of unconscionability takes no account of copyright policy issues and revolves only around matters of contract law and market inquiry. The study of the compatibility of a restrictive licence for use of copyrighted material with federal copyright policy is conducted exclusively under the pre-emption doctrine analysis.²³⁷ Finally, in addition to recognising the applicability of the doctrine of unconscionability, Section 105(c) of the UCITA recognises the precedence of state consumer protection statutes over the provisions of the UCITA or a term of a contract concluded under the Act. This provision may not prove of any use to the consumer of copyrighted material, since most state consumer laws apply to specific areas of commercial activities that are unrelated to the licensing of digital copyrighted material. On the other hand, a mass-market licence that prohibits a person from quoting material for purposes of

²³⁴ See: *Wilson Pharmacy Inc. v. General Computer Corp.*, Tennessee Ct. App., No. E2000-00733-COA-R3-CV, decision of September 21, 2000.

²³⁵ O'Rourke 1997, p. 71.

²³⁶ This failure of the doctrine of unconscionability to take the copyright regime's balance of interest into consideration when applied to copyright licensing practices was denounced by Reichman and Franklin [1999, p. 929] who proposed instead the adoption of a 'public interest unconscionability' test.

²³⁷ On the issue of pre-emption see section 4.1.2 *supra*.

education or criticism, or that precludes a non-profit library licensee from making an archival copy, could perhaps be challenged as running afoul of public policy.²³⁸

It appears from the above survey that the level of protection offered to users of copyrighted material under the rules on consumer protection varies significantly from one country to the next, where the most effective protection derives from the regulation on standard form contracts. While consumer protection in the context of electronic commerce has become a hot topic at the international level, particularly in the Organisation for Economic Co-operation and Development (OECD),²³⁹ the particular problem of restrictive terms of use of copyrighted material has drawn no attention at all. Even harmonisation efforts such as the European Directive on unfair terms fall short of protecting users against the use of unreasonably restrictive licence terms. Nevertheless, it might still be too early to predict how the market for copyrighted material will evolve in the digital networked environment and whether producers and distributors of such material will be in a position to abuse their bargaining power to an unwarranted extent by imposing unreasonably restrictive licence terms on users. By the same token, it is probably too early as well to tell whether specific measures should be adopted to protect on-line users of copyrighted material against unreasonably restrictive licence terms. Nevertheless, there may be a genuine need to protect users of copyrighted material as weaker parties to such electronic contracts. Of course, the need for protection may vary according to the form of the contract, whether standard form or negotiated; the category of user, whether an individual consumer, small business, library or educational institution; the type of limitation or 'legitimate interest' involved. For example, to compensate for the restrictions put on the use of copyrighted material by libraries and educational institutions, other solutions have been proposed either in the form of subsidies²⁴⁰ or of self-regulation²⁴¹.

4.2.2.3 *Constitutional rights*

As is evident from previous subsections of this book, under continental European law, States have the duty to ensure the effectiveness of the protection of rights guaranteed under the Constitution.²⁴² Irrespective of

²³⁸ NCCUSL, UCITA – Official Comments, § 105, comm. 3, p. 19.

²³⁹ See: OECD, *Recommendation of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce*, Paris, December 9, 1999.

²⁴⁰ Hugenholtz 1998 preadvies, p. 236; and Merges 1997, p. 134.

²⁴¹ Krikke 2000, p. 158.

²⁴² See subsection 2.3.4 *supra*.

whether or not the author's right itself is to be considered as a fundamental right,²⁴³ the grant of a subjective right under European copyright law can be regarded as the legislator's fulfilment of the duty to give effect to the author's fundamental rights within the copyright system. More specifically, the recognition of a moral right can be seen as the implementation of the author's fundamental right to personality, and the grant of an exploitation right as the implementation of the author's right to property or alternatively, of her right to choose a profession. The same reasoning certainly holds true concerning the adoption of limitations on copyright. In fact, the introduction of a number of limitations in the copyright regime represents the fulfilment of a similar obligation on the part of the State in relation to the users' constitutional rights. Limitations on copyright, like the authorisation to make quotations, parodies, news reports, private copies or to use public information, are the realisation of the State's duty with respect to the enforcement of the users' freedom of expression and right to privacy. It follows from this that with respect to copyrighted material, authors and users may find themselves invoking competing claims based on the protection of their respective fundamental rights.²⁴⁴

What if the conflict of claims arises not from the mere application of the copyright rules, but from an agreement between private parties? Indeed, a dispute concerning the validity of a copyright licence term is likely to uncover a conflict of rights between licensor and licensee, where the copyright owner's freedom of contract and right to personality or property might be found to collide with the user's fundamental rights. For instance, a licence for the use of copyrighted material, which expressly or implicitly restricts or prohibits the making of quotations or parodies, might conflict with the user's freedom of expression and freedom of creation. A stipulation that expressly or implicitly prevents the making of a news report might be found to conflict with the news organisation's freedom of the press, whereas a prohibition on the making of private copies might conflict with the user's right to privacy or sphere of autonomy.

In fact, a survey of current licensing practices for the use of copyrighted material does indicate that rights owners increasingly tend to restrict or even to prohibit the making of 'any reproduction for any purpose whatsoever', especially in the digital networked environment. Admittedly, the courts have generally been reluctant to accept a separate freedom of expression defence in copyright infringement cases. The argument put forward when refusing to consider this defence has been that if the use of

²⁴³ For comments supporting this view, see: Dessemontet 1998, p. 113; and Vivant 1997, p. 61.

²⁴⁴ Hugenholtz 1989, p. 153; Spoor and Verkade 1993, p. 7.

copyrighted material does not meet the criteria of the statutory limitations on copyright, there would be no reason why it should be exempted under constitutional law. This argument no longer holds true, however, once a contractual stipulation – and not the copyright act itself – limits the user's right to make a reproduction of the work for purposes such as criticism, comment, news reporting, scholarship, or research. Such a contractual restriction might, depending on the circumstances of each case, affect the user's fundamental rights to various degrees. The question is whether a licence term that prevents a quotation, parody, news report, private copy or use of public information to be made from a copyrighted work constitutes a valid restriction of the users' fundamental rights. In view of the total absence of any relevant case law, my remarks on this topic can at this point only be speculative.

Europe

As discussed in subsection 3.2.2.3 above, a party may, in application of the principle of private autonomy, agree by contract to certain restrictions on the protection or exercise of her fundamental rights. However, it is generally recognised under continental European constitutional law that an absolute renunciation of a party's fundamental rights or one that would affect the core of her rights would be null and void. Although most statutory limitations on copyright have not expressly been declared inalienable, a contractual clause through which a user relinquished all benefit from those limitations could probably be held invalid, most of all if such renunciation led to a serious encroachment upon her fundamental rights. Accordingly, a sweeping prohibition on users of copyrighted material to make quotations, parodies or 'any other reproduction for any purpose whatsoever' would most likely be declared null and void. If a complete waiver of the exercise of the limitations on copyright is probably invalid, the question remains to what extent parties to a contract may agree to restrictions on the exercise of such limitations.

Although continental European jurisprudence has not always been consistent, the few cases that have dealt with questions of the horizontal working of constitutional rights have shown a distinct preference for an *indirect* application of the constitutional rights through a constitutionally conform interpretation of the general rules of law. These cases remain exceptional. Moreover, the horizontal effect of constitutional rights is generally held to be much weaker in contractual relationships than in non-contractual situations, since parties are able to exercise their individual autonomy at the time of the conclusion of the contract. On the basis of the case law discussed in subsection 3.2.2.4, courts would take the following

factors into consideration when assessing the validity of a restrictive clause included in a copyright licence:

- The respective bargaining position of the parties;
- The type of contract used;
- The seriousness of the encroachment upon the right;
- The purpose of the contract; and
- Whether the restriction imposed is proportional to the purpose of the contract.

Concerning the respective bargaining power of the parties to a copyright licence and the type of contract used, I refer the reader to my discussion in subsection 4.2.2.2 above. Suffice it to say that in the context of a restriction on a party's fundamental rights, the greater the inequality existing in the respective bargaining position of the parties, the more suspect the stipulation would be.²⁴⁵ The same remark holds true, of course, for restrictions presented in standard form contracts. If a licence term purported to restrict the user's fundamental rights in a standard form contract, the user would certainly be entitled to challenge its reasonableness and fairness on the basis of the legislation on abusive clauses. As demonstrated in the previous subsection, such a challenge might have greater chances of success under Article 6:233(a) of the Dutch NBW or Article 9 of the German AGBG, than under the French principle of *bonne foi* or of Section L. 132-1 of the French Consumer Code.

The question of the seriousness of the encroachment upon the user's fundamental rights is more problematic. Under Dutch and Germany constitutional theory, the question may also be formulated in terms of whether the contractual restriction affects the core of the user's right or merely a peripheral element of that right. If the restriction had the effect of encroaching upon the core of the right, then the stipulation would be null and void. Where a restriction does not affect the rights' essential content, there is no clear answer as to whether such a restriction is lawful or not. Faced with a challenge brought under Article 10 of the ECHR, a court might enquire instead whether the contractual restriction is 'necessary in a democratic society' and whether it is justified for the 'protection of the rights of others'.²⁴⁶ Although no decision has been rendered on this specific issue, valuable insight can be drawn from the case law on freedom of expression and freedom of the press. The European Court of Human Rights developed a test for the assessment of what is 'necessary in a democratic society' in the

²⁴⁵ See: Boukema 1966, p. 46 (Germany) and p. 142 (Netherlands).

²⁴⁶ De Meij, Hins, Nieuwenhuis and Schuijt 2000, p. 252 and f.

Handyside and *The Sunday Times* decisions. In *Handyside*, which involved the publication of an allegedly sexually and morally offensive schoolbook, the Court declared:

‘The Court’s supervisory functions oblige it to pay the utmost attention to the principles characterising a ‘democratic society’. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’. This means, amongst other things, that every ‘formality’, ‘condition’, ‘restriction’ or ‘penalty’ imposed in this sphere must be proportionate to the legitimate aim pursued.’²⁴⁷

One year later, the European Court of Human Rights clarified its thoughts on the notion of what is ‘necessary in a democratic society’, in relation to the role of the press:

‘These principles are of particular importance as far as the press is concerned. They are equally applicable to the field of the administration of justice, which serves the interests of the community at large and requires the co-operation of an enlightened public. (...) Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them’²⁴⁸

A survey of the case law shows that European courts tend to let freedom of expression prevail over other protected interests whenever the expression is considered to contribute significantly to the opinion-forming

²⁴⁷ *Handyside v. The United Kingdom*, European Court of Human Rights, 7 December 1978, Series A No. 24, § 49.

²⁴⁸ *Sunday Times*, European Court of Human Rights, 26 April 1979, Series A No. 30, § 65.

process or to the intellectual debate.²⁴⁹ Thus the core of freedom of expression might be considered affected if for example, an individual or a member of the press was unable to voice an opinion, a criticism or a comment on a matter touching the public interest. Moreover, a number of cases indicate that not only the message conveyed, but also the form of expression are recognised as a protected exercise of freedom of expression under Article 10 of the ECHR or Article 5 of the GG, as the case may be.²⁵⁰ More specifically, a few courts have admitted the fact that the unauthorised use of copyright protected material may, under certain circumstances, constitute a justifiable limit to the rights holder's copyright.²⁵¹ Consequently, I believe that if a contract clause were to prohibit the user of copyrighted material from making otherwise lawful uses of a work in such a way that she would be prevented from contributing to the opinion-forming process or to intellectual debate, the core of her freedom of expression would be affected.

Even if a contract clause does not have the objective or the effect of interfering with the core of a user's freedom of expression, the next step is to ask whether the restriction on the user's freedom is proportional to the objective pursued by the contract. Generally speaking, the purpose of a licence for the use of copyrighted material is to grant the user permission to accomplish certain acts in relation to a work, which without this authorisation

²⁴⁹ In Germany: BVerfGE 42, 143 (*Deutschland Magazin*), at p. 149; BVerfGE 101, 361 (*Caroline von Monaco II*), at p. 392; in Europe: *Sunday Times v. The United Kingdom*, European Court of Human Rights, 26 April 1979, Series A No. 30, § 65; and *Lingens v. Austria*, European Court of Human Rights, 8 July 1986, Series A No. 103; *Barfod v. Denmark*, European Court of Human Rights, 22 February 1989, Series A No. 149, § 29 where the Court writes: 'When striking a fair balance between these interests, the Court cannot overlook, as the applicant and the Commission rightly pointed out, the great importance of not discouraging members of the public, for fear of criminal or other sanctions, from voicing their opinions on issues of public concern.'

²⁵⁰ *Müller & Ors v. Switzerland*, European Court of Human Rights, 24 May 1988, Series A no. 133, § 27; *Oberschlick v. Austria*, European Court of Human Rights, 23 May 1991, Series A No. 204, § 57 where the Court writes: 'Article 10 (art. 10) protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed'; and Hof Amsterdam, 30 October 1980, *NJ* 1981, No. 422 (*Boycott Outspan Aksie*). In Germany: Landgericht Berlin, 12 December 1960 (*Maifeiern*), in *GRUR* 1962/04, p. 207; BVerfGE, 29 June 2000, 1 BvR 825/98 (*Germania*), *AfP* 2000/5, p. 451; and BVerfGE, 17 December 1999, 1 BvR 1611/99 (*Havemann*), *ZUM* 2000/4, p. 316.

²⁵¹ In France: Tribunal de Grande Instance de Paris, 3^e ch., 23 February 1999 (*Fabris v. France 2*), *Le Dalloz* 1999, No. 38, p. 582; *RIDA* 2000/184, p. 374; in Germany: Landgericht Berlin, 12 December 1960 (*Maifeiern*), in *GRUR* 1962/04, p. 207; BVerfGE, 29 June 2000, 1 BvR 825/98 (*Germania*), *AfP* 2000/5, p. 451; and BVerfGE, 17 December 1999, 1 BvR 1611/99 (*Havemann*), *ZUM* 2000/4, p. 316. See discussion of these cases in subsection 2.2.1.1 *supra*.

would constitute an infringement. Such permission is necessary only when a user wishes to execute an act that falls within the scope of the exclusive right of the copyright owner. No permission is needed however, for acts that are covered by a statutory limitation on copyright. A contract term that restricts or prohibits the exercise of a statutory limitation on copyright essentially takes away the privilege of the user to accomplish a particular act with respect to a copyrighted work. Arguably, rights owners hope that the grant of such licences of use will leave them in a position to exercise greater control over the use of their work so as to increase exploitation revenues and to prevent possible acts of infringement. While rights owners are certainly entitled to protect their economic interests, privacy, or reputation within the bounds set by copyright law, would a restriction on the right to quote or to make a parody or news report be considered 'necessary' and 'proportional' to the interest served by the contract?²⁵²

It is virtually impossible to determine in the abstract whether a restriction on the user's exercise of her freedom of expression, through quotes, parodies and news reports, would be held valid as a means to protect the rights owner's interests. The lack of relevant case law on the validity of such contractual restrictions leaves me no choice but to extrapolate ideas from the jurisprudence developed in copyright infringement matters. In my opinion, there would be cases, like the *Maifeiern*²⁵³ and *Germania*²⁵⁴ cases, where a restriction would be found disproportionate to the objective of the licence, especially if it prevented the user from making a contribution to the opinion-forming process or from taking part in intellectual debate. There would be other cases, like in the *Volkskrant v. Stichting Beeldrecht*²⁵⁵ and *Anne Frank Stichting*²⁵⁶ cases, where such a restriction would have proven helpful to protect the rights owner's interest. Between these two extremes would be cases like the *Fabris v. France 2* decision,²⁵⁷ where the balance could tilt either way depending on the judge's appreciation of the facts. However, considering the courts' common reluctance to intervene in negotiated agreements, it is highly improbable in my opinion that a court would invalidate a restrictive copyright licence term to which parties had voluntarily agreed, considering the prevalent interest in protecting

²⁵² See: HR, decision of 3 November 1988, *NJ* 1991/168 (*Woonstichting Sint Joseph arrest*).

²⁵³ Landgericht Berlin, 12 December 1960 (*Maifeiern*), in *GRUR* 1962/04, p. 207.

²⁵⁴ BVerfGE, 29 June 2000, 1 BvR 825/98 (*Germania*).

²⁵⁵ Arrondissementsrechtbank te Amsterdam, 19 January 1994 (*De Volkskrant v. M.A. van Dijk en de Stichting Beeldrecht*), reproduced in *Informatierecht/AMI* 1994, p. 51.

²⁵⁶ Arrondissementsrechtbank te Amsterdam, 12 November 1998, No. 6 (*Anne Frank Fonds v. Het Parool*), in *Mediaforum* 1999, p. 39 with note from Hugenholtz.

²⁵⁷ Tribunal de Grande Instance de Paris, 3^e ch., 23 February 1999 (*Fabris v. France 2*), *Le Dalloz* 1999, No. 38, p. 582; *RIDA* 2000/184, p. 374.

expectations arising from a contract. On the other hand, the courts' appreciation might differ if the restrictive term were included in a standard form contract. After looking at the respective bargaining position of the parties and at the proportional character of the restriction, a court might conclude that a term included in a standard form contract that restricts the user's ability to quote, make a news report or a parody runs afoul of the principle of objective good faith, or of public order and good morals.

United States

In the United States, the outcome of an analysis of the validity of a licence term restricting a person's First Amendment rights would, in my opinion, be as uncertain as in continental Europe, if not more so. There, perhaps more than in Europe, freedom of contract is the rule. Contracting parties are thus free to conclude any contract with respect to the use of copyrighted material that fits their needs, including one that purports to restrict the other party's First Amendment rights.²⁵⁸ As the Official Comments to the UCITA emphasise, the courts are generally reluctant to override contract terms, especially when these terms have been negotiated, in deference to the law's traditional interest in protecting the expectations of the parties. However, contract terms may be held to be unenforceable if they violate a fundamental public policy that clearly overrides the policy favouring enforcement of private contracts between the parties.²⁵⁹ On this point, the Official Comments hold that in the absence of a legislative declaration establishing a particular policy, the courts should consider various factors when deciding whether to enforce a contract term or not.²⁶⁰ Among the different factors mentioned are the extent to which the interests of each party to the transaction or the public are affected, the interest in protecting expectations arising from the contract, the purpose of the challenged term, the extent to which other fundamental public interests are affected, the strength and consistency of judicial decisions applying similar policies in similar contexts, the nature of any express legislative or regulatory policies, and the values of certainty of enforcement and uniformity in interpreting contractual provisions.

The Official Comments further specify that among the offsetting public policies most likely to be applicable to transactions within the scope of application of the UCITA are those relating to innovation, competition, fair comment and fair use. The Comments explain that:

²⁵⁸ Merges 1997, p. 126.

²⁵⁹ Restatement (Second) of Contracts, § 178.

²⁶⁰ NCCSUL, UCITA – Official Comments, § 105, comm. 3, p. 20.

'Rights of free expression may include the right of persons to comment, whether positively or negatively, on the character or quality of information in the marketplace. Free expression and the public interest in supporting public domain use of published information also underlie fair use as a restraint on information property rights. Fair use doctrine is established by Congress in the Copyright Act. Its application and the policy of fair use is (sic) one for consideration and determination there. However, to the extent that Congress has established policies on fair use those can [be] (sic) taken into consideration under this section'.²⁶¹

The drafters of the UCITA have put an emphasis on the balance of interests reached within the copyright system. By referring to the doctrine of fair use and to the public policies behind it, the Official Comments do not purport to declare the fair use doctrine mandatory. At most, the doctrine and the public policies behind it are to be 'taken into consideration' by the courts. It is worth pointing out however that no court has ever declared a contract clause unenforceable on grounds of public policy as violating a party's freedom of speech.²⁶² It remains to be seen how far the courts will go to preserve the balance traditionally established under copyright law when interpreting restrictive copyright licence terms on the basis of the provisions of the UCITA.²⁶³

The Official Comments to the UCITA do concede that 'there remains the possibility that contractual terms, particularly those arising from a context without negotiation, may be impermissible if they violate fundamental public policy'.²⁶⁴ The Comments further state that '[t]his Act and general contract law also recognise the commercial necessity of enforcing standard-form agreements mass market transactions. The terms of such forms may not be available to the licensee prior to the payment of the price and typically are not subject to affirmative negotiations. In such circumstances, courts must be more vigilant in assuring that limitations on use of the informational subject matter of the licence are not invalid under fundamental public policy'.²⁶⁵ The drafters would thus see a difference with respect to restrictions placed on a

²⁶¹ Ibid.

