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Article

COUNTERING THE UNFAIR PLAY OF DRM TECHNOLOGIES

Nicola Lucchi[a1]

I. Introduction

This paper focuses on the side effects for consumers and the possible solutions connected with the diffusion of Digital Rights Management technology (DRM) used to secure digital content and to manage individual user behavior.

***92** DRM technologies underlie a very large number of attractive and innovative services for consumers such as online music and video stores, pay-per-view, and video on demand services. DRM can be applied for many purposes and in different ways which could be beneficial or detrimental to consumers depending on specific circumstances. For example, DRM systems have offered new distribution and pricing models that take advantage of new technologies.

Unfortunately, some digital content formats have embedded capabilities to limit the ways in which digital content can be used, reducing the consumer's choice and generating interoperability problems. For example, use may be restricted for a time period, to a particular computer or other hardware device, or by requiring a password or an active network connection. Furthermore, DRM can also individually control user behavior, presenting a powerful threat to freedom of expression as well as privacy. Such situations can conflict with legitimate consumer rights and privileges.

Because consumers have the right to benefit from technological innovations without abusive restrictions, I suggest considering consumer protection law as an effective and immediately usable solution to reduce some of the imbalances between parties.

To solve this unfairness, it is possible to use different approaches. The question could be addressed (not necessarily solved) by using three different contexts: copyright law, competition law, and consumer protection law.

In this article, I focus only on the consumer protection law perspective. The following pages consider whether and to what extent consumer rights are negatively affected by "digital terms and conditions" enforced with technology and contract law. To balance this inequity, the research investigates the application of consumer protection law as a possible contributory instrument to achieve more fairness in a mass-market digital product transaction.

The first part of the article, after a brief definition of the term "DRM," offers three concrete examples of the potential side effects of using Digital Rights Management technologies in consumer products.

The second part discusses how control of information, essentially based on contract, technology and copyright law, has been reshaped by the digital revolution, putting aside the law and promoting contract and technology. In this troublesome situation, the article offers a route to reconcile conflicting privileges.

The third part looks at the European and the U.S. consumer protection provisions, confronting the U.S. state law doctrine of unconscionability, European consumer protection law, and other traditional limitations on contractual rights.

The article concludes by proposing some possible scenarios and discussing the features suggested by these scenarios. In particular, it invites the reader to reconsider the setting of copyright law and to stipulate new rules for the implementation of specific provisions regarding digital consumer protection. In the meantime, general consumer protection law could contribute to filling the gap, even if it can not be considered a complete cure.

*93 II. DRM Technologies: Definition and Functioning

Digital Rights Management (DRM) is a broad term that refers to any technologies and tools which have been specifically developed for managing digital rights or information.[1] DRM technologies have the potential to control access to and use of digital content.[2] This objective is usually realized by implementing a technological protection measure. Therefore, a technological measure is any technology that is designed to prevent or restrict acts which are not authorized by the right-holder.[3]

The synergistic effect obtained through the combination of technical and legal means of protection allows DRM systems to create a business model for the secure distribution of digital content to authorized users.[4]

In practice, DRM systems are software-based tools tailored to control the use of digital files in order to protect the interests of right-holders. DRM technologies can manage file access (number of views, length of views, ways of viewing), altering, sharing, copying, printing, and saving.[5] These technologies may be included within the operating system, program software, or in the actual hardware of a device.

To secure content, DRM systems can take two approaches: "The first is 'containment,' [or the wrapper,] an approach where

the content is encrypted in a shell so that it can only be accessed by authorized users. The second is 'marking,' [or using an encrypted header,] such as the practice of placing a watermark, flag, XML or XrML tag on content as a signal to a device that the media is copy protected."[6]

DRM systems can be characterized by the different technological protection measure used. Encryption is one of the basic features. It keeps content secure by ***94** scrambling (or "encrypting") it and preventing it from being read until it is unscrambled with the appropriate decryption key.[7] Digital watermarking is another technique used to authenticate, validate, and communicate information. It enables identification of the source, author, creator, owner, distributor, or authorized consumer of digital content.[8] Another type of protection measure is constituted by "trusted systems."[9] These systems strengthen content protection, involving both software and hardware in the control process by building security features like cryptographic signatures in personal computers.[10]

A. Side Effects Induced by DRM Technologies: Some Practical Cases

Three concrete examples of the effects of the use of DRM technologies in consumer products help to better understand the underlying problems and potential strategies to restore the traditional balance. I outline some court decisions connected with cases where consumers never received the correct information concerning the limitation imposed thought the use of DRMs.

1. iTunes

The first case is the iTunes Music Store, a famous virtual record shop where customers can buy and download either complete albums or individual tracks from many major artists of different genres.[11] This service enforces its standard contract terms by means of a DRM system called "FairPlay" and, according to the terms of service, the provider reserves the right, at its sole discretion, to modify, replace or revise the terms of use of the downloaded files:[12]

iTunes reserves the right, at any time and from time to time, to update, revise, supplement, and otherwise modify this Agreement and to impose new or additional ***95** rules, policies, terms, or conditions on your use of the Service. Such updates, revisions, supplements, modifications, and additional rules, policies, terms, and conditions (collectively referred to in this Agreement as "Additional Terms") will be effective immediately upon release and incorporated into this Agreement. Your continued use of the iTunes Store [sic] will be deemed to constitute your acceptance of any and all such Additional Terms. All Additional Terms are hereby incorporated into this Agreement by this reference.[13]

This kind of unilaterally imposed changes in conditions of use on legitimate downloaded files can be enforced just by changing the DRM settings. In the European Communities (EC) market, this behavior is prohibited by law and considered unfair, particularly when applied in a standard form contract not subject to negotiation. According to the Directive 93/13/EEC on unfair terms in consumer contracts,[14] terms of service such as those used by iTunes could be included in the indicative and non-exhaustive list of the terms which may be regarded as unfair, reproduced in the Annex to the Directive.[15] Explicitly, the Directive talks about terms which have the object or effect of "enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract"[16] or of "enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided."[17]

Based on this fact, on January 25, 2006 the Norwegian Consumer Council presented a complaint with the Consumer Ombudsman (Mr. Bjórn Erik Thon) against iTunes Music Store Norge for breach of fundamental consumer rights.[18] Although Norway is just an EEA (European Economic Area) member, its copyright and consumer protection law fully complies with the EC Copyright and Consumer Acquis.[19]

***96** Mr. Thon has ruled that some of the Apple iTunes terms and conditions are in contrast to section 9a of the Norwegian Marketing Control Act.[20] This Act implements in the Norwegian systems the Directive 93/13/EC on unfair terms in consumer contract. Section 9a stipulates that:

> Terms and conditions which are applied or are intended to be applied in the conduct of business with consumers can be prohibited if the terms and conditions are considered unfair on consumers and if general considerations call for such a prohibition. When determining whether the terms and conditions of a contract are unfair, emphasis shall be placed on the balance between the rights and obligations of the parties and on whether the contractual relationship is clearly defined or not.[21] According to this act, the Consumer Ombudsman, upon request from an authority or consumer organizations, can intervene and

prohibit the use of unfair terms and conditions in consumer contracts.[22]

In this case, Mr. Thon considered some of iTunes terms and conditions unreasonable. In particular, he considered both Apple's reservation of the right to unilaterally modify the terms of the usage agreement without notice and its disclaimer of responsibility for computer viruses or other damage that might result from downloading music from its service to be unfair.[23] Both terms violate the basic fundamental principles of contract law. Furthermore the Norwegian Consumer Ombudsman highlighted that Apple's DRM system is not "interoperable" with other formats and devices "locking consumers into Apple's proprietary systems."[24]

This decision, even if the case is still pending, is one of the several small steps on a long path, but it could be considered a very significant step.[25] In fact, it is ***97** important to note that Norway's complaint comes after similar recent legal actions in Europe.[26]

2. Sony-BMG Rootkit

This Sony-BMG CD spyware story confirms that consumer protection in digital media could be found outside copyright law. The story involves the use of a copy-protection technology called XCP (i.e. Extended Copyright Protection) in the Sony-BMG CDs.[27] When consumers tried to play the copy protected CDs on their computers, this DRM system automatically installed software and then hid this software to make it more difficult for consumers to remove it.[28] The side effect of this software was to interfere with the normal way in which the Microsoft Windows operating system played CDs, opening security holes that allowed viruses to break in and collect information from the user's computer.[29] Even if Sony BMG disclosed the existence of this software in the End Users' License Agreement (EULA), the agreement did not disclose the real nature of the software being installed, the security and privacy risks it created, the practical impossibility of uninstalling and many other potential problems for the user's computer.[30] On the ***98** contrary, the EULA misrepresented the real nature of the software including ambiguous and restrictive conditions.[31]

When users and consumer organizations were informed of the matter, they filed more than twenty lawsuits against Sony BMG in Canada, the United States and Europe.[32]

Following the discovery of the use of this surreptitious copy protection technology, in November 2005 the Attorney General of Texas filed a class action lawsuit against Sony BMG[33] under Texas' Consumer Protection Against Computer Spyware Act of 2005 (Texas Spyware Act).[34] In the United States, other private actions were consolidated and settled.[35] Many of these class-action lawsuits were filed in California by Electronic Frontier Foundation asserting the violation California's Consumer Protection Against Computer Spyware Act.[36]

The point is particularly interesting for the article's thesis because, to my knowledge, these are some of the first cases based on consumer law as an instrument of defense against DRM technologies. Actually, the US approach to the problem has been mainly dealt with, at least up to now, under the copyright spectrum.[37]

***99** 3. EMI Music France

The last example is the French case CLCV v. EMI Music France.[38] The consumer association Consommation, Logement et Cadre de Vie (CLCV) filed a lawsuit claiming that EMI Music France had not provided sufficient and correct information to consumers concerning technological protected CDs and their playability restrictions.[39] In particular, the judge determined that not informing consumers about the fact that a content medium like a CD cannot be played on some devices can represent a "tromperie sur les qualités substantielles des CD," or "a deception on substantial qualities of CD."[40] For this reason, it can constitute a misleading behavior about the nature and substantial qualities of the product as recognized by the article L213-1 of the French Comsumer law (Code de la Consommation).[41] The Court of appeal in Versailles confirmed the decision of the Tribunal de Grande Instance de Nanterre, rejecting the arguments of EMI Music France.[42] It also ordered EMI Music to pay 3000 euros as damages and to appropriately label the outside packaging of its products.[43]

***100 B. DRM Technologies, Contract and Consumer Protection**

These three examples offer clear evidence that contemporary transnational economy is often in contrast with national legal

orders, which are unable to rapidly conform to the changes of the society. They also prove that copyright law is drifting away from its leading role because it is inadequate to deal effectively with the challenges of the new global environment. On the other hand, contract law has been able to adapt to the changes in society produced by the industrial revolution as well as in the present-day potential of the digital world.[44] This is the reason why contract has become the principal instrument for legal innovation and legal standardization.[45]

In the information society framework, the combination of contract with technological protection measures could represent a powerful mixture for a fully automated system of secure distribution, rights management, monitoring, and payment for protected content. So, when users access content protected by a technological protection measure, the content provider, in practice, imposes a contractual provision by a click-through or click-wrap agreement. In particular, in the online media marketplace, digital rights management systems can operate in combination with contracts and can be essentially used to enforce contractual conditions.

The flow and control of information is essentially based on the following instruments: contract, technology, and copyright law.[46] The digital revolution has ***101** reshaped the hierarchy by putting aside the law and promoting contract and technology. Copyright law has just become an instrument to strengthen the control based on contract and technology.[47]

Actually, the anti-circumvention legislation enacted in the United States[48] and Europe,[49] combined with the use of technological protection measures and rights management systems, have had the effect to move the issue from copyright law to contract law. As a consequence, if digital content is protected by rights management systems, and rights management systems are protected by technological and legal measures, the consumer's capacity to exercise legitimate rights or exceptions could be compromised. Content owners can unilaterally determine and dictate terms and conditions limiting consumers' behaviors.

