

NO PLACE LIKE HOME FOR MAKING A COPY: PRIVATE COPYING IN EUROPEAN COPYRIGHT LAW AND CONSUMER LAW

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TABLE OF CONTENTS

| | | |
|------|---|------|
| I. | INTRODUCTION | 1061 |
| II. | EUROPEAN COPYRIGHT LAW | 1064 |
| A. | THE PLACE OF THE CONSUMER IN EUROPEAN COPYRIGHT LAW | 1065 |
| B. | RATIONALES OF PRIVATE COPYING LIMITATIONS | 1067 |
| 1. | <i>Privacy</i> | 1068 |
| 2. | <i>Justice</i> | 1069 |
| 3. | <i>Promotion of Creativity and Speech</i> | 1070 |
| 4. | <i>Economic Arguments</i> | 1071 |
| C. | LEGAL NATURE OF PRIVATE COPYING EXCEPTIONS | 1073 |
| D. | ASSESSMENT | 1077 |
| III. | EUROPEAN CONSUMER LAW | 1078 |
| A. | RATIONALES | 1080 |
| 1. | <i>Empowering the Consumer as Sovereign Market Actor</i> | 1080 |
| 2. | <i>Protecting the Weaker Party</i> | 1081 |
| B. | PRIVATE COPYING AND CONSUMER LAW | 1084 |
| 1. | <i>Conformity with Consumers' Reasonable Expectations</i> | 1084 |
| 2. | <i>Fairness of Contractual Terms</i> | 1089 |
| 3. | <i>Rules on Consumer Information</i> | 1090 |
| C. | ASSESSMENT | 1093 |
| IV. | CONCLUSION | 1096 |

I. INTRODUCTION

As an ancient Dutch proverb goes, “There is no place like home for making a private copy.” Well, not really. But certainly the sense of entitlement to make private copies of copyrighted works is deeply ingrained in

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Dutch society, as it is in most other Member States of the European Union. Recent surveys of European consumers show that the ability to make private copies is among the main concerns of consumers of information goods and services.¹ Surprisingly, this general expectation does not rest on legally solid ground. On the one hand, while permitting the Member States of the European Union to adopt their own copyright limitations allowing private copying,² European copyright law³ does not clearly define the legal status of private copying—its scope and enforceability, both in contractual relationships and where private copying is impeded by digital rights management (DRM). On the other hand, consumer protection law in Europe may on occasion give “teeth” to private copying limitations,⁴ al-

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1. NICOLE DUFFT ET AL., INDICARE, DIGITAL VIDEO USAGE AND DRM, RESULTS FROM A EUROPEAN CONSUMER SURVEY 26-28 (2006), http://www.indicare.org/tiki-download_file.php?fileId=170 [hereinafter DUFFT ET AL., DIGITAL VIDEO USAGE]; NICOLE DUFFT ET. AL., INDICARE, DIGITAL MUSIC USAGE AND DRM, RESULTS FROM A EUROPEAN CONSUMER SURVEY 26-28 (2005), http://www.indicare.org/tiki-download_file.php?fileId=110 [hereinafter DUFFT ET AL., DIGITAL MUSIC USAGE].

2. Council Directive 2001/29 on the Harmonization of Certain Aspects of Copyrights and Related Rights in the Information Society, art. 5(2)(b), 2001 O.J. (L 167) 10, 16 (EU) [hereinafter Information Society Directive] (“Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases: . . . (b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned.”).

3. Note that, strictly speaking, “European copyright law” does not exist. The twenty-seven Member States of the European Union each have their own copyright laws. At the European Community level, the existing body of copyright law consists of seven directives that have harmonized distinct aspects of copyright law in the Member States. See note 17 for a complete listing of Directives. The primary aim of harmonization is to remove disparities between national laws, and thus help create an Internal (Single) Market for goods and services. A harmonization Directive is binding upon a Member State, but does not directly bind its citizens. Directives require Member States to adapt their national laws to the norms of the Directive by transposing (implementing) these into national law. National courts are bound to interpret harmonized norms in the light of the corresponding provisions of a directive, subject to ultimate review by the European Court of Justice. Consequently, the laws of copyright in the Member States are similar insofar as the states have implemented the Directives. Absent complete harmonization of copyright, national laws of the Member States will continue to show enormous variety.

4. Note that the term “limitation” is used throughout this article to indicate a statutory limit (i.e., exemption) to the copyright holder’s exclusive right of reproduction. The

lowing consumers to make private copies where copying constitutes an essential functional characteristic of digital media (e.g., time and format shifting, porting, and archiving). However, as recent decisions from courts in France and Belgium demonstrate, consumer law as applied to private copying also suffers from a lack of legal certainty and other deficiencies, stemming in part from the ambiguity in European copyright law regarding private copying.⁵

This Article examines the intersection of copyright law and consumer law relating to private copying in Europe and queries their effectiveness as legal instruments to protect consumers in dealings with information suppliers. The focus will be on traditional consumers, defined as private users of information goods and services for non-commercial purposes. Commercial or institutional users of copyright-protected works, such as publishers, broadcasters, libraries, and universities, therefore remain beyond the scope of this Article. The Article will also not address “prosumers,” consumers doubling as producers. Although national statutes and case law are discussed throughout the Article, the primary reference will be the existing body of European directives that have partly harmonized the laws of copyright and consumer protection of the Member States.

Part II briefly looks at the history and rationales of private copying limitations in Europe, then examines the legal nature and enforceability of private copying exemptions in their diverse manifestations and concludes with a general assessment. Thereafter, Part III analyzes European consumer law following roughly the same structure, first describing the various, sometimes conflicting goals and approaches of consumer protection law in Europe, then examining relevant legal tools, and finally querying how and to what extent these tools might serve to protect consumers’ freedom to make private copies. Ultimately, we demonstrate that while copyright law in Europe does offer a measure of comfort to consumers, the legal instruments of European consumer law are potentially more effective in achieving the freedom to make private copies that European consumers generally expect.

synonymous term “exception,” which is often used in European legislation and scholarship, is avoided here because of its pejorative connotation. In the opinion of the authors of this article, limitations in copyright law are not exceptional. See P. Bernt Hugenholtz, Institute for Information Law, University of Amsterdam, *Fierce Creatures, Copyright Exemptions: Towards Extinction?*, Keynote Speech at IFLA/IMPRIMATUR Conference, Amsterdam: Rights, Limitations and Exceptions: Striking a Proper Balance (Oct. 30, 1997), available at <http://www.ivir.nl/publications/hughenholtz/PBH-FierceCreatures.doc>.

5. See *infra* notes 146, 150, 152, 185, 186.

II. EUROPEAN COPYRIGHT LAW

For over twelve years, private copying has been the proverbial *hot potato* on the menu of European copyright lawmakers. In 1995, the European Commission (EC) initiated an early attempt to harmonize this thorny issue across Member States in the form of a widely circulated but never published draft proposal for a directive.⁶ However, this attempt was aborted because existing differences in private copying legislation in the Member States were considered too great to overcome.⁷ Six years later, the EC legislature was more successful by codifying a rule on private copying in article 5(2)(b) of the Information Society Directive,⁸ the first piece of EC legislation to address private copying in general terms.