²⁶² Garfield 1998, p. 297.

²⁶³ Compare the case *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), which upholds the anti-circumvention provisions of the Digital Millennium Copyright Act, thereby effectively eliminating fair use for most users of digitised works.

²⁶⁴ NCCUSL, UCITA – Official Comments, § 105, comm. 3, p. 20.

²⁶⁵ Ibid.

party's fundamental rights through a negotiated agreement or through a standard form contract. Although the criteria for a valid waiver of First Amendment rights are not entirely clear, the courts would require that the waiver at least be made *voluntarily* and *expressly*,²⁶⁶ which is certainly a more stringent requirement than the level of assent necessary to form a valid contract under the UCITA.

Although the Official Comments to the UCITA make no mention of the possibility, it has been recognised in American case law that an action taken by a private individual that allegedly violates another's rights is open to constitutional scrutiny, if that individual's action can be assimilated to a state action.²⁶⁷ Admittedly, the Supreme Court's case law on the doctrine of state action is not a model of consistency and no court has ever ruled specifically on whether the enforcement of a contractual restriction on a person's rights guaranteed under the Bill of Rights might constitute a state action. However, the Supreme Court did rule that the judicial enforcement of a restrictive contract clause and the judicial application of a state rule of law to a private cause of action both constitute a state action, warranting constitutional scrutiny.²⁶⁸ On the basis of the precedents set by *Shelley v. Kraemer* and *New York Times v. Sullivan*, one could therefore argue that a state action could be found to exist if a court were to apply the state contract law implementing the provisions of the UCITA and enforce a restrictive copyright licence term.

Assuming that in such circumstances, the judicial enforcement of a restrictive copyright licence term would constitute a state action, the following question to be asked concerns the level of constitutional scrutiny to be exercised. No U.S. court has, to my knowledge, ever ruled on the specific question of whether a contractual restriction placed on a user's right to make a fair use of a copyrighted work constitutes a content-based or a content-neutral regulation of speech or a general conduct regulation.²⁶⁹ One decision that may shed some light on this issue is the Supreme Court's ruling in *Snepp v. United States*.²⁷⁰ In this case, the appellant had pledged, as a former agent of the Central Intelligence Agency (CIA), not to divulge classified information and not to publish any information without prepublication clearance. By publishing a book without seeking prior approval, Snepp had breached his employment contract with the CIA. Without expressly

²⁶⁶ See: *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), in which the Supreme Court was 'unwilling to find waiver in circumstances which fall short of being clear and compelling'.

²⁶⁷ See subsection 3.2.2.1 *supra*.

²⁶⁸ *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Barrows v. Jackson*, 346 U.S. 249 (1953); and *New York Times v. Sullivan*, 376 U.S. 254 (1964).

²⁶⁹ See subsection 3.2.2.2 *supra*.

²⁷⁰ *Snepp v. United States*, 444 U.S. 507 (1980).

qualifying the contractual restriction on speech, the Supreme Court explained in a footnote that ‘Snepp’s agreement is an ‘entirely appropriate’ exercise of the CIA Director’s statutory mandate to “protec[t] intelligence sources and methods from unauthorized disclosure”’. In the Court’s opinion, ‘the Government ha[d] a compelling interest in protecting both the secrecy of information important to (...) national security and the appearance of confidentiality so essential to the effective operation of [the] foreign intelligence service’.²⁷¹ The Supreme Court’s reference to a ‘compelling interest’ would seem to indicate that the restriction on speech in Snepp’s employment contract was deemed to constitute a content-based regulation. Nevertheless, Snepp’s contract passed the Court’s First Amendment strict scrutiny by being ‘entirely appropriate’ in the circumstances.

When determining the appropriate level of constitutional scrutiny that should be given to a restrictive copyright licence term, the courts would also examine whether the restricted speech falls within a category of speech that is fully protected under the First Amendment or under a recognised category of ‘low-value’ speech, such as commercial speech,²⁷² or obscenity. In the first case, the restriction on speech would be subject to strict constitutional scrutiny, while in the second case the restriction would be subject to intermediate scrutiny. Considering that the defence of fair use can be raised in relation to a large number of different factual circumstances, it is almost impossible to determine in the abstract whether a restrictive licence term would be equivalent to a content-based, a content-neutral or a general conduct regulation. Arguably, a corporate or an individual copyright owner would probably not place a contractual restriction on the user’s speech because of the content of the latter’s message, so as to constitute a content-based regulation. Consequently, unless the contractual restriction were aimed at the content of the user’s speech, most restrictions on speech would probably fall under the categories of content-neutral or general conduct regulations, depending on the circumstances of each case. Moreover, the same clause that prohibits or limits the user’s capacity to make a quote or a news report from a protected work may in practice constitute a content-neutral restriction in some circumstances, but merely a general conduct regulation in others.

A parallel can also be drawn between the enforcement of a contractual restriction on a user’s right to make a fair use of a work on the one hand, and

²⁷¹ Id., footnote 3.

²⁷² *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), at p. 762; *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989), at p. 482; and *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980) at p. 566.

the enforcement of the rights owner's copyright in the context of an infringement action, on the other hand. Indeed, the enforcement of a contractual restriction may affect the user's speech in a way comparable to the enforcement of the owner's copyright. Over the years, courts and commentators have debated on the question of whether copyright protection and the fair use doctrine raise questions for First Amendment review and if so, whether copyright rules would be content-based or content-neutral and whether they would be subject to strict or intermediate constitutional scrutiny.²⁷³ Since copyright accommodates free speech concerns through the idea/expression dichotomy, the limited duration and the fair use doctrine, the prevailing view among the courts has been that copyright law gives rise to no First Amendment scrutiny.

This position was reiterated recently by the District Court of New York in a context quite similar to that of the enforcement of a restrictive contractual term. In *Universal City Studios v. Reimerdes*, the District Court was asked to review the impact on a users' First Amendment rights of anti-circumvention measures applied to copyrighted works pursuant to the provisions of the Digital Millennium Copyright Act (DMCA).²⁷⁴ In this case, Reimerdes, a traditional publisher engaged in news reporting, was enjoined from providing to his readers the text of a controversial computer program, or even information about where on the Internet the reader could find that programme. In doing so, Judge Kaplan concluded that this type of activity contravened the anti-trafficking provisions of the DMCA and rejected the defendant's claim that the application of these provisions violated his First Amendment rights.

Following the introduction of the anti-circumvention provisions of the DMCA and the District Court's controversial decision in *Reimerdes*, some commentators have urged the legal community to consider copyright protection as a content-neutral form of speech regulation, which should be subject at least to intermediate constitutional scrutiny.²⁷⁵ As Netanel explains:

'In contrast to true general conduct regulation, copyright law is heavily implicated in the structuring and operation of traditional First Amendment media industries and touches directly and consistently on access to and uses of speech. Indeed, with the exception of its limited

²⁷³ Nimmer 1999, § 1.10[A], p. 1-6.42 and ff.; Fraser 1998, p. 1; Patry 1995, p. 574 and ff.; Zimmerman 1992, p. 665; Patterson 1987, p. 1; Goldwag 1979, p. 321; Denicola 1979, p. 285; Rosenfield 1975, p. 795; Nimmer 1970, p. 1180; and Goldstein 1970, p. 983.

²⁷⁴ *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

²⁷⁵ Netanel 2001, p. 4; Benkler 1999, p. 446.

application to computer programs and other functional expression, copyright *only* governs speakers and audiences. So even if using the literal form of existing expression does not itself constitute First Amendment speech, copyright's regulation of such use and the speech burdens that flow from that regulation are intrinsic to copyright's regulatory framework. They are far from the sporadic, adventitious, 'incidental' burdens typical of general conduct regulation falling within the third First Amendment category.²⁷⁶

Assuming that copyright rules were to be recognised as a content-neutral regulation of speech and that state action were found to exist, then a restrictive copyright licence term would only be upheld if it promoted a substantial interest that would be achieved less effectively, in the absence of the regulation and if it does not burden speech substantially more than is necessary to further that interest. The proportionality test would have to be conducted on a case-by-case basis. Thus, the courts would have to rule on the question of whether the restrictive copyright licence term promotes a substantial interest that would be achieved less effectively in the absence of the regulation and on whether such restriction burdens speech substantially more than is necessary to further that interest.

Nevertheless, given the central value of free expression in continental Europe and the United States, I believe that courts should refuse to enforce a restrictive contractual term whenever that term has the effect of preventing a user of copyrighted material from making 'a unique contribution to an enlightened democratic dialogue'.²⁷⁷ In deference to the principle of freedom of contract, parties should be able to agree to restrict the licensee's possibility to make a quote, parody, news report, or any other reproduction of a work for purposes such as criticism, comment, or research. However, to be valid or enforceable under European or American law, such a waiver of the user's freedom of expression should be subject to affirmative negotiations between parties with relatively equal bargaining power and should be no less than *voluntary* and *express*. Contrary to the drafters of the UCITA, I believe that a restriction on the right to quote and to make parodies or news reports should be presumed to run afoul of public policy if inserted in a standard form contract.

My observation holds true whether the restriction is imposed in the form of an absolute prohibition on speech or in the form of a higher price to pay by the user for the privilege of making a quote or other reproduction.

²⁷⁶ Netanel 2001, p. 37.

²⁷⁷ Nimmer 1970, p. 1197.

Indeed, as I have argued earlier in this book,²⁷⁸ the payment of remuneration under a statutory licence is only one condition among others to fulfil for the right to use a protected work without prior authorisation. The choice between an exemption and a statutory licence for the right to use a protected work without authorisation does reflect the importance awarded by the legislator to the 'legitimate interest' underlying the limitation. Most if not all limitations designed to accommodate freedom of expression concerns in Europe and the United States are covered by specific exemptions or by the fair use doctrine, whose exercise is tied to the payment of no remuneration or damage. I conclude from the European legislators' and the American Congress' choice of the type of limitation that they considered the users' freedom of expression interests sufficiently important to leave their exercise free from the obligation to pay remuneration to the rights holder. The idea of submitting the right to quote or to make parodies or news reports to the payment of a higher price under a price discrimination scheme could stifle the users' freedom of expression just as much as an absolute prohibition might.²⁷⁹

In fact, authors who favour the establishment of a price discrimination scheme are conscious of the threat posed by restrictive copyright licence terms to freedom of expression and creation, for some recognise that in certain circumstances users should have a right of 'fair breach' of their contractual obligations.²⁸⁰ In this sense, Fisher has advocated the adoption of a series of compulsory terms designed to preserve the public benefits of specified types of access or use.²⁸¹ Although this proposal deserves serious consideration, Cohen argues that where contracts are enforced by technical protection systems, technology takes insufficient account of the individuals' legal privilege to make lawful uses of protected works.²⁸² She contends that the exercise of the privilege in the digital environment would be rendered either impossible by technological measures or dependent on an *ex post* court ruling recognising the legitimacy of the exercise.

The question of the effect of technical measures on the capacity of users of copyrighted material to exercise their privileges under the Copyright Act lies beyond the scope of my study. There is no doubt, however, that restrictive contract clauses have a 'chilling effect' on expression as soon as users of copyrighted material are effectively prevented – either because of the application of technical measures, fear of litigation or too high a price – from making a quote, parody, news report, or any other reproduction of a work that

²⁷⁸ See subsection 2.3.3 *supra*.

²⁷⁹ Benkler 1999, p. 436.

²⁸⁰ Ginsburg 2000, p. 16.

²⁸¹ Fisher 1998, p. 1241-51.

²⁸² Cohen 2000, p. 1815.

would allow them to contribute to intellectual debate. Consequently, and although this measure may prove insufficient in practice, I maintain along with Fisher that the limitations on copyright that are meant to accommodate the user's freedom of expression should be declared imperative, at least in standard form contracts. Like in the case of the reverse engineering²⁸³ or decompilation of computer programs,²⁸⁴ legislative recognition of the primacy of the limitations based on freedom of expression would give a clear indication to rights owners, users and courts on where public policy draws the line between the interests of rights owners and users.

4.2.2.4 *Abuse or misuse of rights*

It appears from section 3.2.4 above, that in continental Europe, courts may refuse to enforce a subjective right under the doctrine of abuse of rights, if that right has been exercised in an abnormal fashion. The abnormal use of a right may consist 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. Similarly, United States courts have developed the doctrine of copyright misuse, according to which enforcement of a copyright will be refused where the holder's own conduct is so contrary to the law or public policy as to bar recovery in an infringement suit. The question arises whether a licence that restricts the use of copyrighted material beyond the statutory privileges constitutes an abnormal use of a copyright that could be challenged under the civil law doctrine of abuse of rights or under its American counterpart, the common law doctrine of copyright misuse. Since the risk is rather remote that rights owners would exercise their rights, through contract, carelessly or with the intent to cause harm and since cases of abuse of dominant position or of monopolisation have been examined earlier in this book, I focus in the following pages on whether restrictive licence terms may be among those types of exercises either that are done without legitimate interest or divert the right from its social function or that violate American copyright policy objectives. Furthermore, whereas the previous section examined whether the users' constitutional rights may serve as a limit to the licensor's freedom of contract, I consider in this section only those instances of abuse or misuse of rights that involve different user interests than those safeguarded by constitutional law.

²⁸³ U.S. Copyright Act, § 1201(f).

²⁸⁴ Computer programs directive, art. 6.

Europe

Considering that no separate doctrine of abuse of rights has developed under German civil law,²⁸⁵ the validity of a licence term that purports to restrict the privileges normally granted to users under the German Copyright Act would be examined in light of the general principles of *Treu und Glauben* and of *Sozialbindung*. For this, I refer the reader to section 4.2.2.2 above. By contrast, the notion of abuse of rights plays an important role in the control of the exercise made of copyrights in France. Three provisions of the French Intellectual Property Code (CPI) explicitly refer to the concept of abuse. Hence, while Article L. 111-1 lays down the principle according to which the ownership of an intellectual right is independent from the ownership in the material object, Article L. 111-3 specifies that ‘in case of notorious abuse of the owner [of the material object] preventing the exercise of the right of disclosure, the district court may order any appropriate measure to be taken, in compliance with the provisions of Article L. 121-3.’ This provision covers the case of opposing claims between the owner of a copyright in a work and the owner of a tangible copy embodying that work. This would be the situation for example, if the owner of a painting refused to give the artist access to her work for the purpose of making a photograph to be included in a comprehensive catalogue of her works.²⁸⁶ Article L. 121-3 of the Code pertains to the ‘notorious’ abuse in the use or non-use of the right of disclosure on the part of the representatives of a deceased author, whereas Article 122-9 is to the same effect with respect to the exploitation rights of a deceased author. If a ‘notorious’ abuse is found to exist, the court may order any appropriate measure to be taken.²⁸⁷ When is an abuse of rights ‘notorious’? When it is so manifest that the typical owner of a material object, preoccupied by her rights and conscious of her duties with regard to the deceased author's express wishes to communicate her works to the public, would not commit it.²⁸⁸

These provisions of the CPI would in all evidence not cover the case of a living licensor who attempts to restrict the use of copyrighted material beyond the statutory privileges. Be that as it may, the presence of these articles in the CPI manifests the explicit intention of the legislator to subject

²⁸⁵ See section 3.2.3 *supra*.

²⁸⁶ Gautier 1999, p. 246.

²⁸⁷ See: *Fujita case*, Court of Appeals of Rennes, 16 November 1990, *RIDA* 1991/148, p. 168.

²⁸⁸ Gautier 1999, p. 247.

the exercise of author's rights to judicial control under the abuse of rights doctrine. As with regard to the exercise of any other private right under French civil law, the doctrine of abuse of rights imposes on 'copyright owners a code of good conduct in the exercise of their rights'.²⁸⁹ Hence, depending on the circumstances of each case, the courts may be called upon either to apply Articles L. 111-3 or 122-9 of the Code by analogy or to apply the general principle of law set out in Article 544 of the Civil Code. In doing so, the courts would inquire whether the licensor has a legitimate interest in exercising her rights in this fashion or alternatively, invoking Josserand's social function of rights theory, whether such exercise is in compliance with the specific ends for which the rights were granted and which justify their existence.²⁹⁰ What are the specific ends pursued by the French author's rights regime? To what extent must rights owners take account of the public interest in the exercise of their rights?

The influence of natural law principles is clearly discernible from the courts' and the commentators' analysis of the specific ends served by the French author's rights regime. In the *National Meteorology* case for example, where the copyright owner in meteorological data had refused to grant another access to such data, the Court of Appeal of Paris identified as essential ends of the regime the double objective of protecting moral rights and of rewarding creative effort.²⁹¹ Given that the French *droit d'auteur* system is centred on the person of the author, a rights owner would have, in principle, no obligation to take the public interest into account when exercising her rights. In a recent article on the subject, Caron acknowledges that authors' rights should be exercised in conformity with their intended function. Referring to Josserand's theory, he maintains however that the primary function of the author's rights regime is to protect the author's personality rights.²⁹² Thus, an author or her representatives could not invoke the author's moral rights to prevent a reasonable exploitation of the work.²⁹³ Warning against a socialisation of the *droit d'auteur* regime, Caron insists that while the regime undeniably serves a certain social function, the disregard of such a function should not be sufficient to justify having recourse to the doctrine of abuse of rights.²⁹⁴ According to him, the recent

²⁸⁹ Caron 1998, p. 55.

²⁹⁰ Carreau 1996, p. 31; Gautier 1999, p. 462.

²⁹¹ *National Meteorology*, Court of Appeals of Paris, decision of 18 March 1993, *Gaz. Pal.* 9 July 1993, p. 13, cited in Gautier 1999, p. 462.

²⁹² Caron 1998, p. 63.

²⁹³ *Fujita case*, Court of Appeals of Rennes, 16 November 1990, *RIDA* 1991/148, p. 168; and *Serge Malaussena v. Editions Gallimard*, Court of Appeals of Paris, 1st Ch., 19 December 1997, *RIDA* 1998/176, p. 433.

²⁹⁴ Caron 1998, p. 61.

tendency to limit the exercise of copyrights through the application of the doctrine of abuse of rights can be explained by the fact that the requirements for the grant of copyright protection are constantly decreasing. Since protection is granted on items that hardly constitute a work in the sense of the CPI or that manifest little or no originality, the courts are called upon to compensate such excessive protection by applying the doctrine. Caron and others therefore argue that a tightening of the criteria for the grant of copyright protection would reduce or even eliminate the need to resort to the civil law doctrine of abuse of rights.²⁹⁵

In light of this, I find it somewhat unlikely that, in the case of a licence that restricts the use of copyrighted material beyond the privileges granted under the CPI, a French court would conclude that such an exercise of rights is incompatible with the regime's main objectives of protecting moral rights and rewarding creative effort. In other words, such exercise would probably be considered to fall within the *internal* limits of the French author's rights system. Unless the user were able to prove that the rights owner had no legitimate interest in licensing her rights subject to such a restriction or that she acted with a malicious intent, the restrictive licence term would most probably be upheld under the doctrine of abuse of rights. It is worth pointing out, however, that the CPI contains only a small number of limitations on copyrights, most of which either protect the users' constitutional rights or regulate the use of computer programs and databases according to the prescriptions of the European Union Directives. Consequently, the theory of abuse of rights may not have much practical significance for matters that involve other interests than constitutional rights or free competition, which are discussed in previous sections of this book.

Contrary to French copyright law, the Dutch Copyright Act makes no explicit reference to the doctrine of abuse of rights. Moreover, the application of the doctrine of abuse of rights to copyright matters has not led to a significant amount of jurisprudence in the Netherlands. The Supreme Court's decision in *Dior v. Evora*²⁹⁶ is one of the rare instances where the civil law doctrine of abuse of rights was expressly invoked as a defence to a copyright infringement action. Unfortunately, the defendant's argument, according to which Dior had abused her copyright in the sense of Article 3:13 of the NBW, by making use of it for a purpose other than that for which it was granted, was rejected without further explanation. Be that as it may, commentators have, on occasion, explored the issue of the possible application of the doctrine to the field of copyright law. Dutch civilists like Okma and Van der Grinten have generally held that, on the basis of

²⁹⁵ Id., p. 71; and Sirinelli 1999, p. 143.

²⁹⁶ HR 20 December 1995, *NJ* 1996, p. 682, § 3.10.