Furthermore, in the digital marketplace, consumers are increasingly obliged to deal with unfair and obscure licensing agreements, misuse of personal data, device and digital content which are not designed to communicate together and, above all, with lack or insufficient information about products and services.[50]

To balance this iniquity, I want to concentrate on the aspects of consumer protection, fair contractual conditions, information disclosure and deceptive practices. DRM-controlled applications have the potential to formulate rules[51] and to enforce contractual conditions[52] locking content beyond its copyright period or disrespecting existing exceptions, such as the "right" to make copies for private use, parody, quotation, scientific or teaching purposes.[53]

Additionally, a DRM-enforced contract is often realized on unfairness in the process of contract formation and on unfairness in the "invisible" contract terms connected with the use of technological protection measures. Whereas "visible" terms are immediately valuable by consumers, "invisible" terms and conditions are ***102** not only terms that cannot be readily comprehended, but in this case they are also terms implemented without providing consumers notice of the possible limitations of the copy-protected content. In few words, the restrictions imposed by technological measures are frequently unclear to consumers. This lack of information can induce consumers to make buying decisions which they would not have made had they been better informed.

The perverse effect of this technology controlled contract is to preclude the traditional copyright balance between right-holders' interests on the one hand and the interests of users and society on the other hand. This is a traditional balance that has been a part of Anglo-American fair use doctrine as well as part of the copyright exemptions in European copyright law.[54]

Therefore, to avoid a legal regime that reduces options and competition in how consumers enjoy digital media, contractual licensing of information or other standardized digital content transactions must be subject to the same legal limitations as other contracts. The aim is to guarantee consumers certain basic rights in the digital world informing what they can or cannot do with the digital content acquired.

Copyright law is drifting towards a contract law scheme where DRM technologies allow copyright owners to circumvent the existing fair use exceptions in copyright law. Any rights that consumers may have under copyright law could be replaced by a commercial agreement between the parties. I believe that these stronger author rights need more weight in the balancing analysis.

To reach this goal, I think it is necessary to develop a new legal framework to reestablish consumers' rights. In the meantime, we can immediately achieve some positive results by applying general consumer protection law and, in particular, the legal remedies to protect the weaker contractual party.

C. Do Consumers Have Rights When Purchasing Digital Content?

Digital consumers have rights, which must be protected. The development of digital media technology has offered new opportunities of enjoyment for consumers,[55] but it also raises, as mentioned above, significant consumer protection concerns. Various media systems available on the market use DRM technologies without any consideration about the effects on customers.

***103** Obviously, consumers also have certain basic rights in the digital world. Legislation and other rules of conduct designed to protect consumers from deceptive marketing practices, negligent misrepresentation, unfair terms, or unfair business practices apply with full force in the digital world.[56] Moreover, consumers must be able to judge the quality and characteristics of complex technological products and services. There is little doubt that disclosure and transparency are effective means of protecting their rights and interests, especially in cases of information asymmetry.[57]

For example, consumers must know what they can do with their digital hardware and content as well as the limit of their usage.[58] "Rights and duties have always lain at the heart of consumer politics."[59]

These rights are different depending on the type of contract used. Thus, a content transaction could be identified as a license or a sale, but the controversial nature of the distinction between a license and a sale, when applied to the technology world, could make this doctrinal dispute more confusing.[60] The main difference is that in the first case the content transaction falls under contract law while in the second it falls under copyright law.[61] Vendors usually prefer license ***104** agreements so they can avoid the first sale or the exhaustion right, thus imposing terms and limitations on consumers' use.[62] It is clear that this conduct virtually results in determining the landscape of consumer privileges. These privileges are recognized and protected by law, but are often restricted by the use of DRM technologies. The issue is directly related to cases in which the contract scheme is shaped not as the consequence of negotiation between parties, but rather as a form of imposition of unilaterally defined contractual terms and conditions. In this case, the licensor is effectively using the contract or license to manage his rights, never considering the possibility that others also have rights.

As discussed later in the paper, there is a controversy about the value and the consequence of this common practice. We need only decide if consumers can be protected using the umbrella of consumer protection law or copyright law. Then, in case of lack of information, it is necessary to decide the preferred solution: provide the missing information or regulate the market directly.

Under the first point of view, we must consider that pro-digital-consumer legislation has enjoyed no great success in U.S. The most famous consumer-rights legislation proposed in the recent time, the Digital Media Consumers' Rights Act (DMCRA),[63] has been introduced into Congress three times without success.[64]

On the contrary, in France, Norway, and Germany, several pieces of pro-consumer legislation have been recently proposed. The fact that such legislation has been supported is significant in a number of respects. The recent Apple DRM-free music proposal is somehow related to this new European approach.[65]

Thus, it could be reasonable to limit the ability of consumers to copy digital data by requiring manufacturers to embed DRM capabilities into digital content. By the same token, it is also reasonable to disclose exactly the use of DRM technologies and to limit the erosion of fair-use rights. Copyright law has exceptions that may be used to safeguard consumers. A shift from copyright to contract law would allow the traditional and basic consumer's rights, pillar of the modern consumer movement to be adapted and considered in the digital environment. The right to safety, the right to be informed, the right to choose, and the right to be heard must represent the parameters of a new legal framework for distribution of digital content.[66]

*105 D. Reconciling Intellectual Property Rights with Consumer Protection

Traditionally, it has been recognized that an individual consumer might require additional forms of protection than those

offered to a commercial buyer.[67] Consumer protection measures could play a useful role in reconciling the interest of intellectual property rights-holders and users. Unfortunately, the interaction between consumer protection and DRM remain relatively unexplored because of early stage of the investigation among scholars.[68] However, the predominant purpose of the directives and other rules issued in the European Community consumer law area relate to the protection of the economic interests of consumers.[69]

As argued above, technological protection measures have a series of upsetting and unexpected uses. For example, most software programs are subject to End User License Agreements (EULAs), and the common consumers' attitude towards EULAs is to agree without reading them.[70] But a EULA is a classic example of a contract of adhesion that does not come as the result of a negotiation between the vendor and the user.[71] A mass-market software company writes the EULA to license copies of its goods, so it can restrict their customers' rights of transfer and use. Essentially, the only possibility for the end user is to take it or leave it. DRM ***106** can be used to enforce EULA clauses or even policies that are not legally enforceable.

Generally, the use of technological protection measures could increase the power of rights-holders to set excessive conditions on the users. The combination of a contract and technological protection measures could represent a powerful mixture for a fully automated system of secure distribution, rights management, monitoring, and payment for protected content.[72] Thus, DRM can also be seen as the imposition of "unilaterally defined contractual terms and conditions."[73] As already pointed out, when users access content protected by a technological protection measure, the content provider, in practice, imposes a contractual provision by a click-through or click-wrap agreement.[74]

In this sense, "technological protection measures can be considered a condition of the widespread use of contract-based distribution models on the Internet."[75] Therefore, the unfairness that these measures introduce in the different positions should be considered by policymakers if they want to support this kind of business model.[76]

Some commentators have reasonably argued that unless the legislature clarifies the issue, "the copyright regime would succumb to mass-market licenses and technological measures."[77] It will be necessary, for example, to reconsider the norms protecting consumers and weak contracting parties, particularly dealing with a contract able to impose unlimited restrictions on the contents. As has already done in similar situations, it is necessary to rebalance the function of copyright law, ***107** or rather, to identify the limits of contracts as means of exploiting intellectual property rights.

1. Consumer Privileges Under Copyright Law

Normally consumers have some privileges granted under copyright law regime.[78] Copyright law allows certain exceptions whereby users can use copyright works freely without rights holder authorization.[79]

Both common law and civil law countries have more or less several exceptions in common such as educational and scientific purposes, citation, parody, and private copying. Generally these exceptions allow consumers to make copies or utilize copyrighted material in some circumstances.

Problems come out when a technological protection measure is in place because it eliminates these fair use rights or copyright exceptions. Given that the circumvention of these measures is strictly prohibited, the beneficiary of a copyright exception on a technologically protected content would have no possibility to benefit from these exceptions without exposing themselves to sanctions.

Thus, the question is whether right-holders are allowed to render ineffective the copyright exemptions by implementing technological measures.

European law does not resolve these problems: the safeguard provided by article 6(4) of the EC Copyright Directive, which deals with the relationship between technological protection measures and copyright exceptions, is vague and difficult for an individual to claim.[80] Furthermore, the article stipulates that regulations must come from right-holders and, only subsidiarily, are subject to intervention of the State. It is evident that such disposition may cause a delegation of governmental decision making to a non-governmental entity with a consequent privatization of the government's role in protecting intellectual property.

Few Member States have implemented effective rules to protect the interest of consumers of digital content.[81] Some countries, such as Greece and Ireland, have ***108** implemented the Directive into national law requiring that right holders

make available means to beneficiaries to benefit from the exceptions.[82] On the contrary, Austrian and Dutch law does not set any exception to the anti-circumvention provisions.

Concerning private copying exception, Denmark, for instance, does not mention any provision and the UK Copyright Act expressively refers to "time-shifting" as the only private copying exception.[83] In Italy the Legislative Decree 68/2003, transposing the EC Copyright Directive, authorizes a copy of a digital protected content for personal use only if "the user has obtained legal access to the work and the act neither conflicts with the normal exploitation of the work nor unreasonably prejudices the legitimate interests of the rightholder."[84] These are just some examples and it is quite unclear how these rules will be applied in practice. In particular, if right holders do not adopt voluntary measures to allow the use of exceptions, Member States can adopt different policies that vary widely from country to country.[85] This is one of the reasons why the Directive's harmonization purpose seems to have failed.

However, the real problem is that even if consumers have some privileges under national law, copyright exceptions can be replaced with different conditions under a contract between users and content providers. That is, one of the consequences of the use of technological protection measures is that any rights that consumers may have under copyright law could be replaced by a commercial agreement between the parties with a modifying consequence on the balance of rights.[86]

***109** 2. Must Consumers Accept any Digital Terms and Conditions?

In light of the above discussion, it is clear that there is an essential contradiction: if the technological measures against copying are legal, and at the same time there is a set of consumers' legitimate privileges to use content, what kind of solution is possible? The issue is that users are not allowed to eliminate the legal protection to make use of these privileges. Even when consumers have an exception that allows them to make private copies, technological protection measures can effectively hinder consumers from exercising this "right."[87] The legal environment seems to support this adverse practice because rights-holders are not legally obliged to assist a user in utilizing the exception allowing copying for private use. As a consequence, that "right" becomes illusory.[88] From a U.S. perspective, court decisions are quite unclear on the point. However it is unambiguous that, at least to my knowledge, they have just ruled that there is no "generally recognized right to make a copy of a protected work, regardless of its format, for personal noncommercial use."[89] Also European and most national laws do not yet provide a clear answer to the matter.

A possible solution could be to see DRM systems as means to put into effect a contract between the content provider and the end user in a very similar way to "shrink-wrap licenses" for computer software.[90] The issue will be to set the limit on infringement, if it could be identified as a simple contractual infringement concerning civil law of a private nature, or as a criminal offense. It is necessary to keep in mind the fact that the problem of intellectual property exceeds simple private agreements. It is essential to mention explicitly the contractual obligations of the content user.