Serious problems remained. First, Member States are not required to adopt the Directive's rule on private copying, leaving them complete discretion *not* to adopt any rules allowing private copying.⁹ Consequently, the rules on private copying have remained largely unharmonized in the European Union. Second, the issue of copyright levies,¹⁰ directly associated with private copying, always was and still remains a matter of considerable controversy. The European Commission recently attempted to give guidance on the future phasing out of private copying levies in response to DRM's emerging ability to limit private copying. This attempt met enormous opposition from levy collecting societies and the French Govern-

6. Proposition de Directive du Parlement Européen et du Conseil relative à l'harmonisation de certaines règles du droit d'auteur en des droits voisins applicables à la copie privée [Proposed Directive of the European Parliament and Council Relating to the Harmonisation of Certain Rules for Royalties and Copyrights], Brussels, December 1995 (unpublished proposal, copy on file with the authors).

7. Note that general private copying limitations did not, and do not, exist in all Member States. *See infra* note 9.

8. Information Society Directive, *supra* note 2, art. 5(2)(b):

9. General private copying exemptions do not exist in the United Kingdom and Ireland; however, these jurisdictions do allow the making of private copies of broadcast for the purpose of time-shifting. Copyright, Designs and Patents Act, 1988, c. 48, § 101 (U.K.); Irish Copyrights and Related Rights Act, 2000 § 101 (Act No. 28/2000) (Ir.) available at <http://acts.oireachtas.ie/en.act.2000.0028.8.html#partii-chapvi-sec101> (last visited Aug. 28, 2007).

10. Copyright levies are private taxes imposed upon the manufacture and importation of reproduction equipment (e.g., video recorders and MP3 players) and/or blank recording media (e.g., recordable CDs and DVDs). Levies usually have their legal bases in national copyright norms on private copying requiring equitable or fair compensation of copyright holders. Levy systems exist in most Member States of the European Union but vary considerably with regard to tariff and scope. *See infra* Section II.B.2.

ment and was subsequently abandoned.¹¹ Third, the Information Society Directive does not address the question of whether private copying exemptions in national law trump, or may be overridden by, contracts between information producers and consumers. Finally, the Directive's complex rules on DRM and their interplay with the freedom to make private copies are the cause of considerable confusion, and have led to varied implementations by national legislatures.¹²

This Part will describe the current state of private copying in European copyright law, its history and rationales, its various manifestations in European copyright law, and finally assess its strengths and weaknesses, primarily from the perspective of information consumers.

A. The Place of the Consumer in European Copyright Law

For most of the 20th century, private copying occupied a very modest place in the law of copyright in Europe. Buyers and readers of books and other printed matter were rarely perceived as potential competitors or threats to the copyright holders' interests. Early laws on copyright were not concerned with the kind of small-scale hand-made reproduction that occurred in homes or at the workplace. Private copying exemptions have existed in various forms in European jurisdictions since the early days of copyright.¹³ For instance, the German Act of 1876 allowed for the making of a single copy of a work of art, provided it was not intended for commercial use.¹⁴ In legal doctrine, a freedom to make private copies was recognized as well. According to the famous German legal scholar Joseph Kohler, the exclusive right of reproduction was implicated only when a copy of a work "is intended to serve as a means of communicating [the work] to others."¹⁵ In other words, copyright protected authors against acts of unauthorized communication, not consumptive usage.

11. Press Release, Copyright Levies Reform Alliance, Industry Condemns Commission Backdown on Reform: Reform of Copyright Levies Abandoned Following Opposition from France (Dec. 13, 2006), available at http://www.eicta.org/fileadmin/user_upload/document/document1166542590.pdf.

12. See *infra* Section II.C.

13. For example, art. 16 of the Dutch Copyright Act enacted in 1912 allowed copying for personal uses. LUCIE M.C.R. GUIBAULT, COPYRIGHT LIMITATIONS AND CONTRACTS 49-50 (2002).

14. JACOB HENDRIK SPOOR, SCRIPTA MANENT: DE REPRODUKTIE IN HET AUTEURSRECHT 9 (1976).

15. JOSEPH KOHLER, DAS AUTORRECHT 230 (1880); SPOOR, *supra* note 14, at 11.

Even in 2007, the consumer as such remains almost completely invisible in the law of European copyright.¹⁶ The main actors are the content producers, such as authors and other right holders, and the mainstream intermediaries, such as publishers, broadcasters, libraries, and educational institutions. Somewhat confusingly, particularly for those versed in the jargon of consumer law, these intermediaries are traditionally referred to as “users.” The terms “consumer” and “end user” rarely if ever appear in legislative texts on copyright and are absent from the body of harmonized European copyright law. Indeed, none of the provisions of the seven copyright-related directives adopted by the European legislature since 1991 even mention the word “consumer.”¹⁷

Until the digital revolution, the consumer remained mostly an *entité négligeable* in European copyright law. This changed, however, as European copyright law began to address computer programs.¹⁸ Based on the rather technocratic argument that all digital operations involve some form of copying, however temporary or transient, the right of reproduction was stretched into an exclusive right to use works in digital form.¹⁹ This very broad interpretation of the reproduction right was first codified in the EC’s Computer Program Directive of 1991²⁰ and Database Directive of 1996²¹ and later elevated to a general norm in the Information Society Directive

16. The same can be said of current U.S. copyright law. See Joseph P. Liu, *Copyright Law’s Theory of the Consumer*, 44 B.C. L. REV. 397, 399 (2003); Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 347 (2005).

17. Council Directive 91/250 on the Legal Protection of Computer Programmes, 1991 O.J. (L 122) 42 (EC) [hereinafter Computer Programs Directive]; Council Directive 92/100 on Rental and Lending Rights and Certain Rights Related to Copyright in the Field of Intellectual Property, 1992 O.J. (L 346) 61 (EC) [hereinafter Rental Rights Directive]; Council Directive 93/83 on the Co-Ordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, 1993 O.J. (L 248) 15 (EC) [hereinafter Satellite and Cable Directive]; Council Directive 93/98 harmonizing the Term of Protection of Copyright and Certain Related Rights, 1993 O.J. (L 290) 9 (EC) [hereinafter Term Directive]; Council Directive 96/9 on the Legal Protection of Databases, 1996 O.J. (L 77) 20 (EC) [hereinafter Database Directive]; Information Society Directive, *supra* note 2; Council Directive 2001/84 on the Resale Right for the Benefit of the Author of an Original Work of Art, 2001 O.J. (L 272), 32 (EU) [hereinafter Resale Rights Directive].

18. See Computer Programs Directive, *supra* note 17, art. 1(1) (requiring Member States to “protect computer programs, by copyright, as literary works . . .”).

19. P. Bernt Hugenholtz, *Convergence and Divergence in Intellectual Property Law: The Case of the Software Directive*, in INFORMATION LAW TOWARDS THE 21ST CENTURY 319, 323 (Willem F. Korthals Altes, Egbert J. Dommering, P. Bernt Hugenholtz & Jan J.C. Kabel eds. 1992).