Josserand's social function of rights theory, the doctrine of abuse of rights would be particularly well-suited to control the exercise of intellectual property rights, since their social function is more readily discernible than that of other types of property rights.²⁹⁷ Copyright scholars like Spoor and Verkade have suggested that certain copyright infringement cases should be put to the test of the doctrine of abuse of rights, and particularly to the requirement of proportionality that is incorporated in Article 3:13 of the NBW.²⁹⁸ Presenting several examples of cases where defendants have been held liable for committing rather inconsequential forms of copyright infringement, these scholars argue that, had such a proportionality test been applied, more equitable results might perhaps have followed.²⁹⁹

Building on Stein's introductory article on the subject,³⁰⁰ Krikke shows how the doctrine of abuse of rights can serve as a limit to the exercise of copyrights under Dutch law.³⁰¹ Of the three possible instances of abuse listed in Article 3:13 of the NBW, two may be particularly relevant to copyright matters, i.e. 1) whether the right is used for a purpose other than that for which the right has been granted; and 2) whether the right could not reasonably have been exercised, considering the disproportion between the interest to exercise the right and the harm caused thereby. Regarding the latter form of abuse, Krikke refers, like Stein before her, to the argument put forth by Spoor and Verkade. The requirement of proportionality is in fact derived from the jurisprudence of the Dutch Supreme Court. In the *Buma-Brinkmann* case,³⁰² the Dutch collecting society Buma had requested the payment of a significantly higher tariff for the public performance of music from organisers of events like the defendant than from other types of hall operators. In reaction to this tariff structure, the organisers of events started to put pressure on hall operators to conclude agreements with the Buma. The Supreme Court observed in somewhat confused terms that the Buma's behaviour would amount to an abuse of dominant position,³⁰³ but only insofar as the restrictions imposed on the licensee were so cumbersome and harmful that the Buma could not, taking all affected interests into consideration,

²⁹⁷ Okma 1945, p. 92; and Van der Grinten 1984, p. 387.

²⁹⁸ Let me recall that among the instances of abuse listed as examples in article 3:13 of the NBW is 'the exercise of a right where its holder could not reasonably have decided to exercise it, given the disproportion between the interest to exercise the right and the harm caused thereby'.

²⁹⁹ Spoor and Verkade 1993, p. 192; and see also: Van Lingen 1998, p. 116.

³⁰⁰ Stein 1993, pp. 123-126.

³⁰¹ Krikke 1995, pp. 103-110.

³⁰² *Buma-Brinkmann*, HR 24 May 1968, NJ 1968, 252.

³⁰³ The language of the Supreme Court, where the competition law notion of abuse of dominant position is confused with the civil law notion of abuse of right, is not unusual.

reasonably have come up with such an arrangement. According to the Court, there was no such abuse in the circumstances at hand. The Supreme Court's proportionality test under the doctrine of abuse of rights resembles the requirement developed by the same Court under the principle of *redelijkheid en billijkheid*, where parties are said to have a duty to take each other's interest into account.³⁰⁴

As to the first form of abuse, the enforcement of a right may be refused where the purpose of the rights owner's claim does not serve to protect the interest for which the right was granted. In an attempt to define the purpose of the Dutch copyright regime, Krikke acknowledges the difficulty of identifying one single objective, noting for example that Grosheide distinguishes as many as seven rationales behind the copyright system.³⁰⁵ Adding to the uncertainty, Krikke observes that the Hoge Raad has remained rather laconic on the subject. In the *Zienderogen Kunst* case for example,³⁰⁶ the Court simply described the purpose of copyright law as 'to offer protection to the maker of a work, among others in ways that are relevant to the work's exploitation through communication to the public or reproduction'. By contrast, the European Court of Justice has ruled, following a naturalist approach, that the function of copyright is to 'protect the moral rights in the work and ensure a reward for the creative effort'.³⁰⁷ Relying on this definition of the European Court, Krikke concludes that there may be abuse where a copyright is exercised for a purpose other than protecting the moral rights in the work or ensuring a reward for the creative effort. Moreover, even if the exercise pursues a justifiable goal, there could also be abuse if greater consideration were to have been given to the interests of others.³⁰⁸

While I agree in substance with Krikke's first conclusion, I nevertheless believe that the grounds for a finding of abuse may be broader than what the author contends, considering that a number of other rationales behind the adoption of the Dutch copyright system have a more utilitarian character than the ones she relied on. For instance, the Supreme Court's self-restraint on the subject should not be taken as a firm indication that the creation of the Dutch copyright system pursues no other purpose than the one mentioned in the *Zienderogen Kunst* decision. Similarly, the European Court of Justice's conception of the rationales behind the copyright system should

³⁰⁴ *Baris/Riezenkamp*, HR 15 November 1957, *NJ* 1958, 67.

³⁰⁵ Grosheide 1986, p. 128.

³⁰⁶ *Zienderogen Kunst*, HR 22 June 1990, *NJ* 1991, 268.

³⁰⁷ *RTE and ITP v. Commission*, European Court of Justice, 6 April 1995, joint cases C-241/91 and C-242/91, *IIC* 1996/27, at p. 83.

³⁰⁸ Krikke 1995, p. 108.

not be blindly applied for it may not necessarily reflect the distinctiveness of the Dutch system. Indeed, Grosheide identified seven different rationales for the Dutch copyright regime, only two of which correspond to those enumerated by the European Court of Justice. The five other justifications proposed by Grosheide can be said to fulfil some degree of social utility, insofar as they are all based on general considerations of efficiency and of encouragement of creativity.³⁰⁹ Moreover, since the publication of Grosheide's theory on the foundations of the Dutch copyright system in 1986, Dutch commentators have widely referred to it, most often with approval.³¹⁰ Thus, copyright law is to be explained in the Netherlands not only in terms of justice to the author for her intellectual labour or of protection of moral rights, but also in terms of intellectual or cultural usefulness to society.³¹¹

Consequently, I believe that a Dutch court could, depending on the circumstances of each case, refuse to enforce a licence term that purports to restrict the privileges normally granted to users, on the ground that it constituted an abuse of rights in the sense of Article 3:13 of the NBW. In practice, the element of abuse could be tested against any one of the arguments raised by Grosheide. For instance, I submit that a licence term that prohibits a school from incorporating copyrighted material in any kind of course pack (*bloemlezing*) notwithstanding the payment of an equitable remuneration could be held to be abusive to the extent that it conflicts with the cultural policy objectives implemented by Article 15(c) of the Copyright Act. A restrictive licence term might also be held to be abusive, if it were evident to the court that the ensuing protection exceeds the legislator's intended purpose of providing the author with an incentive to create. Furthermore, the fact that such licence terms are included in a standard form agreement rather than in a negotiated agreement may constitute an important factor for consideration in the application of the proportionality test of Article 3:13 of the NBW, as it would in the application of the *redelijkheid en billijkheid* principle. These remarks will remain pure speculation until such time as the courts are called upon to rule on the matter.

³⁰⁹ See section 2.1.1 *supra*. The five other rationales named by Grosheide [1986, p. 128] are the following: the economic argument, the social argument, the cultural argument, the argument of freedom of expression, and the pragmatic argument.

³¹⁰ Dommering 2000, p. 448; Haeck 1998, p. 30-39; Spoor and Verkade 1993, p. 8; Van Lingem 1999, p. 18; Quaedvlieg 1996, p. 7.

³¹¹ Dommering 2000, p. 448; and Spoor and Verkade 1993, p. 8.

United States

In the United States, the doctrine of copyright misuse has been applied in the course of the last decade in cases where a licence agreement either violated the antitrust laws or expanded the licensor's copyright protection beyond the scope of the legal monopoly. In fact, since the Court of Appeals for the Fourth Circuit rendered its decision in the *Lasercomb* case,³¹² a number of courts have held that an antitrust violation is a sufficient, though not necessary, element of the misuse defence.³¹³ In other words, even if the use of a copyright does not violate antitrust laws, a defence of misuse might be admissible in an infringement action if the copyright is being used in a manner that conflicts with the public policy embodied in the grant of a copyright. What type of conduct or of licensing practice have the courts identified as running afoul of Congress' public policy? On the basis of the relevant case law, would a licence that purports to restrict the user's right to make a fair use of a copyrighted work be considered to conflict with public policy so as to qualify as a misuse of copyright?

In the *Lasercomb* case, the plaintiff brought an action for copyright infringement to enjoin Reynolds from copying its computer-aided die-making software. As the evidence showed, however, Lasercomb sought in its standard form licensing agreement to prevent the licensee and all its employees from independently developing any kind of computer-assisted die-making software. Moreover, the contractual restraint lasted for a period of ninety-nine years, possibly longer than the life of the copyright itself. At first instance, the court granted the injunction for the plaintiff. On appeal, the Fourth Circuit reversed the lower court's decision, judging that Lasercomb had misused its copyright through the use of this non-competition provision, which was contrary to the general public policy against restraint of trade. As the Court of Appeals noted: 'the misuse arises from Lasercomb's attempt to use its copyright in a particular expression, the Interact software, to control competition in an area outside the copyright, i.e., the idea of computer-assisted die manufacture, regardless of whether such conduct amounts to an antitrust violation.'³¹⁴ As in the Supreme Court hearing of the *Morton Salt* case,³¹⁵ the Fourth Circuit admitted the copyright misuse defence even

³¹² *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970 (4th Cir. 1990).

³¹³ *Practice Management Information Corp. v. American Medical Association*, 121 F.3d 516 (9th Cir.) *cert denied*, 118 S.Ct. 339 (1997); *DSC Communications Corp. v. DGI Technologies, Inc.*, 81 F.3d 597 (5th Cir. 1996); *National Cable Television Association Inc. v. Broadcast Music, Inc.*, 772 F. Supp. 614, (D.D.C. 1991); *Broadcast Music, Inc. v. Hearst/ABC Viacom Entertainment Services*, 746 F. Supp. 320 (S.D.N.Y. 1990).

³¹⁴ *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970 (4th Cir. 1990), at p. 979.

³¹⁵ *Morton Salt Co. v. G.S. Suppiger*, 314 U.S. 488 (1942).

though the defendants were not explicitly parties to the licensing agreement containing the offending language.

Two other Circuits have expressly followed the *Lasercomb* decision. In *Practice Management Information Corp. v. American Medical Association*,³¹⁶ the Court of Appeals for the Ninth Circuit concluded that the American Medical Association misused its copyright by licensing its software in exchange for the defendant's agreement not to use a competing coding system.³¹⁷ More recently, the Court of Appeals for the Fifth Circuit came to a similar conclusion in a case involving the manufacture and sale by Alcatel (formerly DSC) of non-patented telephone switching equipment controlled by copyrighted system software that it licensed with the equipment.³¹⁸ DSC's licensing agreement restricted the use of the software to its own equipment. Disregarding the clause, the defendant DGI sought to produce a compatible switching device in competition with DSC for use in DSC equipment. In order to build a compatible product, DGI had to download the software to test and operate the microprocessor card. DSC sued DGI for copyright infringement and in its defence, DGI invoked misuse. At trial, the court ruled in favour of the plaintiff. On the basis of the *Lasercomb* decision, the Court of Appeals reversed the judgement, holding that without the freedom to test its cards in conjunction with DSC's software, DGI was effectively prevented from developing its product, thereby securing for DSC a limited monopoly over its uncopyrighted microprocessor cards. In other words, the plaintiff's licensing agreement was seen as an improper expansion of the copyright grant to control competition in an area outside the scope of the copyright.

Given that the origins of the copyright misuse doctrine lie in antitrust law and in the equitable defence of 'unclean hands', it comes as no surprise that most if not all cases where copyright misuse has been raised involve some kind of anti-competitive behaviour on the part of the plaintiff. The anti-competitive behaviour under attack was in all three cases a non-competition clause included in the software licensing agreement, which the courts refused to enforce because it was contrary to the general public policy against restraint of trade. I realise, of course, that the copyright misuse doctrine is a relatively recent trend in United States jurisprudence and that its scope and rationales have yet to be delineated by the Supreme Court. More specifically, the Supreme Court would have to confirm the tendency observed

³¹⁶ *Practice Management Information Corporation v. The American Medical Association*, 121 F.3d 516 (9th Cir.) cert denied 118 S. Ct. 339 (1997).

³¹⁷ Nimmer 1999, p. 13-289.

³¹⁸ *Alcatel USA, Inc. v. DGI Technologies, Inc.*, U.S.C.A. 5th Cir., No. 97-11339, January 29, 1999.

among courts and commentators to consider an antitrust violation as a sufficient but non-necessary element of a copyright misuse defence and to base that defence on grounds of public policy. In view of this tendency, could misuse be found to exist outside the antitrust or restraint of trade context, i.e., in any case where a 'copyright is being used in manner violative of the public policy embodied in the grant of a copyright'?³¹⁹ I believe that it should, although my position at this point mostly speculative is.

More than the pre-emption doctrine or the fair use doctrine, the copyright misuse doctrine is seen as the appropriate tool for restricting the enforcement of anti-competitive licensing provisions and thereby, for tailoring copyright incentives. While an antitrust violation may no longer be required for a finding of misuse, a finding of misuse based on the public policy embodied in the grant of a copyright is hardly ever exempt from considerations of an economic nature, like the prevention of some anti-competitive extension of copyright.³²⁰ When trying to identify the public policy objectives behind the American copyright system, commentators generally refer to the Supreme Court's often-repeated position concerning the utilitarian nature of intellectual property rights. According to established case law of the Supreme Court, the primary objective of American copyright law is to promote the public welfare by enhancing the public's access to an increasing number of works, implemented by Congress through an elaborate scheme of economic incentives.³²¹ Thus, while the copyright regime is meant to guarantee authors adequate control over the use and exploitation of their work, the bundle of rights and privileges granted under the regime is designed to achieve a socially optimal investment in creativity and innovation. In this sense, the rights granted to creators are often perceived as a means to an end, where the end is the production and dissemination of creative material.³²²

The doctrine of copyright misuse should thus provide courts with a tool to balance the potential benefits of creation against the social cost

³¹⁹ *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970 (4th Cir. 1990), at p. 978.

³²⁰ Lemley 1999, p. 151; and Reichman and Franklin 1999, p. 923; Cohen 1995, p. 1193; Hanna 1994, p. 446.

³²¹ *Mazer v. Stein*, 347 U.S. 201, 219 (1953) ('The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts'). See also *Feist Publications, Inc. v. Rural Tel. Services Co.*, 499 U.S. 340, 349-50 (1991) ("The principal objective of copyright is not to reward the labour of authors, but 'to promote the Progress of Science and useful Arts'"); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948); *United States v. Loew's, Inc.*, 371 U.S. 38, 44-51 (1962).

³²² Arar 1994, p. 420.

associated with the exploitation of exclusive rights. Ideally, the doctrine should permit only such exploitation as is necessary to align the public and private interests in the production and dissemination of creative material. As Hanna explains:

‘Rather than attempting to measure the merits of a copyrighted work, then, courts should instead focus on the dynamic impact of a plaintiff’s challenged practice on the pace of innovation within the relevant market. Practices which do not constrain the development and dissemination of innovative materials should be permissible, regardless of the level of profits copyright holders realize. For example, practices which merely constrain the introduction of purely duplicative materials should not be prohibited. By contrast, practices which preclude others from developing and introducing works which improve upon, or expand the range of, available copyrighted materials should be presumed to constitute copyright misuse. Copyright privileges should not be permitted to restrict creative endeavours.’³²³

According to this view, the doctrine of copyright misuse would be available only to control those situations where a rights owner abuses the system of economic incentives granted to her under the Copyright Act, so that the primary purpose of the copyright regime is indirectly subverted. Among the licensing practices that the courts have held to ‘preclude others from developing or introducing new works’ are such terms as non-competition clauses or prohibitions on reverse engineering for purposes of interoperability. On the same grounds, the courts would be likely to refuse to enforce a licence term that prevents the owner of a copy of a computer program to make another copy or adaptation of that computer program, as otherwise permitted under section 117 of the Copyright Act. In my opinion, licence terms that restrict or prohibit the making of quotations or parodies could be held to be abusive, insofar as they might have the direct effect of precluding the production of new works. In this sense, the Supreme Court did state in *Harper & Row* that ‘[it] do not suggest this right not to speak would sanction abuse of the copyright owner’s monopoly as an instrument to suppress facts’.³²⁴ Some twenty years earlier, the Court of Appeals for the Second Circuit had also suggested that copyright protection would find a limit where rights owners would attempt to use their rights for purposes other than those for which they were granted:

³²³ Hanna 1994, p. 446.

³²⁴ *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), at p. 564.

‘The spirit of the First Amendment applies to the copyright laws at least to the extent that the courts should not tolerate any attempted interference with the public's right to be informed regarding matters of general interest when anyone seeks to use the copyright statute which was designed to protect interests of quite a different nature’.³²⁵

Following Hanna's approach, contractual arrangements that prevent libraries and educational institutions from making copies of works for the purpose of disseminating knowledge would probably not be considered abusive, since restrictions on such types of limitations could be construed as merely ‘constraining the introduction of purely duplicative materials’ on the market. The same remark would hold true, of course, for limitations that aim to reduce or eliminate transaction costs in the market, such as the making of reproductions of works for internal or commercial purposes or the retransmission of broadcast signals. In fact, this distinction between contractual clauses that preclude the production of new works and others that prevent the introduction of purely duplicative materials would be consistent with the existing case law on copyright infringement. For instance, in *Campbell v. Acuff-Rose*³²⁶ the Supreme Court rejected Acuff-Rose's copyright infringement claim partly on the ground that the parody of the song ‘Oh, Pretty Woman’ was a ‘transformative work’. By contrast, in *American Geophysical Union v. Texaco*³²⁷ the Court of Appeals for the Second Circuit found in favour of the plaintiff, holding that if Texaco wanted to continue its copying activities, it could either use the licensing schemes of the Copyright Clearance Center or purchase additional subscriptions to the periodical.

As a result, the fact that the misuse doctrine would probably not apply to licence terms that prevent the introduction of purely duplicative materials signifies that contracting parties would be free to regulate purely reproductive activities, which are otherwise characterised by high transaction costs. It would also mean, however, that the doctrine would be of no help to control those contractual arrangements that restrict uses of copyrighted material but that have nevertheless a strong public interest character, such as reproductions by libraries or educational institutions.³²⁸ In this sense, Hanna's view of the applicability of the misuse doctrine on public policy grounds may appear rather restrictive if one considers that the primary

³²⁵ *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), at p. 311 (J. Lumbard).

³²⁶ *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994).

³²⁷ *American Geophysical Union, et al v. Texaco Inc.*, 37 F.3d 881 (2d Cir. 1994), see section 2.3.4 *supra*.

³²⁸ Reichman and Franklin 1999, p. 925.

objective of American copyright law is to promote the public welfare by enhancing the public's access to an increasing number of works. His approach would already go beyond the one that is currently being followed by the courts.

Chapter 5

Conclusion

5.1 Summary

In conclusion, except for the very few statutory limitations that have been expressly declared mandatory, there is no definite guideline to determine whether limitations on copyright are imperative or not. Generally speaking, limitations on copyright can be said to reflect the legislator's express recognition of the users' interests in making certain unauthorised uses of copyrighted material. The question I have tried to answer in this book is the following: if the limitations on copyright are considered to form an integral part of the copyright balance, to what extent are individuals bound to respect this bargain in their private contractual relations? In fact, the answer varies significantly from one country to the next. Not only is the answer dependent on the country's approach to the copyright protection itself, but also on that country's approach to the principle of freedom of contract. My overall conclusion is that in France, where the *droit d'auteur* system is based primarily on the natural rights theory and where positive law admits relatively few limits on freedom of contract, restrictive copyright licence terms would probably be held valid. In the Netherlands and Germany, where the copyright systems would appear more accommodating of the users' interests and where contracting parties are expected to take account of each other's interests, the courts might be more inclined to invalidate restrictive licence terms. In the United States, although the copyright system is known to pursue utilitarian objectives, the principle of freedom of contract is so strong that restrictive copyright licence terms would most likely be held enforceable. These observations essentially hold true whether the restrictive copyright licence term is included in a fully negotiated or a standard form contract. Let me review these findings in a little more detail.

Copyright rules and limitations

Following a brief introduction of the subject in the first chapter, subsections 2.1 and 2.2 examined the general structure of the copyright system, and more particularly the place, the form and the rationales behind

the limitations on copyright. Differences between the American copyright system and Europe's authors' rights regime are immediately visible in the way the limitations are expressed in the legislation. Distinctions also exist between the European systems. To varying degrees, the protection of fundamental freedoms, the safeguard of free competition, and the accommodation of public interest matters, all form part of the copyright balance in France, the Netherlands, Germany and the United States. The protection of the users' fundamental freedom of expression is undeniably the most widely accepted justification for the adoption of statutory limitations on copyright. Although the formulation of the statutory provisions may vary from one act to another, the user's fundamental freedom of expression is generally guaranteed by such exemptions as the fair use doctrine or the right to quote or make reproductions for the purposes of comment, criticism, news reports, research, or parodies. Perhaps because continental European copyright acts contain an exhaustive list of strictly worded and interpreted limitations, continental European courts would seem somewhat more willing than their American counterparts to entertain the idea that the protection of freedom of expression might in certain circumstances constitute a proper defence to a copyright infringement action.