Transactions supervised and enforced by technological protection measures in addition to this type of contract could alter the balance of rights between rights-holders and consumers.[91] In particular, in the U.S. systems, some types of ***110** technologically-enforced rights transactions supersede the limits of fair use and the first sale doctrine.[92] Nevertheless, DRM, when used within a contract, could protect content that is not subject to intellectual property rights protection, and could also erect barriers not only at the entrance level.[93] DRM also has the potential to set up exit barriers because with DRM there are no dates of rights expiration.[94]

Now we return to the initial question: Must consumers accept any digital terms and condition? My answer is no. Consumer law stipulates in details the information that must be communicated to consumers. Also in the framework of digital media and DRM technologies, consumers must be informed about the rules associated with the use of the offered digital content. Furthermore, some unfair contractual terms can be legally prohibited if they cause a significant imbalance in the parties' rights. In both cases, a court could consider the conduct of the contracting parties and, if necessary, the contract could be considered not binding for the consumer. However, the eventual court decision is useless most of the time, as it comes after several years of litigation, long after the product has been in the market, and likely even superseded by a new and updated product.

In the following paragraphs I analyze European and American legal instruments for protecting the weak contractual party in digital media transactions.

E. When DRM Technologies and Contract Terms Jeopardize Consumer Rights: U.S. and EU Approaches

What we see in the contractual structure of DRM is something similar to a standard form contract, already popular in commercial and consumer transactions and particularly diffused in technological transfers, intellectual property licenses, and service agreements.[95] It is rather unquestionable that DRM systems and ***111** technological protection measures are frequently used to enforce standard contract terms. I believe that the current consumer protection law offers the correct instrument to national authorities to mediate in disputes over unfair consumer contracts, in particular when DRM systems are involved and their use is misrepresented or not disclosed to consumers.

In the following pages, I consider the European and the U.S. provisions, and confront the U.S. state law doctrine of unconscionability, European consumer protection law,[96] and other traditional limitations on contractual rights.[97]

1. U.S. Approach Towards Digital Terms and Conditions

The American legal system, generally, has allowed standard form agreements and has enforced their terms.[98] Furthermore, information disclosure has been the ***112** main focal point of American consumer protection legislation for most of the twentieth century.[99]

Federal and state legislatures have enacted statutes to protect the consumer against aggressive contracting, unfair practices and his own ignorance in certain transactions.[100] These goals are shared with the Federal Trade Commission, a law enforcement agency charged by Congress to protect the public against deceptive or unfair practices and anticompetitive behavior.[101] The most important instrument of the Federal Trade Commission in order to apply and to enforce the standard of fairness has been its rule-making authority, even if the recent inclination is to prefer administrative action, which is seen as more flexible and efficient.[102] Rulemaking procedures, administrative actions, injunctions, and other mechanisms to obtain consumer compensation are all potentially effective instruments to protect digital consumers from unfair or deceptive practices.

On this matter, the "doctrine of unconscionability"[103] has the effect of extending the protection of weak contractual parties as far as possible,[104] giving ***113** judges the power to determine boundaries of this remedy.[105] This doctrine provides a way for courts to control unfair contracts and contract conditions. It allows a court to prevent the enforcement of a contract, or specific provisions thereof, if the judge finds that the contract to be unconscionable in whole or in part. The problem with unconscionability as a legal doctrine arises in determining the meaning of unconscionability. The U.C.C., in fact, does not define it. Courts have described it as "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[106] However, courts have demonstrated a reluctance to find unconscionability in standard commercial transactions,[107] but it is indubitable that this institution may be able "to enlarge the spectrum of protection available to the consumer, being an incisive and effective legal instrument against unequal bargaining, and abuse of superior contractual position."[108] Nevertheless, in the opinion of the majority, unconscionability does not seem well standardized to the goal of mitigating the insidious effects of form contracts and copyright licensing practices.[109] Most often, the unconscionability argument is only used by defendants as a defense to suits, and the lack of litigation could suggest the difficulty in proving unconscionability by individual consumers.[110]

***114** Contract law also offers guarantees and protections from potentially unfair clauses in standard form contracts.[111] Particularly, in the case of standardized agreements, the rule of Section 208 of the Restatement (Second) of Contracts permits the court to pass directly on the unconscionability of the contract or clause rather than avoid unconscionable results by interpretation.[112] Furthermore, section 211 of Restatement (Second) of Contracts[113] sets out a standard that, though not frequently applied,[114] overlaps with unconscionability doctrine, but does so in different terms and under different language.[115] The effects of the Restatement[116] are summarized as follows: "a person who manifests assent to a standard form is bound by the terms of that form, except with respect to terms that the party proposing the form has reason to believe would cause the other party to reject the writing if it knew that the egregious term were present."[117]

This standard can offer an additional basis for avoiding some terms in standardized agreements, in particular in front of some unclear and surreptitiously ***115** undiscovered contract terms connected with the use of a technological protection measure.[118]

Some U.S. courts have ruled that form terms unknown to the consumer are unenforceable if the consumer is uninformed of even the existence of terms and this unawareness is reasonable.[119] The doctrinal explanation is that contract terms must be "reasonably communicated" to be legally binding and that this requisite is not achieved when the consumer has no reason to

know of the presence of such terms.[120] An opening in this direction can be read in the proposed bill, the Digital Media Consumers' Rights Act.[121] This is a recent U.S. legislative answer to the problem of misrepresentation and nondisclosure of information related to copy protected digital media. Representative Rick Boucher's proposed bill attempts to restore the historical balance in copyright law and ensures the proper labeling of copy-protected compact discs. It requires labels on copy-protected compact discs and attempts to rebalance the legal use of digital content and scientific research prevented by the Digital Millennium Copyright Act. In particular, the main aim of the bill is to ensure that consumers are fully aware of the limitations and restrictions they may discover when purchasing copy-protected digital media because manufacturers are not currently obligated to place these kinds of notices on packaging. Most consumers are not aware of what media stores and file formats they will be limited to when they make the initial decision to buy a portable device, even if it is probably written in the End User License Agreement.[122]

The overall impression is that the American rules of contract formation limit rescission of an otherwise valid contract to a very limited number of cases and with an underreaction.[123]

Despite these impressions, however, I do agree with those who have observed that the structure of general policing doctrines in the U.C.C. and the common law of contract--including unconscionability, reasonable expectations, contract against ***116** public policy--can be used to address additional unfair practice and terms that have not yet appeared or not yet identified as problematic.[124]

2. European Approach Towards Digital Terms and Conditions

The EC framework is based on a set of rules primarily incorporated in the European Community Council Directive on Unfair Terms in Consumer Contracts.[125] It is considered one of the most important consumer contract law directives, formulating a European concept of unfairness.[126] In addition, further EC legislation, which does not have consumer protection as its primary purpose, offers some consumer protection or regulates the power of national authorities to introduce consumer protection regulations.[127] For example, the Electronic Commerce Directive covers advertising and marketing to consumers by information society service providers.[128] The Television Without Frontiers Directive[129] also coordinates certain aspects of commercial communications through broadcasting means. Moreover, the Brussels Convention[130] and the Rome ***117** Convention[131] establish rules, in cases of a cross-border contractual dispute within the EC, to determine which Member State Court should hear the case and which Member State's law will apply to the contract.[132]

Within the E.C., the general information duties and information duties specifically addressed to consumers are considered an important part of the consumer protection policy. Information is regarded as the basis for the consumers' freedom of choice.[133]

The Unfair Terms Directive invalidates standardized terms that are unfair and result in a significant imbalance of obligations between the parties to the detriment of the consumer.[134] Specifically, a term is considered unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of consumers.[135] The Directive also contains a non-exclusive grey list of unfair terms.[136] It sets only a minimum baseline, while every EC Member State has national consumer legislation that protects consumers who adhere to standardized conditions. The Commission has stated that "[g]eneral contractual terms and conditions aim to replace the legal solutions drawn up by the legislator and at the same time to replace the legal rules in force in the Community by unilaterally designed solutions with a view to maximizing the particular interests of one of the parties."[137] This Directive offers some level of protection only to a consumer, defined in the Regulations as "any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession."[138] A term included in a ***118** standard form contract could be presumed unfair if it produces a "significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer."[139] Comparing the regulation of unfair contract terms and the concept related to the unconscionability doctrine under U.S. contract law, we can see that the European regulation defines a much lower limit for intervention by courts.[140]

The Distance Contract Directive[141] and the Electronic Commerce Directive[142] could also be applied to products and services offered through on-line contracting that may include a DRM system.[143] Both Directives include transparency provisions that oblige the provider to comply with the requirements relating to the information about the main characteristics of the goods or services, the prices, the right of withdrawal, the contract terms and the general conditions. In particular, the Distance Contract Directive grants consumers the right to withdraw from certain contracts with a supplier when the contract formation takes place without physical presence of contractual parties.[144]

In this type of contract, the consumer must receive written confirmation or confirmation in another durable medium, such as electronic mail, at the time of performance of the contract.[145] A supplier is obliged to inform the consumer in writing about: arrangements for exercising the right of withdrawal; the place to which the consumer may address complaints; information relating to after-sales service; conditions under which the contract may be rescinded.[146] The Electronic Commerce Directive introduces legal certainty by requiring the exchange of certain information in connection with the conclusion of such contracts. In particular it requires on-line suppliers to inform consumers about the name, geographic and electronic address of the provider of the service,[147] a clear and unambiguous ***119** indication of the price,[148] an indication of any relevant codes of conduct and information on how those codes can be consulted electronically,[149] and the contract terms and general conditions with the ability to store and reproduce them. Although these directives do not expressly deal with copyright licenses, scholars suggest the possibility to extend these regulations to goods and services offered through click-wrap licenses over the Internet.[150]

Recently, the EC consumer protection regulatory framework has been enriched with a new directive on Unfair Commercial Practices[151] concerning unfair business-to-consumer commercial practices in the internal market. This new directive concerns business-to-consumer transactions whereby the consumer is influenced by an unfair commercial practice affecting decisions about whether or not to purchase a product, the freedom of choice in the event of purchase, and decisions about exercising a contractual right. By harmonizing the legislation in this field, it provides a general criterion for determining if a commercial practice is unfair in order to establish a limited range of unfair practices prohibited throughout the Community. In particular, the principle used to determine whether a practice is unfair, is the material distortion of the economic behaviour of consumers.[152] This criterion refers to the use of a commercial practice that "appreciably impair[s] the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise."[153] There is no doubt that the directive could constitute a new starting point in setting some protection standards regarding digital media transactions in the European electronic marketplace.[154] It has been observed that "the failure to inform consumers about the application on a digital support of an anti-copy device, which prevents them from making any copy for time- or place shifting purposes, could amount to a misleading practice that would be prohibited"[155] under this Directive.

F. Interoperability & Standards as an Indirect Form of Consumer Protection

Another approach in the regulatory framework for consumer protection in digital media world has been proposed by Professor Jane Winn in a recent academic work.[156] She asserts that "because technological standards constitute a ***120** form of regulation that shapes markets and market behavior," regulators and policy makers might also "be able to protect consumer interests in on-line markets by focusing on the content of the technical standards that define the architecture of on line markets."[157] Standards have long been recognized as the natural means to enable the emergence of networked systems and platforms. It would be desirable that these discussions be complemented with concrete proposals on how the global market can benefit from new paradigms of innovation and merge this with adequate intellectual property rights policy. Technical standards are, in fact, considered one of the foundations of the modern consumer movement, as well as one of the most interesting and innovative forms of consumer protection.[158] Governments should intervene in the development of information technology standards because they could be an effective vehicle to protect consumer interests.

Standardized data formats and interoperability offer advantages for technology consumers as well as for the companies that develop them.[159] Accordingly, some economists argue that:

> Consumers generally welcome standards: they are spared having to pick a winner and face the risk of being stranded. They can enjoy the greatest network externalities in a single network or in networks that seamlessly interconnect. They can mix and match components to suit their tastes. And they are far less likely to become locked into a single vendor, unless a strong leader retains control over the technology or wrests control in the future through proprietary extensions or intellectual property rights.[160]

It has been demonstrated that the content industry has been able to reach agreements on the adoption of technological protection measures for special formats. The case of DVD is the most evident example.