20. Computer Programs Directive, *supra* note 17.

21. Database Directive, *supra* note 17.

of 2001.²² Thus, a powerful new right was added to the copyright owners' palette of rights: an exclusive right to *consume* works electronically.²³

B. Rationales of Private Copying Limitations

A variety of arguments, informed by those that traditionally underpin European copyright law, are made to justify private copying exemptions in Europe. Dutch legal scholar Willem Grosheide describes the main rationales of copyright:²⁴

- a) The "Personality" rationale: The work of authorship bears the personal imprint of its maker. Copyright ("author's right") is a species of a general right of personality,²⁵ which is informed by the fundamental right to privacy.²⁶
- b) The "Justice" rationale: Copyright reflects notions of natural justice. "[A]uthor's rights are not created by law but always existed in the legal consciousness of man."²⁷
- c) Cultural rationales: Copyright acts as an incentive to create and disseminate works that advance knowledge and contribute to our cultural heritage.²⁸ Copyright is the proverbial "engine of free expression."²⁹
- d) Economic rationales: Copyright turns information, which is essentially a public good, into a tradable commodity by allocating property rights in informational goods.³⁰ Correcting this "market failure" promotes economic efficiency and competition in information markets.³¹

22. Computer Programs Directive, *supra* note 17, art. 4(a); Database Directive, *supra* note 17, art. 5(a); Information Society Directive, *supra* note 17, art. 2.

23. This stretching of the reproduction right was met with serious criticism from European scholars. See LEGAL ADVISORY BOARD (LAB), REPLY TO THE GREEN PAPER ON COPYRIGHT IN THE INFORMATION SOCIETY (1995), <http://europa.eu.int/ISPO/legal/en/ipr/reply/reply.html>.

24. F. WILLEM GROSHEIDE, AUTEURSRECHT OP MAAT 128-45 (1986).

25. *Id.* at 129-32.

26. See *infra* text accompanying notes 42-43.

27. EDWARD W. PLOMAN & L. CLARK HAMILTON, COPYRIGHT: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 13 (1980); GROSHEIDE, *supra* note 24, at 130.

28. GROSHEIDE, *supra* note 24, at 128.

29. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

30. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989).

31. GROSHEIDE, *supra* note 24, at 128.

The “justice” and “personality” rationales typically support the “author’s rights” systems that prevail in continental Europe,³² while the more utilitarian arguments, the cultural and economic rationales, underpin the copyright systems that are dominant in common law jurisdictions, such as the United States.³³ As the EC continues to harmonize copyright law in the European Union based on market norms and largely driven by economic considerations, however, the main differences between Europe-style author’s right and US-style copyright are gradually disappearing.³⁴ Nevertheless, the justice and personality rationales, as reflected in the moral rights that are omnipresent throughout Europe’s copyright laws, undoubtedly remain important drivers of copyright law and policy in Europe. Similar arguments also underlie the copyright limitations allowing private copying that currently exist in most Member States.³⁵

1. *Privacy*

Historically, private copying in Europe remained outside the scope of copyright because private copies were not considered means of communicating works to the public.³⁶ The rationale of a private copying exception is informed, at least in part, by the idea of protecting the end user’s private sphere. For similar reasons, modern European copyright laws have limited the prohibition of public performance or communication to the public by exempting acts done in the private sphere.³⁷ Such limits reflect the right to privacy, considered a fundamental right or freedom in Europe since the European Convention on Human Rights was signed in 1950.³⁸

32. PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT 3 (2001).

33. *Id.*

34. *Id.* at 4.

35. *See, e.g.*, Auteurswet [Copyright Act], Sept. 23, 1912, Stb. 2006, 60, art. 16(b) (Neth.).

36. *See supra* Section II.A.

37. For example, article 12(4) of the Dutch Copyright Act exempts performances in a restricted circle composed of “relatives or friends or equivalent persons and [if] no form of payment whatsoever is made for admission to the recitation, performance or presentation.” Copyright Act, *supra* note 35.

38. 1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.

Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov 4, 1950, 213 U.N.T.S. 222.

Privacy considerations also played a crucial role in the German Federal Supreme Court's landmark *Personalausweise* decision of 1964,³⁹ which reaffirmed an earlier holding that manufacturers of private recording equipment were liable for contributory copyright infringement.⁴⁰ In *Personalausweise*, the German levy collecting society GEMA⁴¹ sought a court order requiring equipment manufacturers to record the names of purchasers of recording equipment. The Court denied GEMA's request, finding that to grant such a court order would encroach upon the end users' constitutionally protected private sphere.⁴² This decision eventually led to the introduction of a levy on the importation and sale of home recording equipment as a way of remunerating copyright holders while respecting the fundamental right to privacy of end users.⁴³

2. Justice

Since their introduction by the German Federal Supreme Court in 1964, copyright levies have gradually spread across the European Union.⁴⁴ With the notable exception of the UK and Ireland, where private copying has never been fully legalized,⁴⁵ most Member States now have a system

39. *Personalausweise*, Bundesgerichtshof [BGH] [German Federal Supreme Court] May 25, 1964, [1965] *Gewerblicher Rechtsschutz und Urheberrecht* [GRUR] 104 (106) (F.R.G.).

40. *Grundig Reporter*, Bundesgerichtshof [BGH] [German Federal Supreme Court] May 18, 1955, [1955] *Gewerblicher Rechtsschutz und Urheberrecht* [GRUR] 492 (492) (F.R.G.).

41. GEMA (Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte) collectively administers performance and mechanical reproduction rights of composers in Germany, and is presently one of the largest collecting societies in Europe. See GEMA Home Page—English, <http://www.gema.de/engl/home.shtml> (last visited Aug. 8, 2007).

42. Dirk J.G. Visser, *Copyright Exemptions Old and New: Learning from Old Media Experiences*, in *THE FUTURE OF COPYRIGHT IN A DIGITAL ENVIRONMENT* 49, 50 (P. Bernt Hugenholtz ed. 1996); GUIBAULT, *supra* note 13, at 47-56; Andrew F. Christie, *Private Copying and Levy Schemes: Resolving the Paradox of Civilian and Common Law Approaches* (Univ. of Melbourne Legal Studies Research Paper No. 116, 2004), available at <http://ssrn.com/abstract=690521>.

43. Note that Recital 57 preceding the Information Society Directive underscores the importance of implementing privacy safeguards in DRM systems, so as to avoid a conflict with well-developed EC data protection law. Information Society Directive, *supra* note 2, rec. 57.

44. P. BERNT HUGENHOLTZ, LUCIE GUIBAULT & SJOERD VAN GEFFEN, *THE FUTURE OF LEVIES IN A DIGITAL ENVIRONMENT* 13-29 (2003) [hereinafter *FUTURE OF LEVIES*], available at <http://www.ivir.nl/publications/other/DRM&levies-report.pdf>.

45. British law does provide for a more limited defense of "fair dealing" for the purpose of research or private study. This defense, however, does not apply to a broadcast, cable program, sound recording, or film. Copyright, Designs and Patents Act, 1988, c. 48,

of private copying levies.⁴⁶ Levies are imposed on the importation and manufacture of copying equipment, blank media, or both and collected by collecting societies representing authors, performing artists, film producers, and publishers.⁴⁷ Consumers ultimately pay the price of levies.