Significant disparities also exist between copyright regimes regarding the choice of other specific user interests to accommodate through statutory limitations on copyright, as well as regarding the form to give these limitations. These disparities may be explained to a large extent by the distinct foundations and objectives of the two copyright traditions, where the continental European authors' rights tradition follows a naturalist approach and the American copyright tradition takes a utilitarian approach. By putting greater emphasis either on the author's interests or on the social benefit gained from making certain unauthorised uses of copyrighted material, the philosophical underpinnings of each regime plays a determining role in the definition of the rationale, scope, and form of a particular limitation. For example, the American Congress estimated that the general social welfare of the American people would be best served by providing specific limitations in favour of educational institutions, non-profit organisations and libraries in the form of an exemption. By contrast, in continental Europe, if such limitations are implemented at all, they are usually more favourable to the rights owners, permitting certain uses by schools and libraries to take place only against payment of an equitable remuneration to the rights holder. The same observation can be made with respect to the home taping and reprographic activities of users. Where most continental European copyright acts allow these acts to take place only if rights owners receive equitable remuneration, the American Congress has decided not to intervene, with the exception of digital home-recording activities, and to leave the issue to the courts under the uncompensated doctrine of fair use.

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This led me to enquire in subsection 2.3 about the legal nature of the limitations on copyright, and more particularly about the type of entitlement and claim that a user may hold under the law with respect to a copyrighted work. Generally speaking, limitations form an integral part of the copyright system, for they are the recognition under continental European positive law of the users' 'legitimate interests' in making certain unauthorised uses of copyrighted material. Similarly, limitations on copyright are the recognition under American copyright law of the legislator's 'public policy objective' in allowing certain unauthorised uses of copyrighted material to take place. Having identified the user's claim as an 'objective right' in Europe or as a 'privilege' in the United States, I then looked at whether the nature of the user's claim varies according to the form of the limitation or to its justification. From the user's perspective, I believe that the form of a given limitation probably has little influence on its nature, since the payment of remuneration is only one condition to meet among many for the lawful use of a work without prior authorisation. On the other hand, the rationale behind the adoption of a limitation essentially determines the weight that the courts will give the limitation, for example when the user's right comes in conflict with the rights owner's freedom of contract. In other words, a user's right or privilege to use a protected work is only as strong as the 'legitimate interest' or 'public policy objective' that it embodies. Precisely because some 'legitimate interests' weigh heavier than others or contribute more directly to copyright law's utilitarian objectives, certain contractual agreements that purport to restrict the application of a specific limitation on copyright may warrant greater attention than others.

Principle of freedom of contract and its inherent limits

In subsection 3.1, I presented the theoretical background to the study of the intersection between copyright rules and contract rules. To this end, I first examined the foundations of the principle of freedom of contract through the lens of the classic contract model, which inevitably led me to consider the standard form contract model that evolved in reaction to profound socio-economic changes. Despite the growing use of standardised contracts, the principle of freedom of contract remains a cornerstone of the western legal system. Even today, freedom of contract is considered as a means to enhance social welfare and individual self-fulfilment. However, since parties do not always enjoy equal bargaining power, the unrestricted exercise of one party's freedom of contract may lead to distortions in the economic market. Furthermore, there is always the danger that the more powerful party will take unfair advantage of the adhering party's lack of experience or lack of information. Consequently, the fact that freedom of contract constitutes a fundamental principle in our legal system does not make this freedom

unlimited. The doctrine of good faith in continental European civil law, like the doctrine of unconscionability in American common law, constitutes an important limit to freedom of contract. Apart from these general rules of law, the number of specific enactments that restrict the freedom of each individual to regulate her private relationships has considerably increased over time. I therefore focused on the limits set by the norms of economic and protective public order (norms designed to protect specific categories of individuals known to be weaker contracting parties), by the constitutional rights, and by the notions of abuse and misuse of right.

In furtherance of the competitive process, the norms of economic public order impose, among other measures, certain restrictions on the freedom of contract so as to prevent the use of contracts to build economic power and to abuse it. For the purposes of my research, emphasis was put on Article 82 of the EC Treaty and section 2 of the United States Sherman Act, which deal respectively with abuse of dominant position in the market or acquisition or maintenance of monopoly power by an undertaking. The analysis of both provisions led to similar conclusions. To amount to a violation of the European rules on competition or of the American antitrust laws, a copyright owner must be found either to abuse her dominant position or to have acquired or maintained her monopoly power by improper means. As the survey of the relevant case law demonstrated, it can be very difficult to prove abusive conduct or an attempt to monopolise the market on the part of a dominant undertaking. This is especially true considering that, both under European and American competition law, anyone is in principle free to decide with whom and under what conditions she will deal. Moreover, recent case law in the United States and Europe indicates that the 'essential facilities' doctrine is to be applied only in 'exceptional cases'.

To protect weaker parties to a contract, like tenants, authors, or consumers, a vast array of legislative measures has been put in place to limit the stronger party's freedom of contract or to provide a framework for its exercise. A review of the relevant legislation and jurisprudence shows that the Dutch and German laws on contracts follow a distinctly more social approach to contracting – one might say more 'paternalistic' – than the United States or even France might have in comparable circumstances. This social approach to contracting is particularly obvious when one considers that the principle of objective good faith has been interpreted in the Netherlands and Germany as imposing a duty on each contracting party to take each other's interest into account. Like the provisions of the European Directive on unfair contract terms that they inspired, the Dutch and German provisions state that a term included in a standard form contract is generally regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the other party. The fact that a term in a standard form

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contract deviates from a provision of the law has been accepted in the Netherlands and Germany as an indication of the term's unreasonable character. Generally speaking, however, the interpretation of the American doctrine of unconscionability differs quite substantially from the continental European interpretation of unfair terms, where the courts not only look at the oppressive or surprising effect of a term but also at whether the allocation of risks by such term 'unfairly prejudices' the other party.

The question of whether constitutional rights apply in private relationships required a more extensive study in subsection 3.2.2 and, considering the scarcity of relevant case law, my findings on this issue are uncertain at best. Fundamental rights traditionally protect individuals against interference from the State. However, there is among continental European commentators increased acknowledgement of the fact that in a coherent legal system, individuals should have the right to see their fundamental rights respected, including in private relationships. The jurisprudence of the European Court of Human Rights would tend to support this position. Although Dutch and German jurisprudence has not always been constant, the few cases that have dealt with questions of horizontal working of constitutional rights have shown a distinct preference for an *indirect* effect. These cases remain exceptional, however. Moreover, the horizontal effect of constitutional rights is generally held to be much weaker in contractual relationships than in non-contractual situations, since parties are able to exercise their individual autonomy at the time of the conclusion of the contract. In addition to judicial restraint in this area, it must also be noted that, in principle, nothing precludes individuals from waiving the protection of their fundamental rights. Nevertheless, the validity of a restrictive contract term could still be challenged in principle if the circumstances were such that the party's assent to the waiver was not express or voluntary, if the core of the right was affected or if the restriction was disproportionate to the purpose of the contract.

In the United States, an individual's private action would only be open to constitutional scrutiny if that individual's action were to be assimilated to a state action. Even if a state action is found to exist, the courts must then decide what degree of constitutional scrutiny should be applied in the particular circumstances of the case. The main difficulty in defining a single standard for the judicial review of freedom of expression problems is that the First Amendment freedoms play a variety of roles in protecting each individual's interest in self-fulfilment as well as society's interest in robust public debate regarding public interest issues. A number of tests have emerged from the decisions of the United States Supreme Court, which take different approaches to determining the proper standard of judicial review for various types of free speech problems. Perhaps the most widely apply test developed by the Supreme Court is the category approach. In considering

First Amendment challenges under this test, the courts must first determine whether the regulation in question is content-based or content-neutral. Under this test, content-based restrictions are enforced only if they are supported by a compelling governmental interest and if they are narrowly tailored to further that interest. By contrast, content-neutral restrictions are held enforceable if they serve to promote a substantial governmental interest that would be achieved less effectively absent the regulations and if they do not burden speech substantially more than is necessary to further that interest. However, no court has ruled yet on whether the enforcement of a contractual restriction on a person's rights guaranteed under the First Amendment can constitute a state action subject to constitutional scrutiny.

Finally, I turned in subsection 3.2.3 to the doctrine of abuse of rights, recognised under continental European civil law, and to the doctrine of misuse of right, admitted under American common law. Admittedly, the two doctrines have very different origins, one deriving from civil property and liability law, and the other from American antitrust law. Nevertheless, a certain parallel can be drawn between the two concepts. Hence, in certain countries of continental Europe, like France and the Netherlands, the courts have on occasion refused to enforce subjective rights under the doctrine of abuse of rights, when these rights were exercised in an abnormal fashion. The abnormal use of a right may consist 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. Similarly, United States courts have developed the doctrine of copyright misuse, according to which enforcement of a right will be refused where the holder's own conduct is so contrary to law or public policy as to bar recovery in an infringement suit. Both doctrines have the common feature that the use of a right in a manner that runs afoul of public policy or of the social function of the right is not uniformly accepted as a basis for abuse.

Freedom of contract with respect to the use of copyrighted material

Subsection 4.1 dealt with contractual practices relating to the use of copyrighted material. There, I observed that the same evolution has marked this type of contractual relations as those of any other field of economic activity. Alongside of the fully negotiated contracts with producers and distributors of copyrighted material, there is a growing tendency to grant end-users a licence for the use of works on the basis of standard form contracts. For many, digital networked technology is currently revolutionising the mass-market distribution by offering the perfect preconditions for the development of a contractual culture. It has been argued that users of copyrighted material will soon be able to 'individualise' their contracts with merchants so as to best suit their needs, thanks to the interactive nature of the

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medium. The on-line licence models commonly envisioned in Europe and America involve the licensing of rights on a per-transaction, per-use, per-work, or other basis. Even in the digital networked environment however, negotiating every single clause of an on-line contract with every potential user is just as burdensome as it is in the analogue world. The mass-market distribution of copyrighted works is thus accompanied by an increased use of standard form contracts in the digital environment as well.

In practice, shrink-wrap and click-wrap licences would seem to become the norm for the distribution of copyrighted material in digital format. This led me to enquire about the validity of shrink-wrap or click-wrap licences under continental European civil law and American common law. A review of the applicable law and jurisprudence revealed striking differences between the two legal systems. Whereas the validity of electronic or distance contracts has been expressly recognised under the laws of Europe and the United States, the European courts have adopted a much more circumspect attitude towards these licences than their American counterparts, particularly on the question of assent. In France, the Netherlands and Germany, the courts would generally consider a standard form contract to be valid, provided that the adhering party is aware both of the contract's existence and its content before completion of the sale.

By contrast, the Uniform Computer Information Transactions Act (UCITA) essentially endorses the practice developed in certain United States courts of enforcing licence terms even if these were communicated after the transaction occurred, provided that the licensee was given the possibility to return the product if the terms were unacceptable. The UCITA also confirms that in most instances, the simple act of tearing open a plastic wrapping or of running a program on a computer will constitute a valid manifestation of assent on the licensee's part, even if she has not fully read or understood the terms of the licence. In principle, this proposed mode of contracting poses no real problem for on-line licences, where the terms can easily be made available for review before the completion of the transaction. It certainly can create difficulties for off-line licences that are sent along with the product after the transaction has taken place and to which the licensee binds herself by accomplishment of a simple gesture, unless she returns the product if the terms are unacceptable. In view of the general tendency to recognise 'shrink-wrap' and 'click-wrap' licences as valid and enforceable under contract law, rights owners have now the power to condition every use of copyrighted material to the terms of a standard form contract. The situation might become problematic where rights owners attempt to restrict the user's action beyond the limits set by copyright law.

In subsection 4.2, I turned to the study of the possible limits of freedom of contract regarding the use of copyrighted material. Subsection 4.2.1 focused on the limits set by copyright law. In view of the absence of

any relevant case law, any conclusion at this point can be only speculative. In my opinion, the provisions of the copyright systems offer no definite guideline for the solution of conflicts arising between the user's 'objective right' or 'privilege' to benefit from a statutory limitation and a rights owner's freedom of contract. In Europe, even the mandatory provisions of the Directives on computer programs and databases have been implemented differently among Member States, bringing about an inconsistent degree of 'imperativeness' for these provisions. And apart from these specific provisions, French and Dutch copyright legislation gives no further indication concerning the mandatory character of limitations on copyright. In view of the strong naturalist foundations of the French *droit d'auteur* regime, the French courts would probably be reluctant to admit the mandatory character of the limitations included in the Intellectual Property Code. In the Netherlands, some court decisions would lead me to believe that the courts might take a more cautious approach and try to interpret contractual provisions in conformity with the letter and intent of the copyright law. In Germany, the application of the *Sozialbindung* principle could lend support to the argument 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. Consequently, a German court might conclude that an agreement enjoining the user from performing certain acts that are otherwise allowed under copyright law is contrary to the public interest and to the *Sozialbindung* principle.

In the United States, conflicts between copyright law and contract law are solved either under the express pre-emption clause of Section 301 of the U.S. Copyright Act or under the general Supremacy Clause of the U.S. Constitution. However, the general doctrine of pre-emption offers no clear guidelines concerning the enforceability of contracts that purport to derogate from the rights and obligations set forth in the Copyright Act. A contract cause of action will be pre-empted if the contract confers rights that are equivalent to any of the exclusive rights specified by Section 106 of the Copyright Act or if its enforcement would stand as an obstacle to the accomplishment of the full purposes and objectives of Congress. A number of commentators believe that the impact on federal copyright policy necessary to give rise to pre-emption differs if the contract that purports to restrict the user's statutory privileges is fully negotiated or if it is presented to the user as a standard form contract. This argument assumes that fully negotiated contracts of this sort would probably not be widespread and that the user would be aware of the fact that, without the contract, she would be entitled to benefit from the fair use defence and from the other statutory limitations. According to this view, fully negotiated contracts should not be pre-empted. On the other hand, shrink-wrap licences would pose a greater

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threat to the copyright policy objectives and should therefore be pre-empted, because of their wide application to people who, most often, have neither read or understood the terms of the licence. However, in the absence of any relevant case law other than the *Vault* decision, any inquiry into the compatibility of restrictive contract clauses with federal copyright policy under the Supremacy Clause pre-emption analysis remains speculative.

In view of these findings, I analysed in subsection 4.2.2 whether and to what extent the general limits of freedom of contract could apply in the context of an agreement that purports to restrict the privileges recognised to users under the copyright act. With regard to the application of the norms of economic public order as a limit to the parties' freedom of contract, I drew similar conclusions under European and American law. In general, I found that the criteria of application of the rules on competition or antitrust law are quite strict and could not easily serve as a tool to control restrictive copyright licence terms. Indeed, the showing of abuse of a dominant position or unlawful acquisition or maintenance of monopoly power requires strong evidence concerning the intent of the monopolist and the harm on the competitive market. Moreover, for the 'essential facilities' doctrine to apply there must be a market in which plaintiff and defendant compete, so that a monopolist extends its monopoly to the downstream market by refusing access to the facility it controls. Such action would hardly be possible for individual end-users who do not compete with the rights owner in the sense of the EC Treaty or of the Sherman Act. Whether an action would be available to newspaper or book publishers, database, record or software producers, to libraries, archives, and educational institutions or to information providers would be essentially a question of fact.

Next, I looked at whether certain terms of use included in standard form contracts could be invalidated on the basis of the norms of protective public order and more specifically on the basis of the regulation on standard form contracts. Whether a term is deemed unfair or unreasonable towards users of copyrighted material largely depends in my opinion on the country's approach to the copyright regime and to the principle of freedom of contract. In the absence of any relevant case law to the contrary, I believe that, at least in the Netherlands and Germany, the courts might be willing to entertain the idea that in certain circumstances a restrictive copyright licence term might be unfair or contrary to the principles of *redelijkheid en billijkheid* or *Treu und Glauben* respectively. By contrast, the French courts may be very reluctant to conclude that a restrictive copyright licence term is unfair considering that the grant of exclusive rights under the French *droit d'auteur* regime is primarily justified by natural law principles. In the United States, a user of copyrighted material may have a hard time proving that a licence term is unconscionable because it goes beyond the reasonable expectations of an ordinary person, or because it is otherwise oppressive or causes unfair

surprise. Moreover, since the fact that a licence term diverges from the privileges normally recognised under copyright law does not appear to constitute a factor for consideration under the doctrine of unconscionability, most restrictive licence terms would probably be held to be enforceable, irrespective of their copyright policy implications.

In the following subsection, I turned to the study of the application of constitutional rights to private copyright licences. Unfortunately, none of the criteria examined under continental European constitutional law allows me to determine in the abstract whether a restriction on the user's exercise of her freedom of expression, through quotes, parodies and news reports, would be considered proportional to the purpose of protecting the rights owner's interests. Considering the courts' common reluctance to intervene in negotiated agreements, it is in my opinion highly improbable that a continental European court would invalidate a restrictive copyright licence term. On the other hand, the courts' appreciation might differ if the restrictive term were included in a standard form contract. Continental European courts would generally enquire, on a case-by-case basis, about the respective bargaining positions of the parties, the purpose of the contract, the constitutional right involved, the seriousness of the encroachment on that right and the proportionality between the intended purpose and the resulting encroachment. Depending on a court's assessment of these factors, it might conclude that a copyright licence term that restricts the user's ability to quote, make a news report or a parody runs afoul of the principle of objective good faith.

In the United States, the application of constitutional rights to private contracts is even more uncertain than in continental Europe. While a contract term may in principle be held unenforceable if it violates public policy, no court has ever held a contract term that restricts a party's freedom of expression to be unenforceable on the ground that it is contrary to public policy. The Official Comments to the UCITA do mention that when examining restrictive copyright licence terms, the courts should take the doctrine of fair use and to the public policies behind it into consideration. It remains to be seen what influence this non-binding comment will have on the courts, when interpreting restrictive copyright licence terms on the basis of the provisions of the UCITA. Nevertheless, it is in principle not excluded that a restrictive copyright licence term be subject to a First Amendment review, if the licensor's action were to be assimilated to a state action. On the basis of the precedents set by *Shelley v. Kraemer* and *New York Times v. Sullivan*, one could therefore argue that a state action would exist if a court were to apply the state contract law implementing the provisions of the UCITA to enforce a restrictive copyright licence term. Even if a state action were found to exist, a court would still have to decide what level of First Amendment scrutiny should be exercised with respect to copyright protection

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in general and the fair use doctrine in particular. Unless the contractual restriction is aimed at the content of the user's speech, most restrictions on speech would probably fall under the categories of content-neutral or general conduct regulations, depending on the circumstances of each case. Thus, the courts would have to rule on the question of whether the restrictive copyright licence term promotes a substantial interest that would be achieved less effectively in the absence of the restrictive term and on whether such restriction burdens speech substantially more than is necessary to further that interest.

Finally, I considered whether the civil law doctrine of abuse of rights and the common law doctrine of copyright misuse could help control the rights owner's use of restrictive copyright licence terms. In France and the Netherlands, the courts may refuse to enforce a subjective right under the doctrine of abuse of rights, if that right has been exercised in an abnormal fashion, for example by diverting the right from its social function. Again, because the French courts generally construe the *droit d'auteur* regime's main objectives as protecting moral rights and rewarding creative effort, I believe that the courts would not be likely to conclude that a restrictive licence term is incompatible with the purpose for which the author's right was granted. Such a licence term would most probably be upheld in France under the doctrine of abuse of rights. In the Netherlands, commentators have on occasion explored the issue of the possible application of the doctrine to the field of copyright law. No court has yet considered the issue at length. However, I believe that a Dutch court could, depending on the circumstances of each case, refuse to enforce a licence term that purports to restrict the privileges normally granted to users, on the ground that it constituted an abuse of rights. Indeed, in my opinion, copyright law is justified in the Netherlands not only in terms of justice to the author for her intellectual labour or of protection of moral rights, but also in terms of intellectual or cultural usefulness to society.