On this front, it has been observed that the EC "seems to have missed an opportunity to use [information technology] standards to enhance compliance with its very broad data protection laws" while "the U.S. appears to be moving in the direction of using management standards to strengthen the enforcement of some of ***121** its much narrower information

privacy laws."[161] The EC Copyright Directive avoids the requirement of any particular standard yet encourages the compatibility and interoperability of different systems.[162] However, while beneficial from a consumer perspective, the content industry worries about the development and diffusion of a global standard because a standardized management system may be more vulnerable to piracy.

If we accept all these patterns as a starting point for a reasonable solution of the conflict between the two opposing rights, we can probably find a way to reduce intellectual property disputes over digital content, different from the difficult legislative options.

Therefore, we have to decide if we want all content rights transactions to fall under contract law instead of copyright law, and, if so, we have to find remedies to protect the consumer's rights. "Consumer contracts governing the use of digital material" need to be "fair and transparent"[163] and, probably, the application of consumer protection law could immediately offer an effective solution to reduce imbalance between parties. To ensure consumers continue to engage in fair uses, it is necessary to circumvent technological restriction when legitimate purposes require it. Consumers must acquire and keep these legal mechanisms in order to avoid abuses.

III. Final Remarks

This article examined DRM systems, their ability to manage copyright, the intersection of copyright with contract, the limitation of legitimate user rights, and what to do about this problem, while additionally providing a discussion of both consumer law in Europe and the U.S.

Examining a framework where contract law is replacing intellectual property law, I have noted the difficulties and the possible solutions for maintaining a balance between the inherently contradictory interests of intellectual property right-holders and the general public. In particular, I have explored the ways in which consumer protection law can safeguard a consumer's use of DRM-protected digital content. I observed that European Union law[164] includes special rules for specific types of contracts while the U.S. legal system seems to link consumer protection to market mechanism thereby treating the problem in a more general way.[165]

***122** Perhaps the most clearly defined result which has emerged from this investigation is that the law currently governing transaction in digital content was not, for the most part, designed specifically for this purpose.[166] Reform is needed, and it is needed now.

With regard to possible positive actions at European level, it could be necessary to take advantage of the forthcoming review of the European regulatory framework for consumer protection and the recast of the intellectual property acquis. As correctly observed by consumers' organizations, the review must "not merely be retrospective but also prospective in assessing how the acquis can adapt to changes in the market place. In particular, it is essential to assess how the acquis, and more fundamental consumer rights underlying the acquis, can be applied effectively in the digital environment,"[167] stipulating new rules for the implementation of the digital consumer protection.[168] As it was proposed by the Bureau Européen des Unions de Consommateurs, it is indispensable to include a provision on DRM technologies in the unfair contract directive. The implementation of this proposal would allow the consumer protection authorities "to intervene against unfair consumer contract terms if the terms are code rather than contract-based."[169]

Two possible scenarios may assist in achieving safe distribution and use of electronic works. The first scenario assumes that the status quo is maintained. In this case, policy makers will have to reexamine and adjust the regulatory and enforcement copyright policies so as to correct the actual imbalance. In particular, they will have to decide if consumer protection could be better safeguarded inside or outside copyright law.

The second, and more utopian (until little time ago), scenario involves the best alterative for a consumer, which is a situation where content providers decide to abolish DRM technologies. This open environment, free from DRM limitations, might seem much more a provocation rather than a serious argument.[170] But the recent surprising and sudden announcement of the EMI Group CEO, Eric Nicoli, has probably opened the door to this scenario, inviting the other major labels to ***123** reconsider their thoughts and business strategies.[171] Precisely, EMI Music, one of the four major members of the Recording Industry Association of America (RIAA), announced that it will begin offering its entire catalog free of DRM restrictions through iTunes Music Store. There is no doubt that, sooner or later, the other music labels will follow this road announcing

something similar in the near future.

This unexpected event is probably the result of the various European efforts made to require interoperability of DRM systems, the many failed US bills to provide wider fair use protections for consumers and users,[172] and the various market forces acting within the digital media industry. Therefore, it could be considered the direct consequence of the continuing discussions, researches, proposals and debates on issues of consumer and user concerns regarding Digital Rights Management systems.

This is the reason why, as long as circumstances remain the same, I believe that consumer protection law could effectively continue to contribute, acting as a Trojan horse, to provide information disclosure, protection and transparency in relation to transaction done by means of electronic instruments and involving DRM technologies.[173] The duty to correctly inform consumers about DRM systems has the effect of re-establishing consumer confidence in digital media and recalibrating the balance of intellectual property rights in digital content transactions. Consumers must benefit from technological innovations without abusive restrictions and technology should not be surreptitiously used to erode established consumer rights.

Consumer protection law may not be the panacea for the management of digital rights, but it could contribute--while awaiting for new rules--in paving the way for fairer markets while maintaining important consumer rights in the digital environment.

Footnotes

a1 Global & Engelberg Research Fellow, Hauser Global Law School Program, New York University School of Law (2006-2007 a.y.). Research Associate at the Department of Legal Studies of the University of Ferrara, Italy. I am very grateful to Mario Savino, Juan Antonio Ruiz Garcia, Pierpaolo Settembri and Christian Iaione for reading the earlier version of the manuscript presented in January 2007 at the Global Fellows Forum organized by the Hauser Global Law School Program. For their comments and critiques on drafts, I am also grateful to Rochelle Dreyfuss, Eleanor Fox, and Helen Nissenbaum, as well as to all the participants of the NYU School of Law Global Fellows Forum. Special thanks go to Professor Joseph Weiler and the NYU Hauser Global Law School Program for their academic and financial support. I am also deeply indebted to the Cassa di Risparmio di Ferrara Foundation whose generous funding assured a smooth completion of the research.

1 The body of literature on this topic is extensive. See, e.g., Digital Rights Management: Technological, Economic, Legal and Political Aspects 597 (Eberhard Becker et al. eds., Springer-Verlag 2003) (offering a collection of works discussing DRM systems and related laws); William Rosenblatt, William Trippe & Stephen Mooney, Digital Rights Management: Business and Technology (2002); C.J. Alice Chen & Aaron Burstein, Symposium Comment, The Law & Technology of Digital Rights Management, 18 Berkeley Tech. L.J. 487, 487 (2003) (providing an overview of digital rights management).

2 See Stefan Bechtold, From Copyright to Information Law --Implications of Digital Rights Management, in Security and Privacy in Digital Rights Management: ACM CCS-8 Workshop DRM 2001 213, 214-15 (revised papers, Springer-Verlag 2002), available at http://www.jura.uni-tuebingen.de/bechtold/pub/2002/DRM_Information_Law.pdf.

3 See 17 U.S.C. § 1201(a)(3)(B) (2000) (stating that "a technological measure 'effectively controls access to a work' if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.").

4 See Stefan Bechtold, Governance in Namespaces, 36 Loy. L.A. L. Rev. 1239, 1252 n.55 (2003).

5 Electronic Privacy Information Center, Digital Rights Management and Privacy, http://www.epic.org/privacy/drm/ (last visited Mar. 1, 2007).

6 Id.

7 See Comm. on Intell. Prop. Rights and the Emerging Info. Infrastructure, National Research Council, The Digital Dilemma: Intellectual Property in the Information Age 156-58, 283-95 (National Academy Press 2000) [hereinafter Digital Dilemma].

[8] Jana Dittmann et al., Interactive Watermarking Environments, in Multimedia Computing and Systems: Proceedings of the IEEE International Conference on Multimedia Computing and Systems 286 (June 28-July 1, 1998), available at http:// www.ipsi.fraunhofer.de/mobile/publications/fullpapers/IEEE/index.htm.

[9] See Jonathan Weinberg, Hardware-Based ID, Rights Management, and Trusted Systems, 52 Stan. L. Rev. 1251, 1253-55 (2000).

[10] Id.

[11] See Apple iTunes Store, http://www.apple.com/itunes/store/ (last visited Jan. 11, 2007). Similar online services are also present with over 40 services outside the United States. See Google Search, http:// www.google.com/search?q=music+downloads. iTunes itself has a presence in 22 countries. Brian Garrity, iTunes Crosses Language Barrier with Foreign Exchange, Reuters, Jun. 2, 2007, http:// www.reuters.com/article/technologyNews/idUSN0136161120070602.

[12] See Lars Gróndal, DRM and Contract Terms, INDICARE Monitor, Feb. 23, 2006, http://www.indicare.org/tiki-read_article.php?articleId=177 (analyzing the relationship between contract terms and DRM in on-line music stores and specifically in iTunes music store term of service).

[13] iTunes Store Terms of Service §20, http:// www.apple.com/ca/support/itunes/legal/terms.html (last visited Oct. 15, 2007).

[14] Council Directive 93/13, Unfair Terms in Consumer Contracts, 1993 O.J. (L95) 29 (EEC), available at http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:HTML [hereinafter Unfair Terms Directive].

[15] Id. art. 3(3).

[16] Id. annex 1(j).

[17] Id. annex 1(k).

[18] Jo Singstad, iTunes' Questionable Terms and Conditions, Jan. 25, 2006, http://forbrukerportalen.no/Artikler/2006/1138119849.71 (last visited Jan. 8, 2007). The text of the complaint is available at http:// forbrukerportalen.no/filearchive/Complaint%20against%CC20iTunes%CC20Music% 20Store.pdf.

[19] See Agreement on the European Economic Area, Jan. 3, 1994, 1994 O.J. (L 1) 3, available at http:// secretariat.efta.int/Web/EuropeanEconomicArea/EEAAgreement/EEAAgreement/EEA_ Agreement.pdf. The European Economic Area consists of all twenty-five Member States of the European Union as well as Iceland, Liechtenstein, and Norway. See id. at preamble (listing parties to the Agreement). The fundamental provisions of the EEA Agreement replicate the provisions of the EC Treaty. Compare id. with Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) 3. Under the Agreement and its procedural provisions, Norway is legally bound to implement into Norwegian law EU directives and regulations governing the free movement of goods, persons, services and capital. See European Commission, Bilateral Trade Relations--Norway, http:// ec.europa.eu/trade/issues/bilateral/countries/norway/index_en.htm (last visited Oct. 15, 2007).

[20] See Marketing Control Act § 9a, Act No. 47 of 16 June 1972, Relating to the Control of Marketing and Contract Terms and Conditions, Norges Lover 1685-1995, at 1445-48, translation available at http:// www.forbrukerombudet.no/index.gan?id=706&subid=0

[21] Id.

[22] See Mikko Valimaki & Ville Oksanen, DRM Interoperability and Intellectual Property Policy in Europe, 28 Eur. Intell. Prop. Rev. 562, 566 (2006).

[23] See Letter from the Norwegian Consumer Ombudsman to iTunes (May 30, 2006), available at http://www.forbrukerombudet.no/asset/2406/1/2406_1.pdf ("Vilkårene inneholder også bestemmelser som innebaerer at iTunes Music Store fraskriver seg ansvar for grovt uaktsomme eller forsettlige handlinger.... På denne bakgrunn finner jeg tjenestevilkårene til iTunes Music Store urimelige i henhold til mfl. § 9a. Jeg ber derfor om at kontrakten gjennomgås og endres i tråd med de synspunkter jeg har gitt uttrykk for.").

[24] Id. ("For forbrukerne kan den DRM som iTunes Music Store benytter fóre til en rekke uheldige konsekvenser. For det fórste begrenses forbrukernes valgfrihet ved at de nedlastede filene låses til visse avspillere, hovedsakelig Apples egne avspillere.")

[25] See Valimaki, supra note 22, at 566-67 (admitting that, even if consumer authorities can protect only consumer, the case could have a pan-European consequence since European consumer protection laws are widely harmonized).