Levies reflect the “remuneration principle” prevailing in Member States of the authors’ rights tradition. Under this conception of copyright, authors are entitled to “equitable” remuneration for each and every use of their work as a matter of fairness. Although more sympathetic to a future world controlled by DRM than the currently prevailing system of private-copying-cum-levies, the Information Society Directive instructs Member States that permit private copying to grant “fair compensation” to copyright holders.⁴⁸ The Directive does not explicitly mandate levies as a form of “fair compensation,” but levies have remained by far the most common remuneration scheme for private copying in Europe.⁴⁹

3. *Promotion of Creativity and Speech*

An entirely different objective of private copying exemptions is closely linked to yet another main rationale of copyright. If copyright is supposed to promote culture and serve as the “engine of free expression,”⁵⁰ the law of copyright must also allow prospective authors to “stand on the shoulders of giants” and freely engage in transformative uses of works of authorship.⁵¹ Private copying is an essential first step in this process of follow-on creation.⁵²

§ 29 (Eng.). See LIONEL BENTLY & BRAD SHERMAN, *INTELLECTUAL PROPERTY LAW* 199 (2001).

46. FUTURE OF LEVIES, *supra* note 44, at 13-29.

47. *Id.*

48. Information Society Directive, *supra* note 2, art. 5(2)(b). Note however that “fair compensation” is connected to the notion of harm, *id.* at rec. 35, and therefore may amount to less than “equitable remuneration,” a notion based on fairness. See FUTURE OF LEVIES, *supra* note 44, at 36; Stefan Bechtold, *Directive 2001/29/EC*, in *CONCISE EUROPEAN COPYRIGHT LAW* 343, 373 (Thomas Dreier & P. Bernt Hugenholtz eds., 2006); Information Society Directive, *supra* note 2, art. 5(3)(b).

49. Alternatively, a system of state subsidies, as it exists in Norway, would also qualify as “fair compensation.”

50. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

51. LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 249 (2001).

52. MARTIN R.F. SENFLEBEN, *COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST: AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW* 39 (2004) (justifying the need to permit transformative uses on the ground of “inter-generational equity”).

However, the rules on private copying in the Information Society Directive do not refer to private copying for transformative uses. Although some provisions in the Directive do allow Member States to permit such non-private transformative uses as quotation and parody,⁵³ the Directive treats private copying mainly as a consumptive act.⁵⁴ By contrast, several Member States expressly deal with “transformative” private copying in their national laws. For example, German copyright law is more generous regarding private copying for purposes of study and research than, for instance, purely consumptive “home taping” of radio and television programs.⁵⁵

4. *Economic Arguments*

Economic arguments have been used both to justify and to limit private copying and associated levy schemes in Europe. The “market failure” inherent in the absence of practicable licensing and enforcement mechanisms vis-à-vis consumers of copyright works has been a powerful argument in favor of statutory licenses permitting private copying. Concomitantly, the recent emergence of DRM systems that do allow copyright holders to engage in individual end-user licensing has cast into doubt the survival of private copying exemptions.⁵⁶

Indeed, it is surprising that the Information Society Directive does not totally prohibit private digital copying⁵⁷ given certain provisions in the earlier Computer Programs⁵⁸ and Database Directives.⁵⁹ The Database Directive tolerates copying for private purposes only with regard to non-electronic databases.⁶⁰ The Computer Programs Directive prohibits private copying of computer software altogether, except for the occasional backup copy.⁶¹

53. Information Society Directive, *supra* note 2, art. 5(3)(d), (k).

54. *Id.*, art. 5(2)(b).

55. Urheberrechtsgesetz [Copyright Act], Sept. 9, 1965 BGBl. I at 1273, §§ 53, 54 (F.R.G.).

56. ANDRE LUCAS & HENRI-JACQUES LUCAS, *TRAITE DE LA PROPRIETE LITTERAIRE ET ARTISTIQUE* 268 (2d ed. 2001).

57. Early drafts of the Information Society Directive did not permit digital private copying. An echo of this early policy can be heard in Recital 38, which considers that digital private copying is “likely to be more widespread and have a greater economic impact” than analog private copying. Information Society Directive, *supra* note 2, rec. 38.

58. Computer Programs Directive, *supra* note 17.

59. Database Directive, *supra* note 17.

60. *Id.*, arts. 6(2) and 9(a).

61. Computer Programs Directive, *supra* note 17, art. 5(2).

Although the Information Society Directive does not prohibit private copying, the idea that DRM can effectively overcome market failure has informed the provisions of the Directive. Article 5(2)(b) of the Directive instructs the Member States that in calculating the amount of "fair compensation" for acts of digital private copying the "application or non-application of technological measures" be taken into account.⁶² In other words, as DRM gradually displaces private copying, levies are to be phased out.

Considerations of economic industrial policy, or perhaps consumerism, may have also played a role in permitting private copying, especially in countries such as the Netherlands where electronics manufacturers have more political clout than copyright holders. As the Dutch Government explained to its Parliament in 1972, home recording equipment "would lose all attraction" to consumers if private copying were not permitted.⁶³

Economic considerations have also limited the consumer's freedom to make private copies. Private copying is no longer permitted wherever private uses compete with commercial uses reserved to right holders. Article 5(2)(b) of the Information Society Directive requires copies be "made by a natural person for private use and for ends that are neither directly nor indirectly commercial."⁶⁴ This excludes any form of commercial copying, be it for legitimate business-related purposes or ordinary "piracy."⁶⁵ Moreover, Article 5(2)(b) does not permit exemptions allowing "private" copying by or within business enterprises or other legal persons, even if such copying is without commercial purpose.⁶⁶

Article 5(5) of the Directive imposes yet another economically motivated ceiling on private copying, requiring all private copying exemptions to comply with the so-called "three-step test."⁶⁷ The three-step test, which can be found in various instruments of international copyright law,⁶⁸

62. Information Society Directive, *supra* note 2, art. 5(2)(b).

63. Visser, *supra* note 42, at 49 (quoting Second Chamber of Parliament 1972, L. de Vries, *Parlementaire geschiedenis van de Auteurswet 1912 zoals sedertdien gewijzigd* (Parliamentary history of the Copyright Act of 1912, as revised), The Hague 1989, 17).

64. Information Society Directive, *supra* note 2, art. 5(2)(b).

65. Bechtold, *supra* note 48; Information Society Directive, *supra* note 2, art. 5(3)(e).

66. Information Society Directive, *supra* note 2, art. 5(3)(e).

67. *Id.*, art. 5(5) ("The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.").