Similarly, United States courts have developed the doctrine of copyright misuse, according to which enforcement of a copyright will be refused where the holder's own conduct is so contrary to law or public policy as to bar recovery in an infringement suit. Arguably, this doctrine is derived not from property, tort, or contract law, but from antitrust law. However, since the *Lasercomb* decision, a number of courts have ruled that even if the use of a copyright does not violate antitrust laws, a defence of misuse might be admissible in an infringement action if the copyright is being used in a manner that conflicts with the public policy embodied in the grant of a copyright. So far, most, if not all, cases where copyright misuse has been raised involve some kind of anti-competitive behaviour on the part of the plaintiff. It is still uncertain whether misuse can be found to exist outside the antitrust or restraint of trade context, i.e., in any situation where a copyright is

being used in manner that violates the public policy embodied in the grant of a copyright. I believe that it should, although my position is at this point mostly tentative.

5.2 Concluding remarks

In all evidence, the rules on copyright and the general limits on freedom of contract prove insufficient to ensure that the legitimate interests of users of copyrighted material are taken into account in copyright licensing agreements. The inadequacy of the law is particularly acute with respect to the newly developed practice of marketing copyrighted works to end-users subject to the terms of a standard form contract. In fact, none of the legal principles studied in this book provides sufficient means to control that the copyright owner's right is exercised in conformity with its intended purpose and that the functionality of the copyright regime is respected. The lack of effective control over this form of exercise of copyright may in the long term have dire consequences for the production, dissemination, and access to protected subject matter. Tolerance for restrictive licensing practices may also have a determinative impact on the size and the wealth of the public domain.

One must realise that copyright law is but one element of a legislator's overall innovation, cultural, and information policy. The copyright regime must therefore not be examined in isolation from the other elements that constitute the legislator's general public policy objectives. Moreover, under the American copyright regime as well as under the continental European *droit d'auteur* regimes, the balance established by the legislator is carefully designed so as to acknowledge the existence of the several underlying interests of private individuals and of society as a whole. The legitimate interests reflected in the copyright balance are as numerous as they are diverse, ranging from the protection of freedom of expression and of the right to privacy, to the regulation of competition and industry practice, and to the dissemination of knowledge. Although some of these interests may weigh heavier in the balance than others, the copyright regime forms a coherent structure that has its own functionality within the legislator's general public policy objectives.

At this time, the biggest threat to the functionality of the copyright regime comes from the increased use of standard form contracts to license the use of copyrighted material to end-users. Admittedly, standard terms significantly lower the transaction costs associated with the mass distribution of works, in that they save firms and their customers the cost and trouble of negotiating the terms of each contract individually. As such, they should be recognised as valid and should be enforced. However, the problem lies in the

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fact that these licences often contain restrictions on use that go far beyond the bounds of copyright law. Not only do these licences restrict the end-users' capacity to make private uses of the work, but they practically eliminate the possibility for end-users to make any other fair use, quotation, comment, criticism, or parody of the work. Furthermore, under the typical 'shrink-wrap' or 'click-wrap' licence, the simple tearing open of a wrapping on a box, the continued use of a computer program or the clicking of a button on the computer screen is deemed to be a sufficient form of assent on the part of the licensee to bind her to the contractual obligations it contains. This somewhat unsuspecting gesture on the part of the end-user contributes to the establishment of a private ordering system. Indeed, 'shrink-wrap' or 'click-wrap' licences are omnipresent in mass-market transactions and purport to bind all users of a work to the terms set by the rights owner. As a result, standard form contracts that circumvent the statutory limitations on copyright tend to upset the traditional copyright balance and to stand as an obstacle to the accomplishment of the full purposes and objectives of the general public policy.

By contrast, licence terms that purport to restrict the user's exercise of the statutory limitations on copyright may not have as much impact on the copyright balance when they are included in fully negotiated contracts. In my opinion, the main distinction lies in the fact that, contrary to end-user licences, the conclusion of fully negotiated contracts presupposes a more equal bargaining power between rights owners and users of copyrighted material. Contrary to private individuals who have essentially no bargaining power *vis-à-vis* the rights owners to influence the content of the licence, broadcasting organisations, sound and audiovisual producers, newspaper and book publishers, educational institutions, consortia of libraries, and archives, not only have greater bargaining power, but they also possess greater information and experience in the matter. These organisations are thus in a better position to react to a rights owner's attempt to contractually restrict the use of copyrighted material beyond the bounds normally set by copyright law. One could argue that no organisation with reasonable bargaining power and knowledge would agree to a restriction on the exercise of a statutory limitation on copyright, unless some advantage could be drawn from the entire contract. Consequently, restrictive licence terms included in fully negotiated contracts are not likely to be as widespread as those included in standard form contracts.

As mentioned above, neither copyright law nor the general principles of law offer any adequate remedy to correct the imbalance caused by the use of restrictive licence terms in standard form contracts. Considering the ubiquity of these restrictive licence terms, it would certainly be indicated to examine whether certain legislative measures could ensure that the functionality of the copyright regime is maintained (or restored) in mass-

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market transactions as well. One possible option would be to declare a number of statutory limitations mandatory, at least in standard form contracts. Like the limitations of the European Computer Programs and Database Directives have been declared mandatory to preserve free competition, such limitations as the right to quote or to make reproductions for the purposes of comment, criticism, research, or parody, could be made imperative to preserve the users' freedom of expression. Another possibility would be to extend the regulations concerning unfair consumer contract terms to cover copyright matters. For instance, a term included in a standard form contract could be presumed unfair if it departs from the provisions of the copyright act. Such a presumption of unfairness would have the advantage of having a broader application than the first option, since it would not be limited to a certain number of specific limitations.

Incidentally, the drafters of the recent European Directive on Copyright in the Information Society never directly addressed this issue. This lack of interest on their part is all the more puzzling that standard form contracts were already widely used in mass-market transactions with end-users when the Directive was being negotiated and that, in the United States, the National Conference of Commissioners on Uniform State Laws had just adopted the UCITA after years of controversy. Not without reason, the State legislatures have adopted a very cautious attitude towards the implementation of the Act into state contract law. It is not yet too late for the legislator to intervene. Let us hope that legislative action is taken before it is!

SAMENVATTING

Tot besluit, met uitzondering van een enkele wettelijke beperking die uitdrukkelijk van dwingendrechtelijke aard is, is er geen precieze leidraad aan de hand waarvan bepaald moet worden of beperkingen dwingend zijn of niet. In het algemeen kan worden gesteld dat beperkingen van het auteursrecht een weerslag zijn van de uitdrukkelijke erkenning door de wetgever van het belang dat gebruikers hebben bij het gebruik van auteursrechtelijk beschermd materiaal zonder de voorafgaande toestemming van de rechthebbende. De vraag die ik in dit boek heb geprobeerd te beantwoorden, is de volgende: als de beperkingen van het auteursrecht als een integraal onderdeel worden beschouwd van het auteursrechtelijk evenwicht, in hoeverre zijn individuen er dan aan gehouden dit evenwicht ook in hun persoonlijke contractuele relaties te respecteren? Het antwoord verschilt aanmerkelijk van land tot land. Het is niet alleen afhankelijk van de benadering van de auteursrechtelijke bescherming zelf, maar ook van de houding die het land aanneemt tegenover het beginsel van contractuele vrijheid. Mijn algemene conclusie is dat beperkende licentievoorwaarden in Frankrijk, waar het systeem van het *droit d'auteur* voornamelijk is gebaseerd op de theorie van het natuurrecht en waar het positief recht relatief weinig beperkingen van de contractuele vrijheid toestaat, waarschijnlijk rechtsgeldig zouden worden verklaard. In Nederland en Duitsland, waar het auteursrecht meer rekening lijkt te houden met de belangen van gebruikers en waar contractpartijen geacht worden rekening te houden met elkaars belangen, zijn rechters wellicht eerder geneigd om beperkende licentievoorwaarden ongeldig te verklaren. In de Verenigde Staten, waar het auteursrechtelijk systeem erom bekend staat praktische doelen na te streven, is het beginsel van contractuele vrijheid zo belangrijk dat beperkende auteursrechtelijke licentievoorwaarden waarschijnlijk rechtsgeldig zouden worden verklaard. Deze opmerkingen gelden met name bij de vraag of de auteursrechtbeperkende licentiebepaling is opgenomen in een volledig uitonderhandeld contract of dat deze deel uitmaakt van een standaard contract. Ik zal op deze bevindingen hierna iets dieper ingaan.

Auteursrechtelijke regels en beperkingen

Na een korte inleiding op het onderwerp in het eerste hoofdstuk is in de paragrafen 2.1 en 2.2 de algemene structuur van het auteursrechtelijk systeem onderzocht, in het bijzonder de plaats, de vorm en de beginselen van de beperkingen van het auteursrecht. Verschillen tussen het Amerikaanse copyrightsysteem en het Europese stelsel van auteursrechten zijn direct zichtbaar in de manier waarop de beperkingen in de wetgeving zijn

geformuleerd. Maar de verschillende Europese systemen wijken ook onderling af. In verschillende mate maken het waarborgen van fundamentele vrijheden, het beschermen van de vrije concurrentie en het accommoderen van zaken van algemeen belang deel uit van het auteursrechtelijk evenwicht in Frankrijk, Nederland, Duitsland en de Verenigde Staten. De bescherming van de fundamentele vrijheid van meningsuiting van de gebruiker is zonder enige twijfel de breedst geaccepteerde rechtvaardiging voor wettelijke beperkingen van het auteursrecht. Hoewel de formulering van de bepalingen van wet tot wet kan verschillen, wordt de fundamentele vrijheid van meningsuiting van de gebruiker over het algemeen gegarandeerd door uitzonderingsbepalingen als het rechtsbeginsel van *fair use* of het recht om te citeren of kopieën te maken voor doeleinden als commentaren, kritieken, nieuwsreportages, onderzoek of parodieën. Wellicht omdat continentale Europese auteurswetten een limitatieve lijst bevatten van nauw omschreven en geïnterpreteerde beperkingen, lijken Europese rechters eerder dan de Amerikaanse rechters bereid de gedachte te onderschrijven dat de bescherming van de vrijheid van meningsuiting in bepaalde omstandigheden voldoende rechtvaardiging vormt voor het schenden van het auteursrecht.

Er bestaan ook wezenlijke verschillen tussen auteurswetten met betrekking tot de keuze van andere specifieke gebruikersbelangen die worden beschermd door beperkingen van het auteursrecht, en met betrekking tot de vorm van deze beperkingen. Deze verschillen zijn voor een groot deel te verklaren uit de verschillende grondslagen en oogmerken van de twee auteursrechtelijke tradities, waarbij de continentale Europese traditie een naturalistische benadering volgt en de Amerikaanse een utilitaristische. Doordat de nadruk ofwel op de belangen van de auteur wordt gelegd, ofwel op de maatschappelijke voordelen die voortvloeien uit het toestaan van bepaald ongeautoriseerd gebruik van auteursrechtelijk beschermd materiaal, speelt de filosofische grondslag van elke wet een bepalende rol bij het definiëren van het uitgangspunt, de reikwijdte, en de vorm van een specifieke beperking. Zo dacht het Amerikaanse Congres bijvoorbeeld dat het algemeen maatschappelijk belang van de Amerikaanse bevolking het meest gediend was bij specifieke uitzonderingsbeperkingen van het auteursrecht ten behoeve van educatieve instellingen, ideële organisaties en bibliotheken. In Europa daarentegen is het, als er überhaupt dergelijke beperkingen worden doorgevoerd, meestal het belang van de rechthebbenden dat het zwaarst weegt, waardoor bepaalde vormen van gebruik door scholen en bibliotheken alleen zijn toegestaan tegen betaling van een redelijke vergoeding aan de auteursrechthebbende. Hetzelfde kan worden geconstateerd met betrekking tot het privé kopiëren van gegevensdragers en documenten door gebruikers. Terwijl de meeste continentale Europese auteurswetten dit alleen toestaan als de rechthebbende hiervoor een redelijke vergoeding ontvangt, heeft het Amerikaanse Congres besloten niet te interveniëren, behalve bij digitale

thuiskopieeractiviteiten, en de behandeling van het thema over te laten aan de rechter krachtens het rechtsbeginsel van kosteloos *fair use*.

Dit heeft me ertoe gebracht om in paragraaf 2.3 in te gaan op de wettelijke aard van de beperkingen op het auteursrecht, en in het bijzonder op het soort aanspraken en claims waarop een gebruiker zich binnen de wet kan beroepen met betrekking tot een auteursrechtelijk beschermd werk. In het algemeen vormen beperkingen een onlosmakelijk onderdeel van het auteursrechtelijk systeem, omdat deze in het positief recht van continentaal Europa de erkenning vertegenwoordigen van het 'gerechtvaardigde belang' van de gebruiker om in bepaalde gevallen ongeautoriseerd gebruik te kunnen maken van auteursrechtelijk beschermd materiaal. Op dezelfde wijze vormen beperkingen van het auteursrecht in de Amerikaanse auteurswet de erkenning van het 'dienen van de publieke zaak' door de wetgever, door middel van het toelaten van bepaald ongeautoriseerd gebruik van auteursrechtelijk beschermd materiaal. Nadat ik deze claim van de gebruiker had benoemd als 'objectief recht' in Europa en als 'voorrecht' in de Verenigde Staten, heb ik onderzocht of de aard van de claim van de gebruiker varieert met de vorm van de beperking of de rechtvaardiging ervan. Vanuit het perspectief van de gebruiker geloof ik niet dat de vorm van een bepaalde beperking veel invloed heeft op de aard ervan, omdat het betalen van een vergoeding slechts een van de vele voorwaarden is waaraan moet worden voldaan om een werk te mogen gebruiken zonder voorafgaande toestemming. De grondgedachte achter de aanvaarding van een beperking speelt echter wel een essentiële rol bij het bepalen van het gewicht dat rechters aan die beperking toekennen, bijvoorbeeld als de rechten van de gebruiker botsen met de contractuele vrijheid van de auteursrechthebbende. Met andere woorden, het recht of het voorrecht van de gebruiker om gebruik te maken van een beschermd werk is slechts even sterk als het 'gerechtvaardigd belang' of het 'oogmerk van openbaar beleid' dat in dat recht wordt verwoord. Maar juist omdat bepaalde 'gerechtvaardigde belangen' zwaarder wegen dan andere, of directer bijdragen aan de utilitaire doelen van de auteurswet, kunnen bepaalde contractuele afspraken die tot doel hebben de toepassing van een specifieke beperking van het auteursrecht te begrenzen, meer aandacht trekken dan andere.

De contractuele vrijheid en haar begrenzingen

In paragraaf 3.1 heb ik de theoretische achtergrond uiteengezet van het onderzoek naar de raakvlakken tussen regels voor auteursrecht en regels voor contracten. Hiertoe heb ik eerst de grondslagen van het beginsel van de contractuele vrijheid onderzocht vanuit het gezichtspunt van het klassieke contractmodel, waarna ik onvermijdelijk terechtkwam bij het contractmodel met standaardcontracten, zoals dat is ontstaan in reactie op vergaande sociaal-

economische veranderingen. Ondanks het toegenomen gebruik van gestandaardiseerde contracten blijft het beginsel van de contractuele vrijheid een hoeksteen van het westerse juridische systeem. Tot op de dag van vandaag wordt contractuele vrijheid beschouwd als een middel om het maatschappelijk welzijn en de individuele zelfontplooiing te bevorderen. Maar omdat partijen niet altijd even sterke onderhandelingsposities hebben, kan ongelimiteerd gebruik van de contractuele vrijheid door een der partijen leiden tot verstoringen van de economische markt. Bovendien ligt altijd het gevaar op de loer dat de sterkste partij onredelijk voordeel haalt uit het gebrek aan ervaring of kennis van de andere partij. Het feit dat contractuele vrijheid een fundamenteel beginsel van ons juridisch systeem is, wil dus nog niet zeggen dat deze vrijheid onbeperkt is. Het rechtsbeginsel van goede trouw in het civiele recht op het Europese vasteland vormt, net als het rechtsbeginsel van de onredelijkheid in het Amerikaanse *common law*, een belangrijke beperking van de contractuele vrijheid. Buiten deze algemene juridische regels is het aantal specifieke wetsartikelen ter beperking van de individuele vrijheid om privé-relaties te reguleren in de loop der tijd enorm toegenomen. Om deze reden heb ik mij geconcentreerd op de beperkingen die het gevolg zijn van economische normen en normen ter bescherming van de openbare orde, van grondrechten, en van de concepten van misbruik en oneigenlijk gebruik van rechten.

Ter bevordering van het concurrentieproces leggen de normen van de economische openbare orde, naast andere maatregelen, bepaalde beperkingen op aan de contractuele vrijheid. Dit om te voorkomen dat contracten worden gebruikt voor het verkrijgen en misbruiken van economische macht. Voor het doel van mijn onderzoek heb ik de nadruk gelegd op artikel 82 van het EU-verdrag en sectie 2 van de Sherman Act in de Verenigde Staten, die respectievelijk zijn gericht op misbruik van een dominante marktpositie of het verkrijgen of consolideren van een monopoliepositie door een onderneming. De analyse van beide bepalingen leidde tot vergelijkbare conclusies. Voordat een auteursrechthebbende de Europese concurrentieregels of de Amerikaanse antitrustwetten overtreedt, moet hij ofwel zijn machtspositie hebben misbruikt, ofwel op ongeoorloofde wijze een monopoliepositie hebben verkregen of geconsolideerd. En zoals naar voren kwam in het onderzoek van relevante jurisprudentie, kan het bijzonder moeilijk zijn om misbruik of een poging tot monopoliseren van de markt door een dominante onderneming aan te tonen. Dit is met name het geval wanneer in aanmerking wordt genomen dat, zowel volgens Europees als Amerikaans concurrentierecht, iedereen in beginsel de vrijheid heeft om zelf te bepalen met wie en onder welke voorwaarden zaken worden gedaan. Bovendien komt uit recente jurisprudentie in de Verenigde Staten en Europa naar voren dat de doctrine van de 'fundamentele voorzieningen' alleen kan worden toegepast in 'uitzonderlijke gevallen'.

Ter bescherming van zwakkere contractpartijen, zoals huurders, auteurs of consumenten, is een lange reeks wetgevende maatregelen getroffen om de contractuele vrijheden van de sterkere partij te beperken, of om de uitoefening van die vrijheden in te kaderen. Bestudering van de relevante wetgeving en jurisprudentie toont aan dat het Nederlandse en Duitse overeenkomstenrecht een aanmerkelijk socialere benadering van het contractrecht kennen – je zou ook kunnen zeggen een meer 'paternalistische' benadering – dan de Verenigde Staten of zelfs Frankrijk in vergelijkbare omstandigheden zouden hanteren. De sociale benadering van overeenkomsten wordt met name duidelijk wanneer men overweegt dat het beginsel van goede trouw in Nederland en Duitsland wordt geïnterpreteerd als het scheppen van de verplichting dat elk van beide contractpartijen rekening houdt met de belangen van de andere partij. Net als de bepalingen in de Europese richtlijn inzake oneerlijke contractvoorwaarden, die erop gebaseerd is, stellen de Nederlandse en Duitse bepalingen dat een beding in een overeenkomst waarover niet afzonderlijk is onderhandeld, als oneerlijk wordt beschouwd indien, in strijd met de goede trouw, het evenwicht tussen de uit de overeenkomst voortvloeiende rechten en verplichtingen van de partijen ten nadele van de consument aanzienlijk verstoort. Ook het loutere feit dat een voorwaarde in een standaardcontract afwijkt van een wettelijke bepaling wordt in Nederland en Duitsland voldoende geacht als indicatie van het onredelijke karakter van die voorwaarde. In het algemeen wijkt de interpretatie van het Amerikaanse rechtsbeginsel van de onredelijkheid substantieel af van de continentaal Europese interpretatie van oneerlijke voorwaarden, waarbij Europese rechters niet alleen kijken naar het onderdrukkende of onverwachte effect van een voorwaarde, maar ook of de toedeling van risico's als gevolg van zo'n voorwaarde de wederpartij in onredelijke mate schaadt.