[26] Apple is facing legal action on several fronts. Sweden and Denmark consumer authorities are considering whether to follow Norway's judgment. See Henrik Nilsson and Jill Hagberg, Apple's iTunes Terms of Service Under Scrutiny from the Nordic Countries Consumer Ombudsmen (Nov. 20, 2006), http:// www.twobirds.com/english/publications/articles/iTunes_Terms_Service_scrutiny_ Nordic_Consumer_Ombudsmen.cfm; Pinsent Masons, Norway, Sweden, Denmark May Fine Apple Over iTunes, OUT-LAW News, June 8, 2006, http://www.out-law.com/page-6990; Tom Braithewaite & Kevin Allison, Crunch Time for Apple's Music Icon, Fin. Times (FT.com), June 13, 2006, available at http:// search.ft.com/ftArticle?id=060613007896&page=2 (June 13, 2006) ("Norway, Denmark and Sweden said Apple must make music tracks downloaded from iTunes playable on rival devices or get out of their countries. Finland is also looking at intervening."); See also European Consumer Organizations Join Forces in Legal Dispute over iTunes Music Store (Jan 22, 2007), http:// www.forbrukerombudet.no/index.gan?id=11037079. On a different front, iTunes seems to have some problems about the lack of interoperability. See, e.g., Conseil de la Concurrence [Competition Council], Nov. 9, 2004, No. 04-D-54 (Fr.) (addressing practices implemented by Apple Computer, Inc. in the areas of music downloading on the internet and portable digital devices), available at http://www.conseil-concurrence.fr/pdf/avis/04d54.pdf.

[27] For some detailed legal and technical comments of the rootkit case, see Megan M. LaBelle, The "Rootkit Debacle": The Latest Chapter in the Story of the Recording Industry and the War on Music Piracy, 84 Denv. U.L. Rev. 79 (2006); J. Alex Halderman & Edward W. Felten, Lessons from the Sony CD DRM Episode (Ctr. for Info. Tech., Princeton Univ. Dep't of Computer Sci., Working Paper, Feb 14, 2006), available at http://itpolicy.princeton.edu/pub/sonydrm-ext.pdf; Jeremy F. deBeer, How Restrictive Terms and Technologies Backfired on Sony BMG Music (Part 1), 6 Internet & E-Com. L. in Can. 93 (2006); Jeremy F. deBeer, How Restrictive Terms and Technologies Backfired on Sony BMG Music (Part 2), 7 Internet & E-Com. L. in Can. 1 (2006).

[28] Labelle, supra note 27, at 92.

[29] Labelle, supra note 27, at 93-94.

[30] Labelle, supra note 27, at 93-94.

[31] Labelle, supra note 27, at 93-94.

[32] See John Edward Sharp, Comment, There Oughta Be a Law: Crafting Effective Weapons in the War Against Spyware, 43 Hous. L. Rev. 879, 885 (2006). In certain cases, the EC directive on the liability of defective products could be also applied. See Council Directive 85/374, Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 1985 O.J. (L 210) 29 (EEC), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31985L0374:EN:HTML

[33] Complaint, Texas v. Sony BMG Music Entm't, L.L.C., available at http://www.sonysuit.com/classactions/texas/complaint.pdf.

[34] Tex. Bus. & Com. Code Ann. § 48.001 et seq. (Vernon 2006). The statute establishes crimes for the following conduct: (1) unauthorized collection or culling of personally identifiable information; (2) unauthorized access to or modifications of computer settings; (3) unauthorized interference with installation or disabling of computer software; (4) inducement of computer user to install unnecessary software; and (5) copying and execution of software to a computer with deceptive intent. Id. §§ 48.051-48.053, 48.055. It also provides for civil remedies. Id. § 48.201.

[35] See Settlement Agreement, In re Sony BMG CD Techs. Litig., No. 1:05-cv-09575-NRB pt. I(A)-I(B) (S.D.N.Y. 2005), available at http:// www.eff.org/files/filenode/Sony-BMG/sony_settlement.pdf (last visited Apr. 20, 2007).

[36] Cal. Bus. & Prof. Code §§ 22947-22947.6 (West 2007). For details on the litigation, see Electronic Frontier Foundation, Sony BMG Litigation Info, http://www.eff.org/IP/DRM/Sony-BMG (last visited December 6, 2006).

[37] See Natali Helberger, The Sony BMG Rootkit Scandal, INDICARE Monitor, Jan. 9, 2006, http://www.indicare.org/tiki-read_article.php? articleId=165 (citing Julie E. Cohen, The Place of the User in Copyright Law, 74 Fordham L. Rev. 347 (2005) and Joseph P. Liu, Copyright Law's Theory of the Consumer, 44 B.C. L. Rev. 397 (2003)).

[38] Association CLCV v. EMI Music France, Tribunal de Grande Instance (T.G.I.) [ordinary court of original jurisdiction] Nanterre, June 24, 2003, D. 2003, Somm. 2823, full text available at http://www.legalis.net/jurisprudence-decision.php3?id_article=34.

[39] Id.

[40] Id. (finding EMI Music France guilty of a fraud on the operating requirement in omitting to inform consumers about some use restrictions, particularly about the impossibility of reading this CD on certain car stereos or devices) (translating the full text).

[41] C. Consommation art. L213-1, Law No. 92-1336 of Dec. 16, 1992, Journal Officiel de la République Francaise [J.O.] [Official Gazette of France], Dec. 22, 1992 (eff. Mar. 1994), available at http:// www.legifrance.gouv.fr/WAspad/UnArticleDeCode?commun=CCONSO&art=L213-1 (The statute reads: "Sera puni d'un emprisonnement de deux ans au plus et d'une amende de 37 500 euros au plus ou de l'une de ces deux peines seulement quiconque, qu'il soit ou non partie au contrat, aura trompé ou tenté de tromper le contractant, par quelque moyen ou procédé que ce soit, même par l'intermédiaire d'un tiers: [¶] 1° Soit sur la nature, l'espèce, l'origine, les qualités substantielles, la composition ou la teneur en principes utiles de toutes marchandises; [¶] 2° Soit sur la quantité des choses livrées ou sur leur identité par la livraison d'une marchandise autre que la chose déterminée qui a fait l'objet du contrat; [¶] 3° Soit sur l'aptitude à l'emploi, les risques inhérents à l'utilisation du produit, les contrôles effectués, les modes d'emploi ou les précautions à prendre." The statute translated into English reads roughly: "Anyone, whether or not a party to the contract, will be punished by a term of two years' imprisonment and a fine of 37,500 euros or more than one of those two penalties for misleading or attempting to mislead the contracting party, by any means or process whatsoever, even through a third party as to: [¶] 1 the nature, species, origin, essential qualities, the composition or the content of useful principles of the goods; [¶] 2 the quantity of things delivered or on their identity by the delivery of goods other than the thing that has been the subject of the contract; or [¶] 3 the employability or risks of using the product, controls, methods of use or precautions.").

[42] S.A. EMI Music France v. Association CLCV, Cours d'appel (CA) [regional court of appeal] Versailles, 1e ch., Sept. 30, 2004, (Fr.), full text available at http://www.legalis.net/jurisprudence-imprimer.php3?id_ article=1344. (The full text reads: "La cour, statuant publiquement, contradictoirement et en dernier ressort, Reçoit l'appel, Déclare irrecevable la demande de sursis à statuer, Déboute la CLCV de son appel incident; Confirme le jugement en toutes ses dispositions, Condamne la société EMI Music France à payer à la CLCV la somme de 3000 € en application des dispositions de l'article 700 du ncpc; Condamne la société EMI Music France aux dépens avec faculté de recouvrement direct conformément aux dispositions 699 du ncpc." The court's language, translated into English reads: the Court, ruling in public, in the presence of both parties and as the court of last resort, receives the appeal, declares inadmissible the question to stay proceedings; renders a judgment of nonsuit against CLCV; confirms the judgement in all its provisions; codemns EMI Music France to pay to CLCV a penalty sum to a total of 3000 € on the basis of Article 700 of the New Code of Civil Procedure; orders Emi Music France to pay the costs of appeal, which can be recovered in conformity with Article 699 of the New Code of Civil Procedure.) (quoting and translating the full text).

[43] Id.

[44] See George W. Goble, Book Review, 14 Stan. L. Rev. 631, 634 (1962) (noting how contract has become the most seasoned and effective law); Francesco Galgano, Lex Mercatoria 214 (1993) (discussing the ancient Law Merchant and its afterlife, noting that nowadays, the contract is the principal instrument of legal innovation); Francesco Galgano, Diritto ed Economia alle Soglie del Nuovo Millennio, 16 Contratto e impresa 189, 197 (2000). For information on the supremacy of regulation by contractual arrangements in transnational and cyberspace activities, see Ethan Katsh, Law in a Digital World: Computer Networks and Cyberspace, 38 Vill. L. Rev. 403, 415 (1993); I. Trotter Hardy, The Proper Legal Regime for "Cyberspace," 55 U. Pitt. L. Rev. 993, 994 (1994).

[45] See Francesco Galgano, La Globalizzazione nello Specchio del Diritto 93-94 (Saggi 2005); For an analysis of the relationship between Legal and Technical Standardization, see Margaret J. Radin, Online Standardization and the Integration of Text and Machine, 70 Fordham L. Rev. 1125, 1138 (2002).

[46] See Stefan Bechtold, Digital Rights Management in the United States and Europe, 52 Am. J. Comp. L. 323, 352 (2004); Roberto Caso, "Modchips" e Diritto d'Autore. La Fragilità del Manicheismo Tecnologico nelle Aule della Giustizia Penale, 7 Ciberspazio e Diritto 183, 216 (2006), available at http:// www.jus.unitn.it/users/caso/DRM/Libro/mod_chips/download.asp; Giovanni Pascuzzi, Il Diritto dell'Era Digitale: Tecnologie Informatiche e Regole Privatistiche 164 (2006).

[47] See generally Lawrence Lessig, Code and Other Laws of Cyberspace (Basic Books 1999); Lawrence Lessig, The Future of Ideas: The FATE OF THE COMMONS IN A CONNECTED WORLD, (Random House 2001).

[48] Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998); 17 U.S.C. §§ 1201-1205 (2000).

[49] Council Directive 2001/29, Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10 (EC).

[50] See Bureau Européen des Unions Des Consommateurs, BEUC Memorandum for the EU German Presidency [BEUC/X/066/2006] (Nov. 2006) [hereinafter BEUC Memorandum], available at http://docshare.beuc.org/Common/GetFile.asp?PortalSource=2530&DocID=8976&mfd=off&pdoc=1.

[51] This rule-making power is the so called "normative effect of technology." See generally Lessig, Code and Other Laws of Cyberspace, supra note 47; Joel R. Reidenberg, Lex Informatica: The Formulation of Information Policy Rules Through Technology, 76 Tex. L. Rev. 553 (1998).

[52] See generally Lucie M.C.R. Guibault, Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright (Kluwer Law International 2002).

[53] See Andrea Ottolia & Dan Wielsch, Mapping the Information Environment: Legal Aspects of Modularization and Digitization, 6 Yale J. L. & Tech. 174, 248 n.268, 249-53 (2003) (arguing that a contract or a license might be provided and signed by the user while acquiring the DRM).

[54] See, e.g., Lucie M.C.R. Guibault, Contracts and Copyright Exemptions, in Copyright and Electronic Commerce: Legal Aspects of Electronic Copyright Management 125, 130 (P. Bernt Hugenholtz ed., 2000) (noting that copyright exemptions are not only found in countries of the Anglo-American copyright regime, but also in some countries of the droit d'auteur tradition); Guibault, supra note 52, at 21.

[55] See Michael A. Einhorn & Bill Rosenblatt, Peer-to-Peer Networking and Digital Rights Management: How Market Tools Can

Solve Copyright Problems, 534 Cato Inst. Pol'y Analysis 1, 3 (2005), available at http:// www.cato.org/pubs/pas/pa534.pdf (observing that "[w]ith DRM, content owners may offer different rights by designing menus of diverse services and charging a different price for each.").