68. Berne Convention for the Protection of Literary and Artistic Works art 9(2), Sept. 9, 1986, S. Treaty Doc. No. 99-27 (1986), 1161 U.N.T.S. 3; Agreement on Trade-

serves as a general restriction to *all* exemptions presently found, or to be introduced, in the Member States' copyright laws pursuant to the Directive. Even if an exemption falls within one of the 21 categories of permitted exceptions enumerated in Article 5, it is for the legislatures (and, eventually, the courts) of the Member States to determine on a case-by-case basis whether the general criteria of the three-step test are met.⁶⁹ Exemptions permitting digital private copying, therefore, are permitted only (1) "in certain special cases"; (2) "which do not conflict with a normal exploitation of the work"; and (3) "do not unreasonably prejudice the legitimate interests of the right holder."⁷⁰

It is a matter of some speculation, and eventually for the European Court of Justice to decide, whether a generally worded private copying exemption will pass the three-step test. On the one hand, in the digital environment, where end users are capable of producing perfect copies with the proverbial "push-of-a-button," private copying might not be a "certain special case" and may conflict with a "normal exploitation of the work" almost by definition.⁷¹ On the other hand, broadly worded private copying exemptions already existed in many European countries at the time Article 9(2) of the Berne Convention, the predecessor of Article 5(5) of the Information Society Directive, was introduced in 1967.⁷² These exemptions presumably were "grandfathered in" under the Berne Convention and are therefore not subject to the test.⁷³

C. Legal Nature of Private Copying Exceptions

The legal nature of private copying limitations under European copyright law is uncertain and a matter of persistent controversy.⁷⁴ The various user freedoms codified in the Information Society Directive come in several flavors, varying from traditional limitations that users may invoke in

Related Aspects of Intellectual Property Rights art. 13, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299; 33 I.L.M. 1197 (1994); WIPO Copyright Treaty art. 10, Dec. 20, 1996, WIPO Doc. CRNR/DC/94 (published Dec. 23, 1996), *available at* <http://www.wipo.int/documents/en/diplconf/distrib/pdf/94dc.pdf>.

69. Bechtold, *supra* note 48; Information Society Directive, *supra* note 2, art. 5(6).

70. *See generally* SENFTLEBEN, *supra* note 52.

71. SENFTLEBEN, *supra* note 52, at 206.

72. WIPO, 2 RECORDS OF THE INTELLECTUAL PROPERTY CONFERENCE OF STOCKHOLM 291-292 (1967), *available at* <http://www.oup.com/uk/booksites/content/9780198259466/15550029>; SENFTLEBEN, *supra* note 52, at 158.

73. SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986 (1987), 479-81.

74. *See generally* GUIBAULT, *supra* note 13, at 90-110 (qualifying limitations in terms of either a subjective right or an objective right or privilege).

their defense against copyright holders to remedies against technical protection measures that more resemble “user rights.” This section considers the various legal manifestations of private copying limitations as they presently exist at the European level and in the Member States.

Article 5(2)(b) of the Information Society Directive, which allows Member States to permit private copying under specific conditions, is part of a very lengthy Article 5 that exhaustively lists permitted limitations. Although Article 5(1) of the Directive obliges Member States to exempt certain acts of transient copying from the exclusive right of reproduction, including such consumptive acts as browsing and caching content from the web, the other listed limitations are optional. Member States may or may not choose to adopt them, but are not allowed to legislate limitations beyond the list.⁷⁵

As the structure and official caption of Article 5, “Exceptions and limitations,” suggest, the norms of Article 5, inasmuch as they are transposed by the national legislatures, set limits to the copyright holders’ exclusive rights and thus form a first line of defense against copyright holders invoking their exclusive rights. But the Directive has left the Member States in the dark as to the legal nature and enforceability of these user freedoms. Are they simply “exceptions” that may be, and surely will be, pre-empted by contract, by way of the now omnipresent (click-wrap) end user licenses? Or are they inalienable rights that provide relief to qualified users even inside contractual relationships?

The Directive’s silence on this crucial issue contrasts starkly with the two earlier European directives dealing with “digital” issues.⁷⁶ Both the Computer Programs Directive and the Database Directive guarantee lawful users certain end user freedoms, such as a right to make back-up copies⁷⁷ of and to study or test⁷⁸ legally acquired computer software, as well as a right to consult databases.⁷⁹ These freedoms are not framed as mere “exceptions” to copyright, but as full-fledged end user rights that cannot

75. Bechtold, *supra* note 48, at 369; Information Society Directive, *supra* note 2, art. 5(1)(b).

76. See LUCIE GUIBAULT ET AL., STUDY ON THE IMPLEMENTATION AND EFFECT IN MEMBER STATES’ LAWS OF DIRECTIVE 2001/29/EC ON THE HARMONISATION OF CERTAIN ASPECTS OF COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY, REPORT TO THE EUROPEAN COMMISSION 160 (2007) [hereinafter STUDY ON THE IMPLEMENTATION OF DIRECTIVE 2001/29/EC], available at http://www.ivir.nl/publications/guibault/Infosoc_report_2007.pdf.

77. Computer Programs Directive, *supra* note 17, art 5(2).

78. *Id.*, art. 5(3).

79. Database Directive, *supra* note 17, art. 6(1).

be overridden by contract.⁸⁰ However, the Information Society Directive does not expressly give similar imperative status to these exemptions for private copying.⁸¹

Given the Information Society Directive's silence, the legal nature of the limitations listed in Article 5 remains unclear, and is left for the time being to the discretion of the Member States. Two Member States, Belgium and Portugal, have dealt with the issue in their national copyright laws. According to Belgian law, as amended in 1998, nearly all exceptions mentioned in the Belgian Copyright Act, including a private copying exemption, have imperative character and thus cannot be overridden by contract.⁸² Similarly, the Portuguese Copyright Act, as recently amended during the process of transposing the Information Society Directive, declares null and void any contractual provision eliminating or impeding the normal exercise of the free uses mentioned in the Act.⁸³

While the enforceability within contractual relationships of the limitations listed in Article 5 remains unclear, the Information Society Directive is more interventionist when it comes to protecting users against DRM. Although the Directive does not allow users to circumvent technological "locks" designed to prevent unauthorized copying,⁸⁴ Article 6(4) seeks to ensure that users of copyrighted works are able to benefit from designated copyright limitations despite DRM measures meant to prevent copying.⁸⁵

80. *Id.*, art. 15; Computer Programs Directive, *supra* note 17, art. 9(1).

81. "Imperative" status means that the exemption is mandatory in contractual relationships—in other words, that the user's freedom (e.g., to make a private copy) cannot be overridden by contract. Note that according to Article 9 of the Information Society Directive, the provisions of the Directive are without prejudice to "the law of contract." An amendment of the European Parliament stating that "no contractual measures may conflict with the exceptions or limitations incorporated into national law pursuant to Article 5" was rejected by the Council. STUDY ON THE IMPLEMENTATION OF DIRECTIVE 2001/29/EC, *supra* note 76, at 160.

82. Loi relative au droit d'auteur et aux droits voisins [Law on Copyright and Neighboring Rights of 1994], June 30, 1994, *Moniteur belge/Belgisch Staatsblad* 27/07/1994 at 19297, § 22 (Belg.), *translation available at* http://www.wipo.int/clea/docs_new/pdf/en/be/be003en.pdf. See STUDY ON THE IMPLEMENTATION OF DIRECTIVE 2001/29/EC, *supra* note 76, at 160-61.

83. Law No. 62/98 of Sept. 1, 1998, *Diário da República [D.Re.] [Official Gazette of Portugal] I Série-A [Series I]*, Sept. 1, 1998, p. 4524. (Portuguese Act on Copyright and Neighboring Rights) See STUDY ON THE IMPLEMENTATION OF DIRECTIVE 2001/29/EC, *supra* note 76, at 160-61.