De vraag of grondwettelijke rechten van toepassing zijn in privé-relaties vereiste een uitgebreider beschouwing in paragraaf 3.2.2. Mijn bevindingen op dit gebied zijn, gelet op het geringe aanbod van juridisch relevante zaken, op zijn zachtst gezegd onzeker. Grondrechten beschermen het individu van oudsher tegen inmenging door de staat. Onder continentale Europese deskundigen wint echter het inzicht terrein dat, in een coherent juridisch systeem, individuen er recht op hebben dat hun grondrechten ook in privé-relaties worden gerespecteerd. Deze stelling wordt onderschreven door jurisprudentie van het Europese Hof voor de Rechten van de Mens. En hoewel Duitse en Nederlandse jurisprudentie niet altijd eensluidend is blijkt uit de weinige casussen met betrekking tot de horizontale toepasbaarheid van grondwettelijke rechten een duidelijke voorkeur voor een indirecte werking. Toch blijven dergelijke gevallen uitzonderlijk. Bovendien wordt het horizontale effect van grondwettelijke rechten algemeen als veel zwakker beschouwd in contractuele relaties dan in niet-contractuele situaties, omdat

partijen gebruik kunnen maken van hun individuele autonomie op het moment dat het contract wordt afgesloten. In aanvulling op de juridische belemmeringen op dit terrein moet ook worden opgemerkt dat er in beginsel niets is dat individuen belet afstand te doen van de bescherming van hun grondrechten. Toch is de geldigheid van een beperkende contractvoorwaarde in beginsel wel aanvechtbaar indien de omstandigheden zodanig zijn dat niet uitdrukkelijk of vrijwillig afstand is gedaan, indien het recht erdoor in de kern wordt beïnvloed of indien de restrictie buitenproportioneel is ten opzichte van het doel van het contract.

In de Verenigde Staten kan een privé-handeling van een individu alleen onderwerp zijn van toetsing aan de grondwet als deze individuele handeling kan worden gelijkgesteld met een handeling van de staat. Maar zelfs als een vergelijkbare handeling van de staat blijkt te bestaan moeten rechters bepalen in welke mate grondwettelijke toetsing moet worden toegepast in de specifieke omstandigheden van de casus. De grootste moeilijkheid bij het definiëren van één standaard voor juridische toetsing van problemen rond de vrijheid van meningsuiting is dat de vrijheden zoals vastgelegd in het *First Amendment* op de Amerikaanse grondwet een verschillende rol spelen bij de bescherming van enerzijds het belang dat elk individu heeft bij zelfontplooiing en anderzijds het belang dat de maatschappij heeft bij een serieus publiek debat over thema's van publiek belang. Uit uitspraken van het Supreme Court van de Verenigde Staten zijn verschillende criteria naar voren gekomen, met verschillende benaderingen voor het vaststellen van een juiste norm voor een juridisch oordeel over verschillende soorten problemen rond de vrijheid van meningsuiting. Wellicht het meest toegepaste criterium van het Supreme Court is de categorische benadering. Bij het afwegen van zaken die wellicht in strijd zijn met het *First Amendment*, moeten rechters eerst vaststellen of de betrokken beperking van de vrijheid van meningsuiting in de categorie *content-based* (inhoud-afhankelijk) of de categorie *content-neutral* (inhoud-neutraal) valt. Inhoud-afhankelijke beperkingen worden alleen toegelaten als deze een duidelijk bestuurlijk belang dienen en nauwkeurig zijn afgestemd op het dienen van dat belang. Inhoud-neutrale beperkingen daarentegen worden toegelaten als ze een substantieel bestuurlijk belang dienen dat zonder die beperkingen minder goed zou worden gediend, en als ze de vrijheid van meningsuiting niet aanzienlijk meer beperken dan nodig is om dat belang te dienen. Er is tot nu toe echter nog geen rechter geweest die een uitspraak heeft gedaan over de vraag of het handhaven van een contractuele beperking van de persoonlijke rechten zoals gegarandeerd in het *First Amendment* kan worden gelijkgesteld met een handeling van de staat die onderwerp kan zijn van toetsing aan de grondwet.

Ten slotte heb ik mij in paragraaf 3.2.3 bezig gehouden met het rechtsbeginsel van misbruik van recht zoals erkend in het continentaal

Europees burgerlijk recht, en het rechtsbeginsel van onredelijk gebruik van auteursrecht zoals vastgelegd in het Amerikaanse *common law*. De beide rechtsbeginselen hebben zeer verschillende oorsprongen. Het ene is afgeleid van het burgerlijk eigendoms- en aansprakelijkheidsrecht, het andere van Amerikaanse antitrustwetten. Dit neemt echter niet weg dat er een zekere parallel kan worden getrokken tussen de twee concepten. Daarom hebben rechters in bepaalde landen op het vasteland van Europa, zoals Frankrijk en Nederland, bij gelegenheid geweigerd subjectieve rechten toe te kennen krachtens het rechtsbeginsel van misbruik van recht als van deze rechten op een niet-normale manier gebruik werd gemaakt. Niet-normaal gebruik van een recht kan bestaan uit het afwijken van het oorspronkelijke doel van het recht, ofwel met de bedoeling om schade te berokkenen, ofwel als gevolg van roekeloosheid zonder legitieme reden, ofwel door het recht uit zijn oorspronkelijke maatschappelijke verband te halen. Rechters in de Verenigde Staten hebben op vergelijkbare wijze het rechtsbeginsel van onredelijk gebruik van auteursrecht ontwikkeld, op grond waarvan het uitoefenen van een recht niet zal worden toegestaan als de rechthebbende daardoor zodanig in strijd handelt met de wet of met de openbaar orde, dat een beroep op dit recht kan worden verworpen na een inbreukactie. Maar beide rechtsbeginselen hebben gemeen dat het uitoefenen van een recht op een wijze die strijdig is met de openbare orde of met de sociale functie van het recht niet algemeen aanvaard wordt als basis voor misbruik.

Contractuele vrijheid met betrekking tot auteursrechtelijk beschermd materiaal

In paragraaf 4.1 zijn contractuele toepassingen met betrekking tot het gebruik van auteursrechtelijk beschermd materiaal besproken. Daarbij heb ik vastgesteld dat zich bij dit soort contractrelaties dezelfde evolutie heeft voorgedaan als op andere terreinen van economische activiteit. Naast de met producenten en distributeurs van auteursrechtelijk beschermd materiaal volledig uitonderhandelde contracten is er een groeiende tendens waarneembaar om eindgebruikers op basis van standaard contracten gebruikslicenties te verlenen. Voor velen doet zich in de grootschalige marktdistributie momenteel een revolutie voor als gevolg van digitale netwerktechnologie, die de perfecte voorwaarden biedt voor de ontwikkeling van een contractcultuur. Er is wel gezegd dat gebruikers van auteursrechtelijk beschermde werken binnenkort hun overeenkomsten met handelaren geheel naar eigen wens zullen kunnen 'personaliseren' dankzij het interactieve karakter van het medium. De online licentiemodellen die algemeen worden voorzien voor Europa en Amerika zijn gebaseerd op het in licentie geven van rechten per transactie, per gebruik, per werk, of op een andere basis. Maar in

de digitale netwerkgeving is onderhandelen over iedere afzonderlijke clause in een online contract met iedere potentiële gebruiker net zo omslachtig als in de analoge wereld. De grootscheepse marktdistributie van auteursrechtelijk beschermde werken gaat daarom ook in de digitale omgeving gepaard met een toegenomen gebruik van standaardcontracten.

In de praktijk lijken zogenoemde *shrink-wrap* en *click-wrap* licenties (licentievoorwaarden die de gebruiker accepteert door een verpakking te openen respectievelijk met de muis te klikken) de norm te worden voor de distributie van auteursrechtelijk beschermd materiaal in digitale vorm. Om deze reden heb ik gekeken naar de geldigheid van dit soort licenties volgens continentaal Europees burgerlijk recht en Amerikaans *common law*. Een vergelijking van het toepasselijk recht en de jurisprudentie bracht opvallende verschillen tussen beide rechtssystemen aan het licht. Terwijl de geldigheid van elektronische of langeafstandscontracten expliciet wordt erkend volgens de wetgeving in Europa en de Verenigde Staten, hebben de Europese rechters voor een veel behoedzamer benadering gekozen dan de Amerikaanse rechters, in het bijzonder met betrekking tot het vraagstuk van de aanvaarding. In Frankrijk, Nederland en Duitsland worden standaardcontractvormen door rechters over het algemeen geldig verklaard, mits de andere partij op de hoogte is van het bestaan van het contract en van de inhoud ervan voordat de koopovereenkomst tot stand komt.

De Amerikaanse *Uniform Computer Information Transactions Act* (UCITA) bekrachtigt daarentegen in wezen de door enkele rechters in de VS ontwikkelde praktijk, en die bestaat uit het afdwingen van de naleving van licentievoorwaarden, zelfs als deze kenbaar zijn gemaakt nadat de transactie heeft plaatsgevonden, met dien verstande dat de licentiehouder de mogelijkheid moet zijn geboden om het product te retourneren als de licentievoorwaarden onacceptabel werden bevonden. De UCITA bevestigt ook dat in de meeste gevallen de eenvoudige handeling van het openscheuren van de plastic verpakking of het installeren van een programma op een computer een geldige uiting is van de acceptatie van de kant van de licentiehouder, zelfs als deze de licentievoorwaarden niet volledig heeft gelezen of begrepen. In beginsel vormt de voorgestelde wijze van contractafsluiting geen werkelijk probleem voor online licenties, waarbij de voorwaarden gemakkelijk kenbaar kunnen worden gemaakt voordat de transactie wordt afgerond. Problemen kunnen zich wel voordoen bij offline licenties die met het product worden meegezonden nadat de transactie heeft plaatsgevonden en waaraan de licentiehouder is gebonden als gevolg van een simpele handeling, tenzij hij het product terugstuurt omdat de voorwaarden onaanvaardbaar zijn. In het licht van de algemene tendens om *shrink-wrap* en *click-wrap* licenties als geldig en bindend te beschouwen volgens het contractenrecht, krijgen rechthebbenden de macht om elk gebruik van auteursrechtelijk beschermd materiaal te onderwerpen aan de voorwaarden

van een standaardcontract. Problemen kunnen zich voordoen als rechthebbenden de activiteiten van gebruikers verder proberen in te perken dan de beperkingen die zijn vastgelegd in het auteursrecht.

In paragraaf 4.2 heb ik de mogelijke beperkingen van de contractuele vrijheid met betrekking tot het gebruik van auteursrechtelijk beschermd materiaal bestudeerd. Paragraaf 4.2.1 richt zich op de beperkingen die zijn vastgelegd in het auteursrecht. Aangezien er geen relevante jurisprudentie voorhanden is, kunnen conclusies op dit terrein slechts speculatief zijn. Maar naar mijn mening bieden de bepalingen in het auteursrecht geen definitieve richtlijn voor de oplossing van conflicten die ontstaan tussen het 'objectieve recht' of 'voorrecht' van de gebruiker om te profiteren van een wettelijke beperking enerzijds en de contractuele vrijheid van de auteursrechthebbende anderzijds. In de Europese Unie zijn zelfs de dwingendrechtelijke bepalingen van de richtlijnen voor computerprogramma's en databanken op uiteenlopende manieren geïmplementeerd in verschillende lidstaten. Dit heeft geleid tot een inconsequente mate van 'dwang' van deze bepalingen. En buiten deze specifieke bepalingen geven het Franse en Nederlandse auteursrecht geen verdere indicatie met betrekking tot het verplichte karakter van beperkingen van het auteursrecht. Gezien de sterke naturalistische grondslagen van de Franse wetgeving rond het *droit d'auteur* zijn Franse rechters waarschijnlijk huiverig om het verplichtende karakter te erkennen van de beperkingen zoals opgenomen in de *Code de la Propriété Intellectuelle*. Op basis van enkele rechterlijke uitspraken in Nederland denk ik dat de rechters voor een voorzichtiger benadering kiezen en de contractuele bepalingen proberen te interpreteren overeenkomstig letter en geest van de auteurswet. In Duitsland zou de toepassing van het *Sozialbindung*-beginsel het argument kunnen ondersteunen dat, hoewel de wet niet expliciet melding maakt van een dwingendrechtelijk karakter van de beperkingen van het auteursrecht, het systeem wel zorgvuldig is ontworpen om rekening te houden met overwegingen van algemeen belang. Als gevolg hiervan zou een Duitse rechter kunnen concluderen dat een overeenkomst die een gebruiker verbiedt bepaalde handelingen te verrichten die volgens de auteurswet wel zijn toegestaan, haaks staat op het algemeen belang en het *Sozialbindung*-beginsel.

In de Verenigde Staten worden conflicten tussen het auteursrecht en het contractrecht opgelost aan de hand van ofwel de uitdrukkelijke *pre-emption* clause in sectie 301 van de Copyright Act (waardoor bepalingen van de federale auteurswet voorrang krijgen boven bepalingen van het overeenkomstenrecht van lid Staten), ofwel de algemene *Supremacy Clause* in de grondwet. Het algemene rechtsbeginsel van *pre-emption* biedt echter geen duidelijke richtlijnen met betrekking tot de uitvoerbaarheid van contracten waarvan de inhoud niet in overeenstemming is met de rechten en plichten zoals die zijn vervat in de Copyright Act. De rechtsgeldigheid van

een contract wordt onkracht als het bepaalde rechten verleent die gelijkwaardig zijn aan een of meer exclusieve rechten zoals omschreven in sectie 106 van de Copyright Act, of als de uitvoering ervan een belemmering zou vormen voor het verwezenlijken van de volledige doelstellingen van het Congres. Een aantal critici is van mening dat de criteria voor nietigverklaring van een beperkend contract op grond van gevolgen voor het federale auteursrechtelijke beleid verschillen tussen een volledig met de gebruiker doorgesproken contract en een aan de gebruiker overhandigd standaardcontract. Dit argument gaat ervan uit dat volledig uitonderhandelde contracten van dit type waarschijnlijk weinig worden gebruikt en dat de gebruiker zich bewust is van het feit dat hij zich zonder het contract zou kunnen beroepen op het beginsel van *fair use* en andere wettelijke beperkingen. In deze zienswijze dienen volledig besproken contracten niet nietig te worden verklaard. Aan de andere kant zouden *shrink-wrap* licenties een grotere bedreiging vormen voor de doelen van het auteursrecht. Deze zouden nietig moeten worden verklaard omdat ze op grote schaal worden gebruikt voor mensen die de licentievoorwaarden meestal niet hebben gelezen of niet hebben begrepen. Maar aangezien er geen relevante jurisprudentie bestaat buiten de uitspraak in de zaak-Vault, blijft elk onderzoek naar de verenigbaarheid van beperkende contractvoorwaarden met het federale auteursbeleid op grond van de *pre-emption* van de *Supremacy Clause* speculatief.

Met het oog op deze bevindingen heb ik in paragraaf 4.2.2 geanalyseerd of en in welke mate de algemene grenzen van de contractuele vrijheid kunnen worden toegepast in de context van een overeenkomst die tot doel heeft de rechten te beperken die gebruikers volgens het auteursrecht hebben. Met betrekking tot de toepassing van de normen van economische openbare orde als een beperking van contractuele vrijheid van de partijen, ben ik bij het Europese en Amerikaanse recht tot dezelfde conclusies gekomen. In het algemeen vond ik dat de toepassingscriteria voor concurrentieregels of voor de antitrustwet vrij streng zijn en niet gemakkelijk kunnen worden gebruikt als hulpmiddel om restrictieve auteursrechtelijke licentievoorwaarden te controleren. Zichtbaar misbruik van een machtpositie of van onwettige verkrijging of bestendiging van een monopoliepositie vereist stevige bewijsvoering met betrekking tot de intenties van de monopolist en de schadelijke gevolgen voor de vrije concurrentie. Bovendien moet er, om het rechtsbeginsel van de 'fundamentele voorzieningen' te kunnen toepassen, een markt zijn waarin eiser en gedaagde elkaar beconcurreren, op zo'n wijze dat een monopolist zijn monopolie uitbreidt naar een deelmarkt wanneer hij de toegang weigert tot faciliteiten die hij beheerst. Zulke handelingen kunnen nauwelijks worden uitgevoerd voor individuele eindgebruikers, die niet concurreren met de rechthebbende in de zin van het EU-verdrag of de Sherman Act. Of deze handelingen kunnen

worden uitgevoerd voor uitgevers van kranten of boeken, producenten van databanken of software, bibliotheken, archieven en onderwijsinstellingen, of aan informatieverstrekkers, is een vraag die in de praktijk moet worden beantwoord.

Vervolgens heb ik gekeken of bepaalde gebruiksvoorwaarden in standaardcontracten ongeldig zouden kunnen worden verklaard op basis van de normen ter bescherming van de openbare orde, meer in het bijzonder op basis van de regelgeving op het gebied van standaardcontractvormen. Of een voorwaarde als oneerlijk of onredelijk tegenover gebruikers van auteursrechtelijk beschermd materiaal wordt beschouwd, is naar mijn mening afhankelijk van de benadering die in het desbetreffende land tegenover het auteursrecht en het beginsel van de contractuele vrijheid geldt. Aangezien er geen relevante jurisprudentie beschikbaar is om het tegendeel aan te tonen, geloof ik dat in elk geval in Nederland en Duitsland de rechters bereid zijn te aanvaarden dat een restrictieve auteursrechtelijke licentievoorwaarde onder bepaalde omstandigheden oneerlijk kan worden genoemd of in strijd met de beginselen van 'redelijkheid en billijkheid' of 'Treu und Glauben'. Franse rechtbanken daarentegen zijn niet snel geneigd de oneerlijkheid te erkennen van een restrictieve auteursrechtelijke licentievoorwaarde, overwegend dat het toekennen van exclusieve rechten krachtens het Franse auteursrecht in de eerste plaats wordt gerechtvaardigd door beginselen van het natuurrecht. Een gebruiker van auteursrechtelijk beschermd materiaal in de Verenigde Staten kan grote moeite hebben om aan te tonen dat een licentievoorwaarde onredelijk is omdat deze niet overeenkomt met wat redelijkerwijs door een normaal persoon mag worden verwacht, of omdat het op andere gronden te streng is of voor oneerlijke verrassingen zorgt. Bovendien, aangezien het feit dat een licentievoorwaarde afwijkt van de rechten die normaal worden erkend in het auteursrecht geen aanleiding lijkt te vormen om de zaak te beschouwen vanuit het rechtsbeginsel van de onredelijkheid, zullen de meeste licentievoorwaarden waarschijnlijk toepasbaar worden geacht, los van de vraag welke implicaties dit heeft voor het auteursrecht.

In de volgende paragraaf heb ik mij beziggehouden met het onderzoek naar de toepassing van grondwettelijke rechten op particuliere auteursrechtlicenties. Helaas biedt geen van de onderzochte criteria in het constitutioneel Europees recht mij de mogelijkheid om op abstract niveau te bepalen of een beperking van de vrijheid van meningsuiting van de gebruiker in de vorm van citaten, parodieën en nieuwsreportages als proportioneel zou worden beschouwd met het oogmerk de belangen van de rechthebbende te behartigen. Gelet op de algemene terughoudendheid van rechters bij het ingrijpen in wederzijds overeengekomen afspraken, is het in mijn ogen hoogst onwaarschijnlijk dat een continentale Europese rechter een restrictieve auteursrechtelijke licentievoorwaarde ongeldig zal verklaren. Aan de andere kant kan het oordeel van de rechter anders zijn als de restrictieve voorwaarde

onderdeel uitmaakt van een standaardcontractvorm. Continentale Europese rechters zullen over het algemeen van zaak tot zaak onderzoeken wat de respectieve onderhandelingsposities van de partijen zijn, wat het doel van het contract is, welke wettelijke rechten erop van toepassing zijn, wat de ernst van de aantasting van dat recht is en hoe het oogmerk en het resultaat zich verhouden. Afhankelijk van de beoordeling van deze factoren door de rechter, zou men tot de conclusie kunnen komen dat een auteursrechtelijke licentievoorwaarde die de gebruiker beperkt in zijn mogelijkheden tot citeren, parodiëren en het maken van nieuwsberichten in strijd is met het beginsel van objectieve goede trouw.