[56] See John Rothchild, Protecting the Digital Consumer: The Limits of Cyberspace Utopianism, 74 Ind. L.J. 893, 897-98, 898 n.13 (1999) (discussing methods of protecting consumers); Raymond T. Nimmer, Images and Contract Law--What Law Applies to Transactions in Information, 36 Hous. L. Rev. 1, 24 (1999) (discussing the concept of consumerism); FTC Bureau of Consumer Protection, Consumer Protection in the Global Electronic Marketplace: Looking Ahead 7 (2000) (discussing novel and complex consumer protection issues raised by new technology), available at http:// www.ftc.gov/bcp/icpw/lookingahead/electronicmkpl.pdf; Interpretation of Rules and Guides for Electronic Media, 63 Fed. Reg. 24,996 (proposed May 6, 1998) (to be codified at 16 C.F.R. ch. I) (seeking comment on the applicability of rules to newer forms of electronic media).

[57] See Edward Rubin, The Internet, Consumer Protection and Practical Knowledge, in Consumer Protection in the Age of the "Information Economy" 35, 38 (Jane K. Winn ed., 2006); Howard Beales, Richard Craswell, & Steven C. Salop, The Efficient Regulation of Consumer Information, 24 J.L. & Econ. 491, 513 (1981) ("[W]here inefficient outcomes are the result of inadequate consumer information, information remedies will usually be the preferable solution"); Howard Beales, Richard Craswell, & Steven Salop, Information Remedies for Consumer Protection, 71 Am. Econ. Rev. (Special Issue) 410, 411-413 (May 1981) ("Information remedies are most likely to be the most effective solution to information problems. They deal with the cause of the problem, rather than with its symptoms, and leave the market maximum flexibility.").

[58] See, e.g., Consumers Digital Rights Campaign, http:// www.consumersdigitalrights.org/ (last visited Oct. 20, 2007) (providing an overview of consumer rights in the digital environment).

[59] Matthew Hilton, The Duties of Citizens, the Rights of Consumers, 15 Consumer Pol'y Rev., Jan 1, 2005, at 6, available at http:// www.allbusiness.com/management/consumer-demand-management/1021482-1.html.

[60] See Raymond T. Nimmer, Intangibles Contracts: Thoughts of Hubs, Spokes, and Reinvigorating Article 2, 35 Wm. & Mary L. Rev. 1337, 1345-46 (1994) (discussing distinctions between sales of tangible goods and licenses of intangible software under U.C.C. Article 2). See Raymond T. Nimmer, The Law of Computer Technology: Rights, Licenses, Liabilities § 6:1 (3d ed. 1997).

[61] See Rosenblatt, Trippe & Mooney, supra note 1, at 48 (arguing that the tension between copyright and contract law affects the balance that copyright law seeks to strike).

[62] Ryan J. Casamiquela, Business Law: A. Electronic Commerce: Contractual Assent and Enforceability in Cyberspace, 17 Berkeley Tech. L.J. 475, 492-93 (2002).

[63] Digital Media Consumers' Rights Act of 2005, H.R. 1201, 109th Cong. (2005), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi? dbname=109_cong_bills&docid=f:h1201ih.txt.pdf [hereinafter DMCRA].

[64] Alison R. Watkins, Note, Surgical Safe Harbors: The Family Movie Act and the Future of Fair Use Legislation, 21 Berkeley Tech. L.J. 241, 263 (2006).

[65] See Steve Jobs, CEO, Apple, Inc., Thoughts on Music (Feb. 6, 2007), http://www.apple.com/hotnews/thoughtsonmusic (open letter suggesting that record companies abandon DRM).

[66] See President John F. Kennedy, Special Message to the Congress on Protecting the Consumer Interest (March 15, 1962), transcript available at http://www.jfklink.com/speeches/jfk/publicpapers/1962/jfk93_62.html (enshrining these fundamental consumer rights in the Consumers' Bill of Rights in 1962). See also G.A. Res. 39/248, U.N. Doc. A/RES/39/248 (April 16, 1985), available at http://www.un.org/documents/ga/res/39/a39r248.htm (adding more consumer rights through the world consumer movement).

[67] See William L. Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1133 (1960)

("Commercial buyers are usually quite able to protect themselves. It is another thing entirely to say that the consumer who buys at retail is to be bound by a disclaimer which he has never seen, and to which he would certainly not have agreed if he had known of it, but which defeats a duty imposed by the policy of the law for his protection."); Geraint G. Howells & Thomas Wilhelmsson, EC Consumer Law 3 (1997).

[68] But see Mara Rossini & Natali Helberger, Fair DRM Use: Report on the 3rd INDICARE Workshop 1-2 (2005), available at http://www.indicare.org/tiki-download_file.php?fileId=146 (displaying the first interesting attempt of exploring consumer protection and DRM). See also European Consumer Law Group, Copyright Law and Consumer Protection (2005), http:// www.ivir.nl/publications/other/copyrightlawconsumerprotection.pdf (discussing consumer protection policy recommendations based on a study by Dr. Lucie Guibault and Ms. Natalie Helberger); INDICARE, Consumer's Guide to Digital Rights Management (2006), http://www.indicare.org/tiki-download_file.php? fileId=195 [hereinafter Consumer's Guide to DRM] (discussing the necessity for new rules and regulations to protect original work in the digital environment).

[69] See Howells & Wilhelmsson, supra note 67, at 85.

[70] Cf. Annalee Newitz, Dangerous Terms: A User Guide to EULAs, Electronic Frontier Found., Feb. 2005, http://www.eff.org/wp/dangerous-terms-users-guide-eulas (analyzing a collection of unfair EULAs).

[71] See Robert A. Hillman & Jeffrey J. Rachlinski, Standard-form Contracting in the Electronic Age, 77 N.Y.U. L. Rev. 429, 494-95 (2002) (remarking on the easy adaptation of traditional contract law to electronic transactions). See also John J.A. Burke, Reinventing Contract, Murdoch U. Elec. J.L., June 2003, at ¶ 18, http:// www.murdoch.edu.au/elaw/issues/v10n2/burke102nf.html (illustrating how sellers shift risk burdens to consumers because of consumer ignorance); Robert W. Gomulkiewicz & Mary L. Williamson, A Brief Defense of Mass Market Software License Agreements, 22 Rutgers Computer & Tech. L.J. 335 (1996) (providing a defense to EULAs by discussing their advantages).

[72] See P. Bernt Hugenholtz, Copyright and Electronic Commerce: An Introduction, in Copyright and Electronic Commerce: Legal Aspects of Electronic Copyright Management 1, 2 (P. Bernt Hugenholtz ed., 2000).

[73] Jacques de Werra, Moving Beyond the Conflict Between Freedom of Contract and Copyright Policies: In Search of a New Global Policy for On-Line Information Licensing Transactions: A Comparative Analysis Between U.S. Law and European Law, 25 Colum. J.L. & Arts 239, 244 (2003). Other commentators have criticized this approach. See, e.g., Margaret Jane Radin, Regulation by Contract, Regulation by Machine, 160 J. Inst. Theoretical Econs. 1, 12 (2004), available at http://ssrn.com/abstract=534042 (stating that DRM is a replacement for contract).

[74] Under this legal fiction, the consumer can agree to the terms of contract in a very similar way to the shrink-wrap license. On the latter form of licensing agreement, see generally Mark A. Lemley, Intellectual Property and Shrinkwrap Licenses, 68 S. Cal. L. Rev. 1239 (1995). Some commentators argue that, even if "DRM usage contracts are usually made over the Internet and are therefore not shrink-wrap licenses in the strict sense[, they could be] analogized... to their online counterpart: the so-called 'click-wrap' licenses." Bechtold, supra note 46, at 343 (remarking also that "[m]ost DRM usage contracts are such click-wrap licenses"). For more information about the electronic contracting environment, see Hillman & Rachlinski, supra note 71, at 464 (analyzing the electronic contracting environment).

[75] de Werra, supra note 73, at 250. See also Cristina Coteanu, Cyber Consumer Law and Unfair Trading Practice 45-68 (2005) (discussing the standardization of on-line contracts).

[76] See Guibault, supra note 54, at 125, 149-52 (discussing the European perspective on whether copyright limitations and exceptions can be contracted or overridden through contract law or technological protection devices).

[77] Guilbault, supra note 54, at 160.

[78] See de Werra, supra note 73, at 244.

[79] See, e.g., 17 U.S.C. 107 (2000); Berne Convention for the Protection of Literary and Artistic Works, Sept. 28, 1886, revised Sept. 24, 1979, arts. 9(2) (the "Three-Step Test"), 10, and 10bis, S. Treaty Doc. No. 99-27, 828 U.N.T.S. 221, available at http://www.wipo.int/treaties/en/ip/berne. See also Consumer's Guide to DRM, supra note 68, at 11.

[80] Council Directive 2001/29, art. 6(4), 2001 O.J. (L 167) 10, 17-18 (EC) ("[N]otwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b), or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.").

[81] For implementation status as of Sept. 22, 2004, see Urs Gasser & Michael Girsberger, Transposing the Copyright Directive: Legal Protection of Technological Measures in E.U.-Member States, Berkman Ctr. Internet & Soc'y, Nov. 2004, http://cyber.law.harvard.edu/media/files/eucd.pdf. For more updated information concerning this directive, see Silke von Lewinski, Rights Management Information and Technical Protection Measures as Implemented in EC Member States, 35 Int'l Rev. of Intell. Prop. & Competition L. 844 (2004); Margreet Groeneboom, Comparing the EUCD Implementation of Various Member States, INDICARE Monitor, Mar. 21, 2005, http://www.indicare.org/tiki-read_ article.php?articleId=88; Concise European Copyright Law 392, 393 (Thomas Dreier & P. Bernt Hugenholtz eds., 2006).

[82] Groeneboom, supra note 81, pt. 3(b).

[83] Groeneboom, supra note 81, pt. 3(b). See Nora Braun, The Interface Between the Protection of Technological Measures and the Exercise of Exceptions to Copyright and Related Rights: Comparing the Situation in the United States and the European Community, 25 Eur. Intell. Prop. Rev. 496, 501 (2003) (illustrating the different implementation of Art. 6(4) within the European Community); Concise European Copyright Law, supra note 81, at 393.

[84] Groeneboom, supra note 81, pt. 3(b); see Decreto Legislativo n. 68/2003, art. 71(4)-(6), 87 Gazz. Uff., Apr. 14, 2003 ("Fatto salvo quanto disposto dal comma 3, i titolari dei diritti sono tenuti a consentire che, nonostante l'applicazione delle misure tecnologiche di cui all'articolo 102-quater, la persona fisica che abbia acquisito il possesso legittimo di esemplari dell'opera o del materiale protetto, ovvero vi abbia avuto accesso legittimo, possa effettuare una copia privata, anche solo analogica, per uso personale, a condizione che tale possibilità non sia in contrasto con lo sfruttamento normale dell'opera o degli altri materiali e non arrechi ingiustificato pregiudizio ai titolari dei diritti.").

[85] See Concise European Copyright Law, supra note 81, at 392 (commenting on the implementation of article 6(4) in the Members States).

[86] See Rosenblatt, Trippe & Mooney, supra note 1, at 47. See also Consumer's Guide to DRM, supra note 68, at 11.

[87] As an exception, it is not a right in the strict sense of the word.

[88] See Bureau Européen des Unions Des Consommateurs, Digital Rights Management [BEUC/X/025/2004] (Sept. 15, 2004), http:// docshare.beuc.org/Common/GetFile.asp? PortalSource=507&DocID=6188&mfd=off&pdoc=1 [hereinafter DRM Position Paper]. See also Severine Dusollier, Exceptions and Technological Measures in the European Copyright Directive of 2001--An Empty Promise, 34 Int'l Rev. Indus. Prop. & Copyright L. 62, 71 (2003).