84. Information Society Directive, *supra* note 2, art. 6(1); see also *id.*, rec. 52.

85. Notwithstanding 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

Member States may, but are not obliged to, extend this “facilitation” rule to the private copying exemption,⁸⁶ as several countries indeed have done.⁸⁷ In those countries, disenfranchised consumers unable to make “private copies” from DRM-protected works have recourse to the courts, special government agencies, a copyright tribunal, or direct government intervention to ensure that such copies can actually be made.⁸⁸

For example, the recently revised French Copyright Act⁸⁹ establishes a special “Authority” charged with regulating DRM measures.⁹⁰ Private individuals, consumer associations, and other organizations are entitled to bring a case before the Authority requesting the application of the private copying limitation codified in the French Act.⁹¹ Accordingly, the Authority has the power to arbitrate disputes and to determine the minimum number of authorized private copies allowed, depending on the type of work or subject matter protected.⁹²

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.

A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.

Id., art. (6)(4).

86. *Id.*

87. These countries include France, Italy, the Netherlands, and Spain. STUDY ON THE IMPLEMENTATION OF DIRECTIVE 2001/29/EC, *supra* note 76, at 160-62. See GUIDO WESTKAMP, PART II: THE IMPLEMENTATION OF DIRECTIVE 2001/29/EC IN THE MEMBER STATES, REPORT TO THE EUROPEAN COMMISSION (2007), available at http://www.ivir.nl/publications/guibault/InfoSoc_Study_2007.pdf.

88. STUDY ON THE IMPLEMENTATION OF DIRECTIVE 2001/29/EC, *supra* note 76, at 126-29.

89. Law No. 2006-961 of Aug. 1, 2006 art. 14, art. L. 331-6, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Aug. 3, 2006, p. 11529.

90. STUDY ON THE IMPLEMENTATION OF DIRECTIVE 2001/29/EC, *supra* note 76, at 127.

91. CODE CIVIL [C. CIV.] art. L. 122-5 (2) (French Intellectual Property Code).

92. STUDY ON THE IMPLEMENTATION OF DIRECTIVE 2001/29/EC, *supra* note 76, at 127.

The remedies articulated in Article 6(4) of the Directive cannot be enforced against DRM-protected works offered on-demand under agreed-upon contractual terms.⁹³ Because DRM-protected content is typically offered online under click-wrap licenses, this exception effectively swallows the rule. Moreover, if a copyright holder designs a DRM measure that allows some private copying, then Member States are prohibited from recognizing the consumer remedies articulated in Article 6(4).⁹⁴ In any case, copyright holders may use DRM measures to control the number of reproductions in accordance with Articles 5(2)(b) and 5(5).⁹⁵

D. Assessment

To what extent does the emerging body of European copyright law warrant a consumer right to make private copies, and thus cater to the needs and interests of information consumers? Clearly, the traditional copyright system has little to offer to consumers directly. Even in 2007, consumers are not expressly mentioned in the law of copyright.⁹⁶ In the old days of analog reproduction, that did not really matter. Information consumers remained largely off copyright law's radar screen. Copyright and consumer law operated on different planes.

With the advent of the digital age, reproduction in copyright has taken on an entirely new meaning. The information consumer has involuntarily stepped into the copyright arena, and immediately occupied center stage. The expansive interpretation of the reproduction right that has drawn the consumer into the sphere of copyright has seriously compromised end user freedoms and thus does not bode well for consumer autonomy. Despite

93. Information Society Directive, *supra* note 2, art. 6(4).

94. STUDY ON THE IMPLEMENTATION OF DIRECTIVE 2001/29/EC, *supra* note 76, at 108.

95. *Id.* at 111, 155. See Information Society Directive, *supra* note 2, rec. 52, which states:

Voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, as well as measures taken by Member States, do not prevent rightholders from using technological measures which are consistent with the exceptions or limitations on private copying in national law in accordance with Article 5(2)(b), taking account of the condition of fair compensation under that provision and the possible differentiation between various conditions of use in accordance with Article 5(5), such as controlling the number of reproductions. In order to prevent abuse of such measures, any technological measures applied in their implementation should enjoy legal protection.

Id.

96. See *supra* Section II.A.

legislative attempts to protect end user freedom, every act of information consumption by digital means nowadays effectively requires a "license." In Europe, this has led to a variety of consumer-protective measures in copyright law, ranging from simple "exceptions" allowing private copying without permission of copyright holders, to "use rights" that cannot be overridden by contract. In addition, European law provides certain, albeit rather toothless, remedies to certain users disenfranchised by DRM technology.

Despite the promise of the Information Society Directive to harmonize and add legal certainty to the European copyright framework,⁹⁷ the laws on private copying in the Member States still vary enormously, both in scope and legal character. While most countries of the European continent permit some measure of private copying, copying for personal uses is generally considered copyright infringement in the United Kingdom and Ireland. Most Member States treat private copying as a simple "exception" to the copyright holder's exclusive right of reproduction, but some countries, such as Belgium and Portugal, have given elevated status to the limitation by immunizing private copying against contractual overrides.⁹⁸ Other countries, including France, Italy, and Spain, have made the limitation enforceable against technological protection measures.⁹⁹

As Part III shall demonstrate, the varied legal landscape of private copying in Europe has a ripple effect on consumer law and explains much of the confusion surrounding the legal status of private copying in European consumer law.

III. EUROPEAN CONSUMER LAW

European consumer law sets basic rules for the bargaining game between "persons acting as consumer in the marketplace and their counterparts, the businesses."¹⁰⁰ The approach of consumer law differs fundamentally from the copyright-holder-centric approach of copyright law. Consumer law is consumers' law, where "the consumer" is the central protagonist.

97. Information Society Directive, *supra* note 2, rec. 4.

98. *See supra* Section II.C.

99. *See supra* text accompanying note 87.

100. Thomas Wilhelmson, *Consumer Law and the Environment: From Consumer to Citizen*, 21 J. CONSUMER POL. 45, 46 (1998).

Consumers are neither professional sellers nor producers. In all the various definitions of the “consumer”¹⁰¹ in European consumer law, a “consumer” is a natural person acting outside his professional capacity. In other words, consumer law is the body of law that protects consumers’ reasonable expectations to enjoy goods and services in their private environment. To this end, consumer law is designed to protect and promote the interests of consumers of goods and services in their commercial relationship with suppliers.

European consumer law has influenced to a substantial degree the consumer laws of the Member States of the European Union.¹⁰² Furthermore, the Directorate General for Consumer Affairs has begun to show a pronounced interest in digital information consumers and the potential of consumer law to protect their interests,¹⁰³ and an extensive review of the current state of EC law is on its way.¹⁰⁴ A chief objective of the EC review is to strengthen the rights of consumers of digital information services.¹⁰⁵ Without repeating this exercise, this Part demonstrates on a more abstract level how consumer law can give “teeth” to the private copying exemption. To this end, this Part analyzes the main rationales and legal tools of

101. Cf. Council Directive 2005/29, Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market, art. 2(a), 2005 O.J. (L 149) 22 (EU) [hereinafter Unfair Commercial Practices Directive] (“any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession”); Council Directive 2000/31 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, art. 2(e), 2000 O.J. (L 178) 1, 7 (EC) [hereinafter Electronic Commerce Directive] (“any natural person who is acting for purposes which are outside his or her trade, business or profession”); Council Directive 99/44 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees, art. 1(2)(a), 1999 O.J. (L 171) 12, 14 (EC) [hereinafter Sale of Consumer Goods Directive] (“any natural person who, in the contracts covered by this Directive, is acting for purposes which are not related to his trade, business or profession”); Council Directive 97/7 on the Protection of Consumers in Respect of Distance Contracts, art. 2(2), 1997 O.J. (L 144) 19 (EC) [hereinafter Distance Selling Directive] (“any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession”); Council Directive 93/13 on Unfair Terms in Consumer Contracts, art. 2(b), 1993 O.J. (L 95) 29 (EC) [hereinafter Unfair Terms Directive] (“any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession”).