In de Verenigde Staten is de toepassing van grondwettelijke rechten op particuliere contracten nog onzekerder dan op het vasteland van Europa. Hoewel een contractsvoorwaarde in beginsel nietig kan worden verklaard als deze in strijd is met het openbaar beleid, is dat nog nooit voorgekomen. In de Officiële Commentaren bij de UCITA wordt opgemerkt dat rechters bij het onderzoeken van restrictieve auteursrechtelijke licentievoorwaarden rekening moeten houden met het rechtsbeginsel van eerlijk gebruik en het achterliggende belang van het openbaar beleid. Maar het is onzeker welke invloed deze niet bindende commentaren zullen hebben op rechters die restrictieve auteursrechtelijke licentievoorwaarden interpreteren op basis van de bepalingen van de UCITA. Desondanks is het niet uitgesloten dat een restrictieve auteursrechtelijke licentievoorwaarde tegen het licht zal worden houden op basis van het *First Amendment* als de handeling van de licentieverstrekker zou worden gelijkgesteld met een handeling van de staat. Op basis van de precedënten die zijn geschapen door de zaken *Shelley versus Kraemer* en *New York Times versus Sullivan* zou men kunnen aanvoeren dat sprake is van een handeling van de staat indien een rechter het contractrecht van een staat toepast met inbegrip van de bepalingen van de UCITA om een restrictieve auteursrechtelijke licentievoorwaarde af te dwingen. Zelfs als wordt geconcludeerd dat er sprake is van een handeling van de staat, zou een rechter nog moeten vaststellen in welke mate toetsing aan het *First Amendment* moet plaatsvinden met betrekking tot bescherming van het auteursrecht in het algemeen en het rechtsbeginsel van *fair use* in het bijzonder. Tenzij de contractuele beperking gericht is op de inhoud van de uiting van de gebruiker, zouden de meeste beperkingen ervan vallen onder de categorie inhoud-neutraal of onder algemene gedragbepalingen, afhankelijk van de omstandigheden van elk afzonderlijk geval. Dus, rechters zouden moeten oordelen over de vraag of de auteursrechtbeperkende licentiebepaling een substantieel belang dient dat minder doeltreffend te bereiken is bij het ontbreken van de bepaling en of een dergelijke beperking het zich uiten meer zou belasten dan nodig is om dat belang te bevorderen.

Ten slotte heb ik de vraag opgeworpen of het civielrechtelijke beginsel van misbruik van recht en het *common law* beginsel van onredelijk gebruik

van auteursrecht kunnen bijdragen aan het controleren van het gebruik van restrictieve auteursrechtelijke licentievoorwaarden door de rechthebbende. In Frankrijk en Nederland kunnen rechters weigeren een subjectief recht toepasselijk te verklaren op grond van rechtsmisbruik als dat recht op een niet-normale manier wordt uitgeoefend, bijvoorbeeld wanneer het is losgemaakt van de sociale context. Omdat Franse rechters de belangrijkste doelstellingen van het *droit d'auteur* over het algemeen opvatten als het beschermen van morele rechten en het belonen van creatieve inspanningen, geloof ik niet dat rechters snel zullen overgaan tot nietigverklaring van een restrictieve licentievoorwaarde voor het doel waarvan de toestemming van de auteur is verkregen. Zo'n licentievoorwaarde zou in Frankrijk hoogstwaarschijnlijk standhouden bij toetsing aan het beginsel van misbruik van recht. In Nederland hebben commentatoren bij gelegenheid onderzoek gedaan naar het thema van de mogelijke toepassing van dit rechtsbeginsel op het terrein van het auteursrecht. Het thema is nog niet uitvoerig door rechters bekeken. Toch ben ik van mening dat een Nederlandse rechter, afhankelijk van de omstandigheden van de zaak, zou kunnen weigeren een licentievoorwaarde te erkennen die tot doel heeft de rechten te beperken die normaal worden toegekend aan gebruikers, op grond van misbruik van recht. Naar mijn mening wordt het auteursrecht in Nederland namelijk niet alleen gerechtvaardigd op basis van bescherming van de auteur of zijn intellectuele arbeid, of op basis van morele rechten, maar ook op basis van het intellectuele of culturele belang voor de maatschappij.

Op dezelfde wijze hebben rechtbanken in de Verenigde Staten het beginsel ontwikkeld van onredelijk gebruik van auteursrecht, op grond waarvan de handhaving van een auteursrecht moet worden geweigerd, als de rechthebbende daardoor zodanig in strijd handelt met de wet of met de openbare orde, dat een beroep op dit recht kan worden verworpen na een inbreukactie. Dit beginsel is niet ontleend aan het eigendomsrecht, het beginsel van de onrechtmatige daad of het contractenrecht, maar aan de antitrustwetgeving. Sinds de uitspraak in de zaak-*Lasercomb* heeft een aantal rechtbanken echter bepaald dat zelfs wanneer het gebruik van auteursrecht niet tot overtreding van antitrustwetten leidt, een aanklacht van misbruik kan worden gehonoreerd indien het auteursrecht zodanig wordt gebruikt dat het in conflict komt met het openbare beleid dat tot uitdrukking komt in de toekenning van het auteursrecht. Tot dusver was in de meeste, zo niet in alle zaken rond onredelijk gebruik van auteursrecht sprake van een of andere vorm van concurrentiebelemmerend gedrag van de kant van de eiser. Het is nog onzeker of er gevallen van onredelijk gebruik kunnen worden gevonden buiten de context van antitrustwetten of handelsbelemmering, dat wil zeggen in een situatie waarin het auteursrecht wordt gebruikt op een manier die niet overeenstemt met het openbaar beleid dat wordt uitgedrukt in de toekenning

SAMENVATTING

van dat auteursrecht. Ik ben ervan overtuigd dat dit mogelijk moet zijn, hoewel mijn mening op dit moment voornamelijk speculatief is.

SOMMAIRE

En conclusion, à l'exception de quelques limites législatives qui ont été expressément déclarées impératives, il n'existe aucune ligne directrice précise permettant de déterminer si les limites sont obligatoires ou non. De façon générale, on peut dire que les limites au droit d'auteur sont l'expression de la reconnaissance expresse par le législateur des intérêts qu'ont les usagers à faire certaines utilisations d'œuvres protégées par le droit d'auteur sans avoir auparavant obtenu l'autorisation du titulaire de droit. La question à laquelle nous avons tenté d'apporter une réponse dans ce livre est la suivante : si les limites au droit d'auteur sont considérées comme partie intégrante de l'équilibre que représente le droit d'auteur, dans quelle mesure les particuliers sont-ils tenus de respecter cet équilibre dans leurs relations contractuelles privées? La réponse varie considérablement d'un pays à l'autre. Elle dépend de l'approche adoptée par chaque pays en ce qui concerne non seulement la protection même du droit d'auteur, mais aussi le principe de la liberté contractuelle. Ma conclusion générale est qu'en France, où le système du droit d'auteur est fondé principalement sur la théorie des droits naturels et où le droit positif admet relativement peu de limites à la liberté contractuelle, des clauses restrictives dans des licences de droit d'auteur seraient sans doute acceptées comme valides. Aux Pays-Bas et en Allemagne, où les régimes du droit d'auteur semblent faire une plus large place aux intérêts des usagers et où les parties contractantes sont censées tenir compte des intérêts de l'autre partie, les tribunaux pourraient être plus enclins à invalider des clauses de licence restrictives. Aux États-Unis, même s'il est établi que le régime du droit d'auteur poursuit des objectifs utilitaires, le principe de la liberté contractuelle est si fortement ancré que des clauses restrictives de licence du droit d'auteur seraient sans doute considérées comme valides. Ces observations valent autant pour la clause restrictive d'une licence de droit d'auteur qui est insérée dans un contrat entièrement négocié que pour celle qui figure dans un contrat type. Revenons à ces conclusions de façon plus détaillée.

Les règles sur le droit d'auteur et les limites au droit d'auteur

Après une brève présentation du sujet au chapitre premier, les sections 2.1 et 2.2 examinent la structure générale du régime du droit d'auteur et plus particulièrement la place, la forme et les justifications des limites au droit d'auteur. Les différences entre les régimes américain et européen du droit d'auteur ressortent immédiatement dans la façon dont les limites sont exposées dans la législation. Il existe également des différences entre les

divers régimes européens. À des degrés variables, la protection des libertés fondamentales, la sauvegarde de la libre concurrence et la place ménagée aux questions d'intérêt public font partie de l'équilibre du droit d'auteur en France, aux Pays-Bas, en Allemagne et aux États-Unis. La protection de la liberté fondamentale d'expression des usagers est indéniablement la justification la plus largement acceptée pour l'adoption de limites législatives au droit d'auteur. Bien que la formulation puisse varier d'une loi à l'autre, la liberté fondamentale d'expression des usagers est ordinairement garantie par des exceptions telles la doctrine du *fair use* ou le droit de citer ou de reproduire dans des buts précis : commentaire, critique, information d'actualité, recherche ou parodie. Peut-être parce que les lois sur le droit d'auteur de l'Europe continentale contiennent une liste exhaustive de limites strictement formulées et interprétées, les tribunaux de l'Europe continentale semblent plus disposés que leurs homologues américains à accepter l'idée que la protection de la liberté d'expression peut, dans certaines circonstances, constituer une défense appropriée à une action en contrefaçon du droit d'auteur.

Des disparités appréciables existent également entre les régimes de droit d'auteur quant au choix des intérêts spécifiques d'usagers qui sont pris en compte par des limites législatives au droit d'auteur, et quant à la forme à donner à ces limites. Ces disparités s'expliquent, dans une bonne mesure, par les fondements et les objectifs différents des deux traditions en matière de droit d'auteur : alors que la tradition des droits d'auteur de l'Europe continentale s'appuie sur une approche de droit naturel, la tradition américaine adopte une approche utilitaire. En accordant davantage d'importance soit aux intérêts de l'auteur, soit à l'avantage social découlant d'utilisations non autorisées d'un objet protégé par le droit d'auteur, les fondements philosophiques de chaque régime jouent un rôle déterminant dans la définition de la justification, de la portée et de la forme d'une limite particulière. Par exemple, le Congrès américain estime qu'il est préférable pour le bien-être collectif du peuple américain de prévoir des limites précises en faveur des établissements d'enseignement, des organismes sans but lucratif et des bibliothèques par la voie d'une exemption. À l'opposé, en Europe continentale, s'il arrive que de telles limites soient établies, elles sont ordinairement plus favorables aux titulaires de droits, ne permettant certains usages par les écoles et les bibliothèques que moyennant le paiement d'une rémunération équitable aux titulaires des droits. La même observation s'applique en ce qui a trait aux activités de reproductions et de copies destinées à l'usage privé des utilisateurs. Tandis que la plupart des lois européennes permettent ces utilisations à la condition que les titulaires de droits d'auteur reçoivent une rémunération équitable, le Congrès américain a

décidé de ne pas intervenir, sauf en ce qui concerne les enregistrements numériques de copies privées, et de s'en remettre aux tribunaux sur le fondement de la doctrine du *fair use* sans indemnisation.

Cela nous amène à étudier dans la section 2.3 la nature juridique des limites au droit d'auteur et plus particulièrement le genre de droit et de prérogative dont un utilisateur dispose en droit au sujet de l'œuvre protégée par le droit d'auteur. De façon générale, les limites sont partie intégrante du régime du droit d'auteur, car elles constituent la reconnaissance, dans le droit positif des pays de l'Europe continentale, des intérêts légitimes des utilisateurs à faire certains usages non autorisés d'un objet protégé par le droit d'auteur. De façon similaire, les limites au droit d'auteur représentent dans la loi américaine la reconnaissance de l'objectif de politique publique poursuivi par le législateur en permettant certains usages non autorisés d'un objet protégé par le droit d'auteur. Ayant identifié la prérogative de l'usager comme un « droit objectif » en Europe ou comme un « privilège » aux États-Unis, nous examinons si la nature de la prérogative de l'usager peut varier ou non selon la forme de la limite ou selon sa justification. Du point de vue de l'usager, nous croyons que la forme d'une limite donnée a probablement peu d'influence sur sa nature, puisque le paiement d'une rémunération ne constitue qu'une condition à remplir, parmi d'autres, pour l'usage licite d'une œuvre sans autorisation préalable. Cependant, la justification de l'adoption d'une limite détermine pour l'essentiel le poids que les tribunaux vont lui accorder, par exemple lorsque le droit de l'usager entre en conflit avec la liberté contractuelle du titulaire du droit d'auteur. En d'autres mots, le droit ou le privilège de l'usager d'utiliser une œuvre protégée n'a jamais que la force de « l'intérêt légitime » ou de « l'objectif de politique publique » qu'il incarne. Précisément parce que certains « intérêts légitimes » ont plus de poids que d'autres ou contribuent plus directement aux objectifs utilitaires de la loi sur le droit d'auteur, certains contrats qui visent à restreindre l'application d'une limite précise au droit d'auteur peuvent mériter une attention particulière.

Le principe de la liberté contractuelle et ses limites inhérentes

Dans la section 3.1, nous présentons les fondements théoriques de l'étude des points de recoupement entre les règles relatives au droit d'auteur et les règles contractuelles. À cette fin, nous examinons d'abord les fondements du principe de la liberté contractuelle en fonction du modèle du contrat classique, qui nous conduit inévitablement à considérer le modèle du contrat type qui est apparu en réaction à de profonds changements socio-économiques. En dépit de l'usage croissant de contrats types, le principe de la liberté contractuelle demeure la pierre angulaire du système juridique

occidental. Même aujourd'hui, la liberté contractuelle est encore considérée comme un moyen favorisant l'amélioration sociale et l'accomplissement personnel. Cependant, puisque les parties ne jouissent pas toujours d'un égal pouvoir de négociation, l'exercice illimité de la liberté contractuelle par l'une des parties peut engendrer des distorsions sur le plan économique. Plus encore, il existe toujours un danger que la partie la plus puissante ne profite indûment du manque d'expérience ou d'information de la partie adhérente. Par conséquent, le fait que la liberté contractuelle constitue un principe fondamental dans notre système juridique n'entraîne pas nécessairement que cette liberté soit illimitée. La théorie de la bonne foi en droit civil de l'Europe continentale, tout comme la doctrine de l'*unconscionability* dans la *common law* américaine, représente une limite importante à la liberté contractuelle. En plus de ces principes généraux du droit, le nombre de dispositions particulières qui restreignent la liberté de chaque individu en réglementant ses relations privées s'est accru énormément avec le temps. Nous nous concentrons donc sur les limites établies par les normes de l'ordre public économique et de l'ordre public de protection, par les droits constitutionnels et par les notions d'abus de droit et d'usage abusif d'un droit.

Pour favoriser la libre concurrence, les normes de l'ordre public économique imposent notamment certaines restrictions à la liberté contractuelle dans le but de prévenir l'usage de contrats pour ériger un pouvoir économique et en abuser. Dans le cadre de notre recherche, nous avons mis l'accent sur l'article 82 du Traité de Rome et sur l'article 2 du *Sherman Act* aux États-Unis, qui traitent respectivement de l'abus de position dominante sur le marché, et de l'acquisition ou du maintien d'un pouvoir monopolistique par une entreprise. L'analyse des deux dispositions conduit à des conclusions semblables. Pour conclure que le titulaire du droit d'auteur a contrevenu aux règles européennes de la concurrence ou aux lois américaines antitrust, il faut établir qu'il abuse de sa position dominante ou qu'il a acquis ou maintenu son pouvoir monopolistique par des moyens abusifs. Comme le montre l'examen de la jurisprudence, il peut être très difficile de prouver une conduite abusive ou une tentative de monopoliser le marché de la part d'une entreprise dominante. Cela est d'autant plus vrai que, selon les lois sur la concurrence tant en Europe qu'aux États-Unis, chacun est en principe libre de décider avec qui traiter et à quelles conditions. En outre, selon la jurisprudence récente aux États-Unis et en Europe, la théorie des « moyens essentiels » ne doit être appliquée que dans des « cas exceptionnels ».

Pour protéger la partie plus faible au contrat comme le locataire, l'auteur ou le consommateur, un vaste éventail de mesures législatives a été mis en place pour limiter la liberté contractuelle de la partie la plus forte ou pour encadrer son exercice. L'examen de la législation pertinente et de la

jurisprudence montre que le droit contractuel de l'Allemagne et des Pays-Bas adopte une approche nettement plus sociale du contrat – on pourrait dire plus paternaliste – que celui des États-Unis et même de la France. Cette approche sociale du contrat est particulièrement évidente quand on considère que le principe de bonne foi objective a été interprété, aux Pays-Bas et en Allemagne, comme imposant aux parties contractantes l'obligation de considérer l'intérêt l'une de l'autre. Comme les dispositions de la Directive européenne concernant les clauses abusives qu'elles ont inspirées, les dispositions néerlandaises et allemandes prévoient qu'une clause incluse dans un contrat type est généralement jugée injuste si, à l'encontre de l'exigence de bonne foi, elle cause un déséquilibre important dans les droits et les obligations des parties découlant du contrat, au détriment de l'autre partie. Le fait qu'une clause dans un contrat type s'écarte d'une disposition de la loi a été jugé aux Pays-Bas et en Allemagne comme une indication de son caractère déraisonnable. De façon générale, toutefois, l'interprétation de la doctrine américaine de l'*unconscionability* diffère très nettement de l'interprétation des clauses abusives en Europe continentale, où les tribunaux non seulement prennent en compte l'effet d'oppression ou de surprise d'une clause, mais examinent également si la répartition des risques découlant de la clause « désavantage de façon abusive » l'autre partie.

La question de savoir si des droits constitutionnels s'appliquent dans les relations privées exige une étude plus approfondie, effectuée dans la sous-section 3.2.2; étant donné la jurisprudence peu abondante, nos conclusions sur le sujet demeurent incertaines. Traditionnellement, les droits fondamentaux protègent les individus contre l'ingérence de l'État. Toutefois, il existe dans la doctrine de l'Europe continentale une reconnaissance accrue du fait que, dans un système juridique cohérent, les individus doivent avoir le droit de faire respecter leurs droits fondamentaux, y compris dans leurs relations privées. La jurisprudence de la Cour européenne des droits de l'homme tendrait à appuyer cette position. Bien que la jurisprudence néerlandaise et allemande n'ait pas toujours été constante en cette matière, les quelques affaires ayant traité des questions d'application horizontale de droits constitutionnels ont témoigné d'une préférence marquée pour un effet *indirect*. Ces affaires demeurent cependant exceptionnelles. En outre, l'effet horizontal des droits constitutionnels est généralement considéré comme beaucoup plus faible dans les relations contractuelles que dans les situations non contractuelles, parce que les parties peuvent exercer leur autonomie individuelle au moment de la conclusion du contrat. En plus de la retenue judiciaire dans ce domaine, soulignons qu'en principe, rien n'empêche les individus de renoncer à la protection de leurs droits fondamentaux. Néanmoins, la validité d'une clause contractuelle restrictive peut encore être

contestée en principe si les circonstances sont telles que le consentement d'une partie à la renonciation n'était pas exprès ou volontaire, si la substance du droit est atteinte ou si la restriction était disproportionnée eu égard à l'objet du contrat.

Aux États-Unis, une action privée d'un particulier ne donnera lieu à un examen constitutionnel que si elle peut être assimilée à une action de l'État. Même s'il est jugé qu'il existe une action de l'État, les tribunaux doivent alors décider quel degré d'examen constitutionnel il faut appliquer, compte tenu des circonstances particulières de l'affaire. La principale difficulté pour définir une norme unique de contrôle judiciaire dans le domaine de la liberté d'expression réside dans le fait que les libertés du Premier Amendement jouent divers rôles dans la protection de l'intérêt de l'individu dans son accomplissement personnel ainsi que de l'intérêt de la société dans des débats publics vigoureux concernant les problèmes d'intérêt public. Un certain nombre de critères se sont dégagés des décisions de la Cour suprême des États-Unis, adoptant des approches différentes pour déterminer la norme de contrôle judiciaire applicable à divers types de problèmes de liberté d'expression. Des critères élaborés par la Cour suprême, celui qui est peut-être le plus largement appliqué est l'approche par catégorie. Dans l'examen des contestations fondées sur le Premier Amendement en fonction de ce critère, les tribunaux doivent d'abord déterminer si la réglementation en question est fondée sur le contenu ou si elle est neutre par rapport au contenu. Selon ce critère, les restrictions fondées sur le contenu ne sont appliquées que si elles sont soutenues par un intérêt gouvernemental capital et si elles sont strictement adaptées à servir cet intérêt. Par contre, les restrictions neutres par rapport au contenu sont jugées applicables si elles servent à promouvoir un intérêt gouvernemental substantiel qui serait atteint de façon moins efficace en l'absence de ces réglementations et si elles n'entravent pas la liberté de parole nettement plus qu'il n'est nécessaire pour favoriser cet intérêt. Toutefois, aucun tribunal n'a encore statué sur le point de savoir si l'application d'une restriction contractuelle aux droits d'une personne protégés par le Premier Amendement peut constituer une action de l'État soumise à un examen constitutionnel.