[89] United States v. Elcom Ltd., 203 F. Supp. 2d 1111, 1135 (N.D. Ca. 2002). See also Recording Indus. Ass'n of Am., Inc. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1079 (9th Cir. 1999) (determining that the private, noncommercial recording of copyrighted musical works using digital technology and the Internet constitutes fair use).

[90] See Bechtold, supra note 46, at 342 (arguing that DRM usage contracts are employed to establish contractual privity between providers and individual consumers in a mass market protecting content not only by technology, but also by contract). On the increased use of licensing, see Digital Dilemma, supra note 7, at 34. But see Radin, supra note 73, at 12 (stating that DRM is a replacement for contract).

[91] See Dan L. Burk, DNA Rules: Legal and Conceptual Implications of Biological "Lock-Out" Systems, 92 Cal. L. Rev. 1553, 1564 (2004) (observing that by implementing technical constraints on access to and use of digital information, a copyright owner can effectively supersede the rules of intellectual property law). See also Niva Elkin-Koren, Copyright Policy and the Limits of Freedom of Contract, 12 Berkeley Tech. L.J. 93, 111 (1997) (arguing that online dissemination may make the use of copyright law in securing protection dispensable).

[92] Rosenblatt, Trippe & Mooney, supra note 1, at 46. See 17 U.S.C. § 107 (2006) (statutory basis for the fair use doctrine); 17 U.S.C. § 109(a) (2006) (statutory basis for the first sale doctrine).

[93] See ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1455 (7th Cir. 1996) (upholding a shrinkwrap license agreement that would protect the plaintiff's CD-ROMs of telephone listings from being posted on the internet although the court had said that this kind of material could not be protected by copyright); see also Feist Publ'ns, Inc. v. Rural Tel. Servs. Co, 499 U.S. 340, 363-64 (1991). For examples of contractual terms that conflict with copyright law, see Mark A. Lemley, Beyond Preemption: The Law and Policy of Intellectual Property Licensing, 87 Cal. L. Rev. 111, 125-26, 132 (1999). See also Elkin-Koren, supra note 91, at 94-98.

[94] DRM systems exercise the same control on works that should not qualify for copyright protection, hampering their entry into the public domain and establishing a de facto unending copyright protection. See John R. Therien, Comment, Exorcising the Specter of a "Pay-Per-Use" Society: Toward Preserving Fair Use and the Public Domain in the Digital Age, 16 Berkeley Tech. L.J. 979, 994-95 (2001) (discussing the potential "overprotection" of creative and informational media through use restrictions).

[95] DRM has been defined as "a souped-up standard form contract." Ian Kerr & Jane Bailey, The Implications of Digital Rights Management for Privacy and Freedom of Expression, 2 Info. Comm. & Ethics in Soc'y, 87, 89 (2004), available at http://idtrail.org/content/view/307/42/ (select "Click here to download this paper").

[96] The principal consumer protection measures in European Community law may be divided into two main categories referred to as generally applicable directives and directives containing rules regarding specific sectors or selling methods.
Included in the first category are: (1) Council Directive 84/450, Misleading Advertising, 1984 O.J. (L 250) 17 (EEC), amended by Council Directive 97/55, Comparative Advertising, 1997 O.J. (L 290) 18 (EC); (2) Directive 98/6, Consumer Protection in the Indication of the Prices of Products Offered to Consumers, 1998 O.J. (L 80) 27 (EC); (3) Unfair Terms Directive, supra note 14; and (4) Directive 1999/44, Sale of Consumer Goods and Associated Guarantees, 1999 O.J. (L 171) 12 (EC).
The second category includes: (1) Council Directive 95/58, amending Council Directives 79/581, Consumer Protection in the Indication of Prices of Foodstuffs (1979 O.J. (L 158) 19 (EEC)) and 88/314, Consumer Protection of Prices of Non-food Products (1988 O.J. (L 142) 19 (EEC)), 1995 O.J. (L 299) 11 (EC); (2) Council Directive 76/768, Approximation of Laws of the Member States Relating to Cosmetic Products, 1976 O.J. (L 262) 169 (EEC); (3) Council Directive 96/74, Textile Names, 1997 O.J. (L 32) 38 (EC), amended by Council Directive 97/37, 1997 O.J. (L 169) 74 (EC); (5) Council Directive 92/28, Advertising of Medicinal Products for Human Use, 1992 O.J. (L 113) 13 (EEC); (6) Council Directive 90/314, Package Travel, Package Holidays and Package Tours, 1990 O.J. (L 158) 59 (EEC); (7) Council Directive 85/577, To Protect the Consumer in Respect of Contracts Negotiated Away from Business Premises, 1985 O.J. (L 372) 31 (EEC); (8) Council Directive 87/102, Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Consumer Credit, 1987 O.J. (L 42) 48 (EEC); (9) Council Directive 97/7, Protection of Consumers in Respect of Distance Contracts, 1997 O.J. (L 144) 19 (EC); (10) Council Directive 90/384, Harmonisation of the Laws of the Member States Relating to Non-Automatic Weighing Instruments, 1990 O.J. (L189) 1 (EC); and (11) Council Directive 94/47, Protection of Purchasers in Respect of Certain Aspects of Contracts Relating to the Purchase of the Right to Use Immovable Properties on a Time-Share Basis, 1994 O.J. (L 280) 83 (EC).

[97] See Association of American Publishers, Contractual Licensing, Technological Measures and Copyright Law, http://www.publishers.org/home/abouta/copy/plicens.htm (last visited Apr. 1, 2007) (on file with Journal).

[98] For an overview of standard terms in American law, see E. Allan Farnsworth, Contracts (Aspen Publishers, 4th ed. 2004).

[99] See Rubin, supra note 57, at 35; Stephen Bainbridge, Mandatory Disclosure: A Behavioral Analysis, 68 U. Cin. L. Rev. 1023 (2000) (discussing information disclosure in the area of securities regulation); Thomas A. Durkin & Gregory Elliehausen, Disclosure as a Consumer Protection, in The Impact of Public Policy on Consumer Credit 109, 110 (Thomas A. Durkin & Michael E. Staten eds., 2002).

[100] Burke, supra note 71, ¶ 4. See Robert L. Oakley, Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts, 42 Hous. L. Rev. 1041, 1061 (2005) (arguing that the United States does not have a general law governing unfair contract terms with any specificity).

[101] See Stanley Morganstern, Legal Protection for the Consumer 1 (2d ed. 1978); Hans W. Micklitz & Jürgen Kessler, Marketing Practices Regulation and Consumer Protection in the EC Member States and the US 419 (2002); Douglas J. Whaley, Problems and Materials on Consumer Law 58 (4th ed. 2006).

[102] Micklitz & Kessler, supra note 101, at 424, 433.

[103] See U.C.C. § 2-302 (1978); See also Restatement (Second) of Contracts §208 (1981). For more regarding unconscionability, see Arthur Allen Leff, Unconscionability and the Code--The Emperor's New Clause, 115 U. Pa. L. Rev. 485, 487 (1967) (coining the terms "procedural" and "substantive" unconscionability); Richard Craswell, Property Rules and Liability Rules in Unconscionability and Related Doctrines, 60 U. Chi. L. Rev. 1, 51-60 (1993) (discussing unconscionability in the context of inadequate information); Richard A. Epstein, Unconscionability: A Critical Reappraisal, 18 J.L. & Econ. 293, 295 (1975) (arguing that the doctrine should be abandoned); Russell Korobkin, Bounded Rationality, Standard Form Contracts, and Unconscionability, 70 U. Chi. L. Rev. 1203, 1203 (2003) (arguing that the doctrine should be modified to better respond to the primary cause of contractual inefficiency); Eric A. Posner, Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract, 24 J. Legal Stud. 283, 283 (1995) (defending the doctrine); John A. Spanogle, Jr., Analyzing Unconscionability Problems, 117 U. Pa. L. Rev. 931, 931 (1969) (general analysis of the doctrine); Carol B. Swanson, Unconscionable Quandary: U.C.C. Article 2 and the Unconscionability Doctrine, 31 N.M. L. Rev. 359, 359 (2001) (discussing the history of the doctrine and the effect of UCC Article 2 on the doctrine).

[104] See W. David Slawson, Binding Promises: The Late 20th-Century Reformation of Contract Law 57 (1996) (describing the doctrine's introduction in the 1960s and subsequent adoption). See also Hillman & Rachlinski, supra note 71, at 456 (noting that the unconscionability doctrine "affords courts considerable discretion to strike unfair terms directly rather than covertly by stretching less-applicable rules in order to reach a fair result.").

[105] See Cristiana Cicoria, The Protection of the Weak Contractual Party in Italy vs. United States Doctrine of Unconscionability: A Comparative Analysis, Global Jurist Advances, Dec. 27, 2003 (2d article), §2, http:// www.bepress.com/gj/advances/vol3/iss3/art2. The doctrine of unconscionability is a contract law doctrine that makes a contract term unenforceable when both procedural and substantive unfairness are demonstrated. See Black's Law Dictionary 1524 (6th ed. 1990). For the distinction of these two kinds of unconscionability, see Leff, supra note 103, at 487-88.

[106] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965). Unconscionability has also been recognized as the "absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 472 S.E.2d 242, 245 (S.C. 1996) (citation omitted).

[107] See Sandra J. Levin, Comment, Examining Restraints on Freedom to Contract as an Approach to Purchaser Dissatisfaction in the Computer Industry, 74 Cal. L. Rev. 2101, 2108 (1986) ("Courts have exhibited a reluctance to find unconscionability in standard commercial transactions.") (citation omitted); Lewis A. Kornhauser, Comment, Unconscionability in Standard Forms, 64 Cal. L. Rev. 1151, 1153-57 (1976) (discussing market theory and its impact on the doctrine).

[108] See Cicoria, supra note 105, § 2.1.

[109] See Korobkin, supra note 103, at 1208, 1256 (arguing that the doctrine should be modified to respond to the primary cause of

contractual inefficiency). See also Guibault, supra note 52, at 262 (arguing that 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); J.H. Reichman & Jonathan A. Franklin, Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information, 147 U. Pa. L. Rev. 875, 929-932 (1999) (perceiving its inability to respond to intellectual property rights issues and proposing a doctrine of "public interest unconscionability").

110 See Fred H. Miller & John D. Lackey, The ABCs of the UCC: Related and Supplementary Consumer Law 109 (2d ed. 2004) (observing that for this reason statutes that permit administrative enforcement are also important for consumer protection).

111 Restatement (Second) of Contracts § 208 (1981). See generally John E. Murray, Jr., The Standardized Agreement Phenomena in the Restatement (Second) of Contracts, 67 Cornell L. Rev. 735, 762-79 (1982); see also Hillman and Rachlinski, supra note 71, at 454-63 (investigating the three main doctrines American courts use to review potential abuses in standard-form contracts: unconscionability, Restatement (Second) of Contracts § 211(3), and the doctrine of reasonable expectations).

112 Restatement (Second) of Contracts § 208 cmt. a (1981).

113 Id. §211.

114 Only forty-three published judicial opinions had interpreted § 211(3) of the Restatement; twenty-five of those were penned by Arizona courts, most of which dealt with insurance coverage disputes. James J. White, Form Contracts under Revised Article 2, 75 Wash. U. L.Q. 315, 324-25 (1997).

115 Raymond T. Nimmer, Breaking Barriers: The Relation Between Contract and Intellectual Property Law, 13 Berkeley Tech. L.J. 827, 874 (1998). The so-called doctrine of "reasonable expectations" and its variation described in § 211 of the Restatement (Second) of Contracts have been incorporated into (substantive) unconscionability analysis by most courts. See Korobkin, supra note 103, at 1270-77.