102. NORBERT REICH & HANS-W. MICKLITZ, *EUROPÄISCHES VERBRAUCHERRECHT [EUROPEAN CONSUMER LAW]* 45 (4th ed. 2003).

103. *Commission Green Paper on the Review of the Consumer Acquis*, at 6, COM (2006) 744 final (Feb. 8, 2007) [hereinafter *2006 Green Paper*].

104. *Id.* at 6.

105. *Id.* at 3.

generic European consumer law,¹⁰⁶ leaving aside procedural questions and the effectiveness of remedies.

A. Rationales

Two distinct and major rationales underlie consumer law—to empower the consumer as a sovereign market actor and to protect the consumer as the weaker party in commercial dealings with suppliers.

1. *Empowering the Consumer as Sovereign Market Actor*

The image of the consumer as a sovereign market actor has shaped large parts of European consumer law.¹⁰⁷ The prevailing image of the European consumer in EC law is that of the “average” consumer who is “reasonably well informed and reasonably observant and circumspect”—a concept developed by the European Court of Justice.¹⁰⁸ This average consumer, provided he is adequately informed, is well equipped to address his own needs and preferences and is able to search among the services and products that are publicly available for those that best meet his needs. Of course, what best addresses a consumer’s needs differs from consumer to consumer. Such needs can be economic (e.g., getting the best deal for the money), non-economic (e.g., the making of private copies to engage in transformative uses), self-centered, or altruistic.¹⁰⁹ Note that in the European perception the sovereign consumer plays a far more active role than just “consuming.” He is an active driver behind the development of the Internal Market¹¹⁰ and behind a competitive offering of services that re-

106. Note that for the time being there is little sector-specific information consumer law. Some provisions in the Electronic Commerce Directive are aimed specifically at digital consumers, including, but not limited to, consumers of information services and products.

107. J.G.J. Rinkes, *Europees consumentenrecht* [European Consumer Law], in *HANDBOEK CONSUMENTENRECHT. EEN OVERZICHT VAN DE RECHTSPOSITIE VAN DE CONSUMENT* [CONSUMER LAW. AN OVERVIEW OF THE LEGAL POSITION OF THE CONSUMER] 31, 36 (E.H. Hondius & G.J. Rijken eds., 2006).

108. Unfair Commercial Practices Directive, *supra* note 101, rec. 18. *See also* Case C-210/96, *Gut Springenheide GmbH and Rudolf Tusky v. Oberkreisdirektor des Kreises Steinfurt—Amt für Lebensmittelüberwachung*, 1998 E.C.R. I-04657, para. 55; Case C-470/93, *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v. Mars GmbH*, 1995 E.C.R. I-01923, para. 24.

109. *Cf.* Thomas Wilhelmsson, *The Consumer’s Right to Knowledge and the Press*, in *CONSUMER LAW IN THE INFORMATION SOCIETY* 367, 379 (Thomas Wilhelmsson, Salla Tuonminen & Heli Tuomola eds., 2001) (discussing what constitutes reasonable expectations of newspaper consumers); Thierry Bourgoignie, *Characteristics of Consumer Law*, 14 *J. CONSUMER POL.* 293, 303 (1992).

110. One of the goals of current EU policy is to realize an Internal or Single European Market, a situation where people, goods, services, and capital can move freely be-

sponds to the interests of consumers of the European Union.¹¹¹ In other words, if the European consumer attaches any value to private copying, it is up to him to make markets deliver information products and services that can be copied for private use.

To be an active market player, the sovereign consumer must have choice. Accordingly, protecting the sovereign consumer's "right to choice" is a central objective of European consumer law.¹¹² Principle One of the EC's Ten Basic Principles of Consumer Protection in the European Union is: "Buy what you want, where you want."¹¹³ Consequently, consumer law's role is to create the market conditions that allow consumers to "vote with their purse" by rectifying market failures, most notably information asymmetries.¹¹⁴ Consumer information is an important prerequisite for the sovereign consumer to manage his own affairs.¹¹⁵ Thus, EU consumer policies focus on consumer empowerment, or "consumer assistance," with minimal intervention,¹¹⁶ rather than on consumer protection. The better the market serves the interests of consumers, the smaller the role of the legislature can remain.¹¹⁷

2. *Protecting the Weaker Party*

In contrast, proponents of a more interventionist role of the state in consumer matters warn against overestimating the self-regulatory powers of the market and emphasize that empowering the consumer is not always sufficient to guarantee an adequate standard of consumer protection.¹¹⁸ Common justifications for a more activist role of the regulator are welfare

tween the different national markets of the member states of the European Union without encountering legal or economic barriers. For further information visit European Commission, The EU Single Market, http://ec.europa.eu/internal_market/index_en.htm (last visited Aug. 8, 2007).

111. *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, EU Consumer Policy strategy 2007-2013 Empowering Consumers, Enhancing Their Welfare, Effectively Protecting Them*, at 2-6, COM (2007) 99 final (Mar. 13, 2007) [hereinafter *Empowering Consumers*].

112. René Barents, *The Image of the Consumer in the Case Law of the European Court*, 1 EUR. FOOD L. REV. 6, 8 (1990).

113. EUROPEAN COMMISSION, CONSUMER PROTECTION IN THE EUROPEAN UNION: TEN BASIC PRINCIPLES 3 (2005), available at http://ec.europa.eu/consumers/cons_info/10principles/en.pdf. See also Barents, *supra* note 112, at 8.

114. Barents, *supra* note 112, at 15-18.

115. *Empowering Consumers*, *supra* note 111, at 3.

116. Bourgoignie, *supra* note 109, at 305.

117. See *Empowering Consumers*, *supra* note 111.

118. See, e.g., Barents, *supra* note 112, at 22; Norbert Reich, *Diverse Approaches to Consumer Protection Philosophy*, 14 J. CONSUMER POL. 257, 260-61 (1992).

economics and imbalances in the transactional relationship between consumers and service providers.¹¹⁹ Through this lens, the consumer is less the sovereign decision maker and more the structurally weaker party in commercial negotiations. Unlike the sovereign consumer, the weak consumer is less capable of minding his own affairs because he lacks information, education, awareness, or negotiation power.¹²⁰ Thus, removing market failures that obstruct the consumer's "right to choice" is not enough to protect the weak consumer.¹²¹ From this perspective, the primary role of consumer law is to intervene where consumers suffer harm or are treated unfairly by suppliers in business relationships.