Finalement, nous passons dans la section 3.2.3 à la théorie de l'abus de droit, reconnue dans le droit civil de l'Europe continentale, et à la doctrine de l'usage abusif du droit (*misuse of right*), admise par la *common law* américaine. Certes, les deux théories ont des origines très différentes, l'une provenant du droit civil en matière de propriété et de responsabilité et l'autre, de la loi antitrust américaine. Néanmoins, un certain parallèle peut être établi entre les deux notions. En conséquence, dans certains pays de l'Europe continentale, tels la France et les Pays-Bas, les tribunaux ont parfois refusé

d'appliquer des droits subjectifs en vertu de la doctrine de l'abus de droit, quand ces droits étaient exercés de façon anormale. L'usage anormal d'un droit peut consister dans un détournement par rapport à son usage projeté, soit avec l'intention de causer un préjudice, par négligence, sans intérêt légitime ou en détournant ce droit de sa fonction sociale. De la même façon, les tribunaux des États-Unis ont développé la doctrine de l'usage abusif du droit d'auteur, selon laquelle l'application d'un droit sera refusée lorsque la conduite du titulaire est tellement contraire à la loi ou à l'ordre public qu'elle fait obstacle à tout recouvrement dans une action en contrefaçon. Les deux théories ont en commun le fait que l'usage d'un droit d'une manière contraire à l'ordre public ou à la fonction sociale du droit n'est pas uniformément accepté comme fondement de l'abus.

La liberté contractuelle à l'égard de l'usage de l'objet protégé par le droit d'auteur

La section 4.1 traite des pratiques contractuelles concernant l'utilisation de l'objet protégé par le droit d'auteur. Nous observons que ce type de relations contractuelles a subi la même évolution que celles de n'importe quel autre champ d'activité économique. En dehors des contrats entièrement négociés conclus avec des producteurs et des distributeurs d'objets protégés, il se développe une tendance observable à concéder aux utilisateurs finals individuels des licences d'utilisation d'œuvres au moyen de contrats types. Nombreux sont ceux qui pensent que la technologie numérique révolutionne actuellement la distribution de masse en offrant les conditions préalables parfaites pour le développement d'une culture contractuelle. On a soutenu que les usagers d'objets protégés par le droit d'auteur vont bientôt pouvoir « individualiser » leurs contrats avec les commerçants de manière à les ajuster en fonction de leurs besoins grâce à la nature interactive du médium. Les modèles de licence en ligne communément envisagés en Europe et en Amérique font appel à la concession de droits de licence par transaction, par utilisation, par œuvre ou sur une autre base. Même dans l'environnement numérique, toutefois, la négociation de chaque clause d'un contrat en ligne avec chaque utilisateur potentiel est aussi fastidieuse que dans le monde analogique. Ainsi, la distribution de masse d'œuvres protégées s'accompagne-t-elle d'un usage accru de contrats types dans l'environnement numérique également.

En pratique, les licences sous emballage de plastique (*shrink-wrap*) et en ligne (*click-wrap*) semblent devenir la norme pour la distribution d'objets protégés en format numérique. Ceci nous amène à examiner de la validité des licences sous emballage de plastique et en ligne dans le droit civil de

l'Europe continentale et dans la *common law* américaine. L'examen des lois applicables et de la jurisprudence fait ressortir une différence frappante entre les deux systèmes juridiques. Alors que la validité des contrats électroniques ou à distance a été expressément reconnue selon les lois européennes ou américaines, les tribunaux européens ont adopté une attitude beaucoup plus circonspecte à l'égard de ces licences que leurs homologues américains, particulièrement au sujet du consentement. En France, aux Pays-Bas et en Allemagne, les tribunaux considéreraient généralement un contrat type comme valide à condition que la partie adhérente soit informée à la fois de l'existence du contrat et de son contenu avant la conclusion de la vente.

À l'opposé, l'*Uniform Computer Information Transactions Act* (UCITA) entérine pour l'essentiel la pratique développée par certains tribunaux américains d'appliquer des clauses de licence même si elles ont été communiquées après que la transaction a eu lieu, à condition que le preneur de licence ait la possibilité de retourner le produit si les clauses sont inacceptables. L'UCITA confirme également que dans la plupart des cas, le simple acte d'ouvrir un emballage plastique ou d'exécuter un programme sur un ordinateur constituera une manifestation valide du consentement du preneur de licence, même s'il n'a pas lu ou compris toutes les clauses de la licence. En principe, cette façon de contracter ne pose pas de problèmes réels pour les licences en ligne, parce qu'il est facile de donner accès aux clauses de façon que le preneur puisse en prendre connaissance avant de conclure la transaction. Par contre, elle peut certainement créer des difficultés dans le cas de licences hors ligne (*off-line*), transmises avec le produit après que la transaction est intervenue et auxquelles les preneurs deviennent partie par l'accomplissement d'un acte simple, à moins qu'ils ne retournent le produit si les clauses sont inacceptables. Compte tenu de la tendance générale vers la reconnaissance des licences sous emballage de plastique et en ligne comme valides et applicables en vertu du droit des contrats, les titulaires de droits ont maintenant le pouvoir de subordonner toute utilisation de l'objet protégé aux clauses d'un contrat type. La situation peut devenir problématique lorsque les titulaires de droit tentent de restreindre la liberté d'action des utilisateurs au-delà des limites prévues par la législation sur le droit d'auteur.

Dans la section 4.2, nous nous penchons sur l'étude des limites possibles à la liberté contractuelle en ce qui concerne l'utilisation de l'objet protégé. La sous-section 4.2.1 se concentre sur les limites établies par la législation sur le droit d'auteur. Étant donné l'absence de jurisprudence, on en est réduit pour l'instant aux conjectures. Nous sommes d'avis que les dispositions des régimes de droit d'auteur n'offrent pas d'indications claires pour la résolution de conflits opposant le « droit objectif » ou le « privilège » de l'utilisateur de bénéficier d'une limite législative et la liberté contractuelle

du titulaire des droits. En Europe, même les dispositions impératives de la Directive sur les programmes d'ordinateur et de la Directive sur les bases de données ont été appliquées différemment selon les États membres, ce qui a entraîné un degré variable dans le caractère impératif de ces dispositions. À l'exception de ces dispositions spécifiques, les législations française et néerlandaise en matière de droit d'auteur ne donnent pas d'autres indications quant au caractère impératif des limites au droit d'auteur. Compte tenu de l'ancrage solide du régime du droit d'auteur français dans le droit naturel, les tribunaux français ne seraient guère enclins à admettre le caractère impératif des limites incluses dans le Code de la propriété intellectuelle. Aux Pays-Bas, quelques décisions nous portent à croire que les tribunaux adopteraient une approche plus prudente et chercheraient à interpréter les clauses contractuelles en conformité avec la lettre et l'esprit de la législation sur le droit d'auteur. En Allemagne, l'application du principe de *Sozialbindung* vient renforcer l'argument que, même si la loi ne fait aucune mention expresse de la nature impérative des limites au droit d'auteur, le régime du droit d'auteur a été élaboré avec soin pour tenir compte des considérations d'intérêt public. Par conséquent, un tribunal allemand pourrait conclure qu'un contrat interdisant à un usager d'accomplir certains actes qui sont autrement permis par la loi sur le droit d'auteur est contraire à l'intérêt public et au principe de *Sozialbindung*.

Aux États-Unis, les conflits entre la loi sur le droit d'auteur et la loi contractuelle sont résolus soit en vertu de la disposition de primauté expresse de l'article 301 du *Copyright Act* des États-Unis, soit en vertu de la disposition de suprématie générale de la Constitution américaine. Toutefois, la doctrine générale de la primauté n'offre pas d'indications claires au sujet de l'applicabilité de contrats qui visent à déroger aux droits et obligations prévus dans le *Copyright Act*. On ne pourra faire valoir une cause d'action contractuelle si le contrat confère des droits qui sont équivalents aux droits exclusifs prévus par l'article 106 du *Copyright Act* ou si son application ferait obstacle au plein accomplissement de l'objet du Congrès. Un certain nombre d'auteurs estiment que l'incidence sur la politique fédérale en matière de droit d'auteur nécessaire pour faire jouer la primauté diffère selon que le contrat qui vise à restreindre les privilèges prévus par la loi est entièrement négocié ou qu'il est présenté à l'utilisateur comme un contrat type. Cet argument suppose que les contrats entièrement négociés de ce type ne seraient probablement pas répandus et que l'utilisateur serait au courant du fait que, sans le contrat, il serait autorisé à bénéficier de la défense en vertu du *fair use* et des autres limites législatives. Selon cette position, on ne devrait pas faire jouer la primauté contre les contrats entièrement négociés. Par contre, les licences sous emballage de plastique pourraient constituer une plus grande menace pour les

objectifs de la politique de droit d'auteur et devraient en conséquence faire jouer la primauté en raison de leur vaste utilisation par des personnes qui, le plus souvent, n'ont pas lu ou compris les clauses de la licence. Cependant, en l'absence de jurisprudence si ce n'est la décision *Vault*, l'examen de la compatibilité des clauses contractuelles restrictives avec la politique fédérale sur le droit d'auteur dans le cadre de l'analyse de la primauté sur le fondement de la disposition de suprématie relève de la conjecture.

Compte tenu de ces conclusions, nous analysons dans la section 4.2.2 les limites générales de la liberté contractuelle pour savoir si elles s'appliquent et dans quelle mesure, dans le contexte d'un contrat qui vise à restreindre les privilèges reconnus aux usagers par la loi du droit d'auteur. En ce qui concerne l'application de normes de l'ordre public économique comme limite à la liberté contractuelle des parties, nous arrivons à des conclusions semblables en ce qui concerne le droit européen et le droit américain. De façon générale, nous pensons que le critère d'application des règles du droit de la concurrence ou de la loi antitrust sont très strictes et qu'on ne pourrait pas facilement s'en servir comme d'un instrument pour contrôler les clauses restrictives d'une licence du droit d'auteur. En fait, pour établir l'abus d'une position dominante ou l'acquisition ou le maintien illégal d'un pouvoir monopolistique, il faut une preuve solide au sujet de l'intention du monopoleur et de l'atteinte causée à la concurrence. De plus, pour appliquer la doctrine des « moyens essentiels », il doit y avoir un marché sur lequel le demandeur et le défendeur se font concurrence, de telle sorte que le monopoleur étend son monopole au marché en aval en refusant l'accès au moyen contrôlé. Une telle action serait difficilement possible pour des utilisateurs finals individuels qui ne font pas concurrence au titulaire des droits au sens du Traité de Rome ou du *Sherman Act*. Quant à savoir si une action est possible pour les éditeurs de livres ou de journaux, les producteurs de bases de données, de disques ou de logiciels, les bibliothèques, les centres d'archives et les établissements d'enseignement ou les fournisseurs d'information, ce serait essentiellement une question de fait.

Ensuite, nous examinons si certaines clauses d'utilisation contenues dans les contrats types pourraient être invalidées sur le fondement de normes de l'ordre public de protection et plus spécifiquement de la réglementation des contrats types. La question de savoir si une clause est jugée abusive ou déraisonnable à l'égard des usagers d'objets protégés dépend pour une bonne part, à notre avis, de l'approche adoptée par le pays à l'égard du régime du droit d'auteur et du principe de la liberté contractuelle. En l'absence de jurisprudence en sens contraire, nous pensons que, au moins aux Pays-Bas et en Allemagne, les tribunaux seraient disposés à accepter l'idée que, dans certaines circonstances, une clause restrictive dans une licence du droit

d'auteur pourrait être abusive ou contraire aux principes de *redelijkheid en billijkheid* ou *Treu und Glauben* respectivement. Par contre, les tribunaux français seraient probablement très peu enclins à conclure qu'une telle clause restrictive est abusive, vu que l'octroi de droits exclusifs en vertu du régime français du droit d'auteur est justifié surtout par des principes du droit naturel. Aux États-Unis, l'usager d'un objet protégé aura probablement de la difficulté à prouver qu'une clause de licence est abusive parce qu'elle va au-delà des attentes raisonnables d'une personne ordinaire, ou parce qu'elle crée autrement une oppression ou cause une surprise injuste. De plus, comme le fait qu'une clause de licence s'écarte des privilèges normalement reconnus par la loi sur le droit d'auteur ne semble pas constituer un facteur à prendre en compte selon la doctrine de l'*unconscionability*, la plupart des clauses de licence restrictives seraient très probablement jugées valides, abstraction faite de leur incidence sur la politique sur le droit d'auteur.

Dans la section suivante, nous passons à l'étude de l'application des droits constitutionnels à des licences privées de droit d'auteur. Malheureusement, aucun des critères examinés dans le droit constitutionnel de l'Europe continentale ne nous permet de déterminer dans l'abstrait si une restriction à l'exercice de la liberté d'expression de l'utilisateur, au moyen de citations, de parodies ou d'information d'actualité, serait considérée comme proportionnelle à l'objectif de protection des intérêts du titulaire des droits. Compte tenu du fait que les tribunaux sont ordinairement peu disposés à intervenir dans des contrats négociés, nous sommes d'avis qu'il est très improbable qu'un tribunal de l'Europe continentale invalide une clause restrictive de licence du droit d'auteur. Par contre, les tribunaux pourraient adopter une attitude différente si une clause restrictive était incluse dans un contrat type. Les tribunaux de l'Europe continentale examineraient généralement, au cas par cas, les positions respectives des parties dans la négociation, l'objectif du contrat, le droit constitutionnel touché, la gravité de l'empiétement sur ce droit et la proportionnalité de l'objectif visé et de l'empiétement qui en résulte. Selon son appréciation de ces facteurs, le tribunal pourrait conclure qu'une clause de licence du droit d'auteur qui restreint la possibilité pour l'usager de citer l'œuvre, de la diffuser à titre d'information d'actualité ou d'en faire une parodie va à l'encontre du principe de bonne foi objective.

Aux États-Unis, l'application des droits constitutionnels à des contrats privés est même plus incertaine qu'en Europe continentale. Si une clause contractuelle peut être jugée invalide parce qu'elle porte atteinte à l'ordre public, aucun tribunal n'a jamais jugé invalide une clause contractuelle qui restreint la liberté d'expression d'une partie au motif qu'elle contrevient à l'ordre public. Les commentaires officiels de l'UCITA mentionnent que, dans

l'examen des clauses restrictives de licences du droit d'auteur, les tribunaux doivent tenir compte de la doctrine du *fair use* et des politiques publiques qui la sous-tendent. Reste à voir quelle influence ce commentaire sans force obligatoire aura sur les tribunaux lorsque l'interprétation des clauses restrictives de licence du droit d'auteur se fera en fonction des dispositions de l'UCITA. Quoi qu'il en soit, il n'est pas exclu, en principe, qu'une clause restrictive de licence du droit d'auteur soit soumise à un contrôle en vertu du Premier Amendement, si l'action du donneur de licence devait être assimilée à une action de l'État. En se fondant sur les précédents établis par *Shelley v. Kraemer* et *New York Times v. Sullivan*, on pourrait alors soutenir qu'il existerait une action de l'État si un tribunal devait appliquer la loi contractuelle de l'État mettant en œuvre les dispositions de l'UCITA pour appliquer la clause restrictive d'une licence du droit d'auteur. Même si le tribunal juge qu'il existe une action de l'État, il doit encore décider quel niveau d'examen en fonction du Premier Amendement devrait être exercé à l'égard de la protection du droit d'auteur en général et de la doctrine du *fair use* en particulier. À moins qu'une clause restrictive de licence du droit d'auteur soit dirigée contre le contenu véhiculé par le message de l'utilisateur, la plupart des restrictions à la liberté de parole tomberaient sous la catégorie des réglementations neutres par rapport au contenu ou encore des réglementations d'application générale, suivant les circonstances de chaque cas. Ainsi, un tribunal aurait à trancher la question de savoir si une clause restrictive de licence du droit d'auteur sert à promouvoir un intérêt substantiel qui serait atteint de façon moins efficace en l'absence de cette restriction et si elle n'entrave pas la liberté de parole nettement plus qu'il n'est nécessaire pour favoriser cet intérêt.

Finalement, nous examinons si la théorie civiliste de l'abus de droit et la doctrine de *common law* sur l'usage abusif du droit d'auteur peuvent servir à contrôler l'utilisation des clauses restrictives de licence du droit d'auteur par les titulaires de droits. En France et aux Pays-Bas, les tribunaux peuvent refuser de sanctionner un droit subjectif en vertu de la théorie de l'abus de droit, si ce droit a été exercé d'une manière anormale, par exemple en détournant ce droit de sa fonction sociale. De plus, parce que les tribunaux français considèrent généralement que les principaux objectifs du régime du droit d'auteur sont de protéger les droits moraux et de récompenser l'effort créateur, nous pensons qu'ils ne seraient pas enclins à conclure qu'une clause restrictive de licence est incompatible avec le but pour lequel le droit d'auteur est accordé. Une telle clause de licence serait très probablement jugée valide en France par rapport à la théorie de l'abus de droit. Aux Pays-Bas, certains auteurs ont examiné la question d'une application possible de la théorie de l'abus de droit en matière de droit d'auteur. Aucun tribunal n'a encore

examiné la question de façon approfondie. Cependant, nous pensons qu'un tribunal néerlandais pourrait, selon les circonstances de chaque affaire, refuser d'appliquer une clause de licence qui vise à restreindre les privilèges normalement accordés aux usagers au motif qu'il s'agit d'un abus de droit. En réalité, à notre avis, le droit d'auteur trouve sa justification, aux Pays-Bas, non seulement dans la justice à l'endroit de l'auteur pour son travail intellectuel ou dans la protection des droits moraux, mais aussi dans l'utilité intellectuelle et culturelle de l'œuvre pour la société.

De même, les tribunaux américains ont développé la doctrine de l'usage abusif du droit d'auteur, selon laquelle l'application d'un droit d'auteur sera refusée lorsque la conduite du titulaire est contraire à la loi ou à l'ordre public au point de faire obstacle au recouvrement dans une action en contrefaçon. On pourrait prétendre que cette doctrine tire sa source non pas dans le droit des biens, dans le droit de la responsabilité délictuelle ou dans le droit des contrats, mais dans le droit antitrust. Cependant, depuis la décision *Lasercomb*, un certain nombre de tribunaux ont jugé que, même si l'usage d'un droit d'auteur ne viole pas les lois antitrust, une défense d'usage abusif peut être admissible dans une action en contrefaçon si le droit d'auteur est utilisé d'une manière qui entre en conflit avec l'ordre public incorporé dans l'octroi d'un droit d'auteur. Jusqu'à présent, la plupart, sinon toutes les affaires où l'usage abusif du droit d'auteur a été invoqué, font intervenir un comportement anticoncurrentiel de la part du demandeur. Il n'est pas encore certain si les tribunaux peuvent juger que l'usage abusif existe en dehors du contexte de la loi antitrust ou des restrictions commerciales, c'est-à-dire dans toute situation où le droit d'auteur est utilisé de manière à porter atteinte à l'ordre public incorporé dans l'octroi du droit d'auteur. Nous pensons qu'il devrait l'être, mais il s'agit d'une conclusion fort provisoire.

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COPYRIGHT LIMITATIONS AND CONTRACTS

An Analysis of the Contractual Overridability of Limitations on Copyright

Lucie M.C.R. Guibault

Traditional copyright law strikes a delicate balance between an author's control of original material and society's interest in the free flow of ideas, information, and commerce. In today's digitally networked environment, this balance has shifted dramatically to one side, as powerful rights holders contractually impose terms and conditions of use far beyond the bounds set by copyright law. This vitally significant book explores this conflict from its gestation through its current manifestations to its future lineaments and potential consequences.

Focusing on statutory copyright limitations that enshrine constitutional rights such as freedom of expression and privacy, foster dissemination of knowledge, safeguard competition, and protect authors from market failure, *Copyright Limitations and Contracts* clearly explains the rationale for these limitations and questions the legality of overriding them by contractual means. The author finds a complex array of factors clouding the emergence of coherent rules in the matter, among them the nature of the contract (e.g., fully negotiated vs. "shrink-wrap"), the respective interests of the parties involved, and the legislated policy of particular regimes. She points out that the United States' new Uniform Computer Information Transactions Act (UCITA), which is likely to be adopted by many U.S. States and influence similar legislation in many other countries, leaves this crucial issue essentially unresolved.

Among the author's many startling insights is that, contrary to the commonly held notion that the Internet is a bastion of free speech, in fact it is now possible (via encryption technology) for the first time in human history to exercise absolute control over copyrighted material, even under circumstances of global mass distribution. As we become more and more aware that the intersection of copyright and contract reveals one of the deepest and most far-reaching contradictions of our time, this illuminating analysis will be of extraordinary value to jurists in every area of public and private law.

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