116 Restatement (Second) of Contracts § 211 (1981)("(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing. [¶] (2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard term of the writing. [¶] (3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement."). See also Restatement (Second) of Contracts § 211 cmt. f (1981)("Reason to believe [that a term would have been refused had the other party known of it] may be inferred from the fact that the term is bizarre or oppressive, from the fact that it eviscerates the non-standard terms explicitly agreed to, or from the fact the it eliminates the dominant purpose of the transaction. The inference is reinforced if the adhering party never had an opportunity to read the term, or if it is illegible or otherwise hidden from view. This rule is closely related to the policy against unconscionable terms and the rule of interpretation against the draftsman.").

117 Nimmer, supra note 115, at 874 (citing Restatement (Second) of Contracts §211 (1981)).

118 Courts have already applied Restatement §211(3) to invalidate standardized contract terms modifying existing law in software transactions. E.g., Angus Med. Co. v. Digital Equip. Corp., 840 P.2d 1024, 1030-31 (Ariz. Ct. App. 1992) (holding contract term shortening the statute of limitations from six years to 18 months unenforceable). Cf. Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 682 P.2d 388 (Ariz. 1984) (adopting the Restatement). See Lemley, supra note 74, at 1249 (discussing court decisions related to shrinkwrap licenses).

119 Korobkin, supra note 103, at 1268.

120 See Silvestri v Italia Società Per Azioni Di Navigazione, 388 F.2d 11, 17-18 (2d Cir. 1968) (establishing that terms must be

"reasonably communicated" to purchasers).

121 DMCRA, supra note 63, at 2.

122 See Michael P. Matesky, Note, The Digital Millennium Copyright Act and Non-Infringing Use: Can Mandatory Labeling of Digital Media Products Keep the Sky from Falling?, 80 Chi.-Kent L. Rev. 515, 532-33 (2005) (discussing how consumers likely have expectations when they purchase products that disagree with the terms of purchase as stated in a license agreement).

123 See Richard Craswell, Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere, 92 Va. L. Rev. 565, 576, 579, 590 (2006) (discussing rescission).

124 See Jean Braucher, New Basics: Twelve Principles for Fair Commerce in Mass-Market Software and Other Digital Products, in Consumer Protection in the Age of the 'Information Economy' 177, 195 (Jane K. Winn ed., 2006).

125 Unfair Terms Directive, supra note 14. A fundamental part of the literature on the Unfair Terms Directive is written by German scholars; a great number of the provisions in the Directive are very similar to the provisions of the 1976 German Standard Contract Terms Act--Gesetz Zur Regelung des Rechts der Allgemeinen Geschaftsbedingunen. See generally Hans Erich Brandner & Peter Ulmer, The Community Directive on Unfair Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission, 28 Common Mkt. L. Rev. 647 (1991); Vincenzo Roppo, La Nuova Disciplina delle Clausole Abusive nei Contratti fra Imprese e Consumatori, 40 Rivista Diritto Civille 277 (1994); Giorgio De Nova, Criteri Generali di Determinazione dell'Abusività di Clausole ed Elenco di Clausole Abusive, 48 Rivista Trimestrile de Diritto e Procedura Civille 691 (1994); Roberto Pardolesi, Clausole Abusive (nei Contratti dei Consumatori): Una Direttiva Abusata?, 119 Il Foro Italiano 137 (1994); Christian Joerges, The Europeanization of Private Law as a Rationalization Process and as a Contest of Disciplines--An Analysis of the Directive on Unfair Terms in Consumer Contracts, 3 Eur. Rev. Private L. 175 (1995); Bernd Tremml, The EU Directive on Unfair Terms in Consumer Contracts, 3 Int'l Cont. Adviser 18 (1997); Hugh Collins, Regulating Contracts 256 (1999); Geraint G. Howells & Stephen Weatherill, Consumer Protection Law 261 (2d ed. 2005). See also Oakley, supra note 100, at 1065.

126 See Howells & Wilhelmsson, supra note 67, at 88.

127 See Commission Green Paper on European Union Consumer Protection, COM (2001) 531 final (Oct. 10, 2001).

128 Council Directive 2000/31, Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178) 1 (EC).

129 Council Directive 89/552, Co-ordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1989 O.J. (L 298) 23 (EEC), as amended by Council Directive 97/36, 1997 O.J. (L 202) 60 (EC).

130 Council Regulation 44/2001, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 (EC).

131 Convention on the Law Applicable to Contractual Obligations, 80/934 [Rome Convention], Oct. 9, 1980, 1980 O.J. (L 266) 1 (EEC).

132 See id. art. 3.1 (laying out the general rule, stating: "A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty...."); see id. art. 5 (providing for an exception for contracts involving consumers and for which the subject "is the supply of [tangible] goods or services."). For contracts involving consumers, in fact, the law preferred by the parties should not adversely affect the mandatory provisions of the State in which the consumer is habitually resident. The application of this rule is questionable in the case of intellectual property licensing agreements as the convention fails to deal expressly with issues of jurisdiction and choice of law for copyright infringement cases. See Raquel

Xalabarder, Copyright: Choice of Law and Jurisdiction in the Digital Age, 8 Ann. Surv. Int'l & Comp. L. 79, 80 (2002) (discussing the interaction between domestic and international copyright law and private international choice of law and jurisdiction rules).

133 Lena Oslen, The Information Duty in Connection with Consumer Sales over the Net, in Consumer Law in the Information Society 147 (Thomas Wilhelmsson et al. eds., 2001).

134 The Unfair Terms Directive, supra note 14, applies only to consumer transactions--those involving an individual who acquires products for her own personal consumption and not for business or professional use. See Howells & Wilhelmsson, supra note 67, at 88-95.

135 Unfair Terms Directive, supra note 14, art. 3(1).

136 Unfair Terms Directive, supra note 14, art. 3(3).

137 Commission Report, Implementation of Council Directive 93/13 (Unfair Terms Directive), at 13, COM (2000) 248 final (Apr. 27, 2000), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do? uri=COM:2000:0248:FIN:EN:PDF.

138 Unfair Terms Directive, supra note 14, art. 2(b).

139 Guibault, supra note 52, at 254.

140 Jane K. Winn and Brian H. Bix, Diverging Perspectives on Electronic Contracting in the U.S. and EU, 54 Clev. St. L. Rev. 175, 186 (2006) (finding a much lower threshold for intervention by courts also with reference to federal and state regulation of unfair and deceptive trade practices).

141 Council Directive 97/7, supra note 96.

142 Council Directive 2000/31, supra note 128.

143 See European Consumer Law Group, supra note 68, at 10-14. See generally Natali Helberger, Digital Rights Management from a Consumer's Perspective, IRIS Plus, Aug. 2005 (8th article), http://www.obs.coe.int/oea_ publ/iris/iris_plus/iplus8_2005.pdf.en.

144 Council Directive 97/7, supra note 96, art. 6(1).

145 Council Directive 97/7, supra note 96, art. 5(1).

146 Council Directive 97/7, supra note 96, art. 5(1). To comply with this regulation, some European music stores have already granted customers the right to return downloaded digital music within seven days. Urs Gasser, iTunes: How Copyright, Contract, and Technology Shape the Business of Digital Media--A Case Study 21, Berkman Ctr. Internet & Soc'y, June 2004, http:// cyber.law.harvard.edu/home/uploads/370/iTunesWhitePaper0604.pdf.

147 Council Directive 2000/31, supra note 128, art. 5(1).

148 Council Directive 2000/31, supra note 128, art. 5(2).

[149] Council Directive 2000/31, supra note 128, art. 10(2).

[150] See Guibault, supra note 52, at 302-04; Gasser, supra note 146, at 21-22.

[151] Council Directive 2005/29, 2005 O.J. (L 149) 22 (EC). See The Forthcoming EC Directive on Unfair Commercial Practices (Hugh Collins ed., 2004).

[152] Council Directive 2005/29, supra note 151, arts. 2(e), 5(2)(b).

[153] Council Directive 2005/29, supra note 151, art. 2(e).

[154] See generally Cristina Coteanu, supra note 75.

[155] European Consumer Law Group, supra note 68, at 15.

[156] Jane K. Winn, Is Consumer Protection an Anachronism in the Information Economy?, in Consumer Protection in the Age of the Information Economy 1 (Jane K. Winn ed., 2006), available at http://www.law.washington.edu/Directory/docs/Winn/Winn_Consumer_Anachronism_Intro.pdf.

[157] Id. at 6.

[158] See Jane K. Winn, Information Technology Standards as a Form of Consumer Protection Law, in Consumer Protection in the Age of the Information Economy 99, 100 (Jane K. Winn ed., 2006), available at http://www.law.washington.edu/Directory/docs/Winn/Info_Tech_Stds.pdf (illustrating three case studies that demonstrate the cost and benefits of government intervention in the development and adoption of information technology standards as a competitive strategy for protecting consumer interests). For a broader discussion, see also Geraint G. Howells, Consumer Safety and Standardization--Protection Through Representation?, in Law and Diffuse Interests in the European Legal Order: Liber Amicorum Norbert Reich 755 (Hans-W. Micklitz et al., eds., 1997); Jessie V. Coles, Standardization of Consumers' Goods, an Aid to Consumer-Buying (1932).

[159] Carl Shapiro & Hal R. Varian, The Art of Standards Wars, Cal. Mgmt. Rev., Winter 1999 (41:2), at 8, 14.

[160] Carl Shapiro & Hal R. Varian, Information Rules: A Strategic Guide to the Network Economy 233 (1999).

[161] Winn, supra note 156, at 6.

[162] Marie-Thérèse Huppertz, The Point of View of the Software Industry, in The Future of Intellectual Property in the Global Market of the Information Society: Who is Going to Shape the IPR System in the New Millennium? 61, 71 (Frank Gotzen ed., 2003).

[163] DRM Position Paper, supra note 88, at 3.

[164] Consumer protection has also received a significant place in the Community's constitution. See Treaty Establishing a Constitution for Europe art. III-235, Dec. 16 2004, 2004 O.J. (C 310) 1, 105.

[165] See Winn & Bix, supra note 140, at 190 (comparing the two approaches). Sometimes this might be correct as markets could be

much efficient and fast than government institutions at tailoring well-balanced solutions.

166 Braucher, supra note 124, at 176.

167 BEUC Memorandum, supra note 50, at 8.

168 See Helberger, supra note 143 (arguing for sector-specific rules designed to take into account specific characteristics of the subject-matter).

169 Cornelia Kutterer, Senior Legal Advisor, Bureau Européen des Unions de Consommateurs, Protection of Consumers Against Unfair Practices in e-Commerce (Nov. 27 2006), at 3, http://docshare.beuc.org/Common/GetFile.asp?PortalSource=2530&DocID=9114&mfd=off&pdoc=1 (presented at the European Legal Framework for e-Business and Innovation Conference held in Brussels).

170 See Jobs, supra note 65.

171 See Press Release, EMI Music Group, EMI Music Launches DRM-free Superior Sound Quality Downloads Across Its Entire Digital Repertoire (April 2, 2007), http://www.emigroup.com/Press/2007/press18.htm.

172 One of the recent proposals entitled the Freedom and Innovation Revitalizing U.S. Entrepreneurship Act of 2007 was recently introduced in the House of Representatives. See H.R. 1201, 110th Cong. (2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_ bills&docid=f:h1201ih.txt.pdf. It is co-sponsored by Congressman Rick Boucher, Congresswoman Zoe Lofgren and Congressman John Doolittle with the intent to amend title 17 of the United States Code. Id. at 1.

173 Cf. Helberger, supra note 143, at 7 (asserting that neither copyright law nor general consumer protection law currently offers a common, comprehensive protection standard for users of electronically protected content).