Playing a central role in European consumer law, corrective justice is also an important justification underlying consumer sales law, the rules on unfair commercial business practices, and the rules on contracts.¹²² The basic assumption is that commercial dealings between consumers and suppliers must weigh the legitimate interests of both parties to be considered just and fair. An important benchmark in assessing the fairness of a transaction is the standard of parties' "reasonable expectations."¹²³ This standard has evolved into one of the leading benchmarks of European consumer law.¹²⁴ Consideration of parties' reasonable expectations sets limits to the principle of freedom of contract that defines the commercial relationship between consumers and suppliers.¹²⁵ The moment that a product or service does not meet the reasonable expectations of the consumer, the contract can no longer be assumed to reflect the consumer's free will to commit to the transaction.

Distributive or social justice is a related rationale underlying consumer law and includes a more abstract social policy motive: to increase equality

119. Reich, *supra* note 118, at 260-61.

120. Ewoud Hondius, *The Protection of the Weak Party in a Harmonised European Contract Law: A Synthesis*, 27 J. CONSUMER POL. 245 (2004); Santiago Cavanillas Múgica, *Protection of the Weak Consumer Under Product Liability Rules*, 13 J. CONSUMER POL. 299, 300-02 (1990).

121. Barents, *supra* note 112, at 16 (referencing law of the European Court of Justice).

122. Thomas Wilhelmsson, *Consumer Law and Social Justice*, in TWELVE ESSAYS ON CONSUMER LAW AND POLICY 191, 192-93 (Tuuli Junkkari ed. 1996).

123. Wilhelmsson, *supra* note 109, at 378; CLARISSE GIROT, *USER PROTECTION IN IT CONTRACTS: A COMPARATIVE STUDY ON THE PROTECTION OF THE USER AGAINST DEFECTIVE PERFORMANCE IN INFORMATION TECHNOLOGY* 32 (Kluwer Law International 2001); Martien Schaub, *A Breakdown of Consumer Protection Law in the Light of Digital Products*, INDICARE MONITOR, July 29, 2005, at 13, available at http://www.indicare.org/tiki-read_article.php?articleId=123.

124. Wilhelmsson, *supra* note 109, at 380.

125. See GIROT, *supra* note 123, at 33-51.

and fairness in society.¹²⁶ Governments and policy makers weigh considerations of distributive justice and then translate these abstract goals into concrete policy measures. For example, during the German EU presidency, considerations of distributive justice served as an impetus to the adoption of the Charter on Consumer Sovereignty in the Digital World, part of the initiative of the German Federal Ministry for Food, Agriculture and Consumer Protection.¹²⁷ The Charter highlighted the importance for future consumer policy of ensuring equal access for consumers to a diversity of cultural products and services, including respect for the existing exemptions under copyright law.¹²⁸ The ministry acknowledged that the protection of fundamental freedoms—such as freedom of speech, freedom from discrimination, and the protection of privacy—is a new challenge for consumer policy.¹²⁹ To this end, the Charter emphasized the need to formulate clear rights for consumers of digital services.¹³⁰

European telecommunications law provides an example of the realization of distributive goals and fundamental freedoms as a matter of consumer policy. Certain rules in European telecommunications law, specifically aimed at consumers of communication services, take as their policy objective the realization of fair and equal access to services and of fundamental rights of the information consumer.¹³¹ For example, the Universal Service Directive¹³² provides a mix of measures that both serve the interests of individual end users *and* pursue social objectives, such as the broad accessibility and affordability of communications services for all users, including disadvantaged users.¹³³ The underlying image of the consumer

126. Wilhelmsson, *supra* note 122, at 193 (defining distributive justice as “the goal of increasing equality between members of society”).

127. BMELV Consumer Protection, Charter increases consumer confidence in digital technologies, http://www.bmelv.de/cln_045/nn_749980/EN/03-ConsumerProtection/CharterDig.html__nnn=true (last visited Aug. 8, 2007).

128. *Id.* at 1, 3.

129. *Id.*

130. *Id.* at 1.

131. European communications law provides for a sector-specific definition of the consumer of communication services. “Consumer” means “any natural person who uses or requests a publicly available electronic communications service for purposes which are outside his or her trade, business or profession.” Council Directive 2002/21 on a Common Regulatory Framework for Electronic Communications Networks and Services, art. 2(i), 2002 O.J. (L 108) 33, 39 (EU) [hereinafter Framework Directive].

132. Council Directive 2002/22 on Universal Service and Users’ Rights Relating to Electronic Communications Networks and Services, 2002 O.J. (L 108) 51 (EU) [hereinafter Universal Service Directive].

133. *Id.* art. 1(1).

in the Universal Service Directive is *also* that of a citizen.¹³⁴ Thus, apart from a set of “classical” consumer rights,¹³⁵ the Directive entitles national regulatory authorities to safeguard fairness in commercial dealings between consumers and providers of telecommunications services, for example, by defining reasonable pricing and prohibiting discriminatory practices or practices that impede the ability of consumers to choose between different operators.¹³⁶ Giving national regulatory authorities this power achieves “the twin objectives of promoting effective competition,” which the Directive translates into greater choice for consumers, and “pursuing public interest needs, such as maintaining the affordability of publicly available telephone services for some consumers.”¹³⁷ Where the market will not likely give consumers access to services at affordable conditions, the Directive authorizes Member States to mandate access to a pre-defined minimum set of services to all consumers at affordable prices, the so-called universal service obligations.¹³⁸ Universal service obligations are another example of rules tailored in part for consumers in pursuit of distributive justice—in this case, to provide access to communications services for disadvantaged consumers, such as consumers in geographically isolated areas, financially weaker consumers, and elderly or disabled consumers.¹³⁹

B. Private Copying and Consumer Law

European consumer law provides for a number of legal instruments that may legitimize the interests of consumers in making private copies. This section introduces three of these instruments: the rules of conformity of products with reasonable consumer expectations, the test of fairness of contractual terms, and rules on consumer information.

1. *Conformity with Consumers' Reasonable Expectations*

Consumers have a right to expect that goods “show the quality and performance which are normal in goods of the same type and which the

134. Peter Rott, *Consumers and Services of General Interest: Is EC Consumer Law the Future?*, 30 J. CONSUMER POL. 49, 53 (2007).

135. *E.g.*, Universal Service Directive, *supra* note 132, art. 20 (articulating minimum requirements for consumer contracts about the supply of communication services); *id.* arts. 20-21 (requiring information about prices, service quality, and standard terms and conditions); *id.*, art. 24 (discussing interoperability of consumer digital television equipment).

136. This and the specific conditions are laid down in Article 17(1)-(2) of the Universal Service Directive, *supra* note 132.

137. *Id.*, rec. 26.

138. *Id.*, arts. 1(2), 3(1).

139. *Id.*, rec. 7.

consumer can reasonably expect, given the nature of the goods.”¹⁴⁰ According to the EC Directive on Sale of Consumer Goods, the right to expect quality in goods that is in conformity with consumers’ reasonable expectations cannot be restricted or abrogated by contract.¹⁴¹ For the time being, however, the European rules on product conformity do not extend to services; the matter is currently under review.¹⁴²

The reasonable expectation test is subject to judicial interpretation. There is still very little conclusive case law on whether consumers have a right to expect to be able to make private copies of information products or services. For this reason, the following discussion remains somewhat speculative. Note that the reasonable consumer expectation standard counterweighs the copyright-holder-centered norms on private copying that prevail in a copyright law analysis.¹⁴³ The test leaves room for considering the individual circumstances of a particular case, such as a product’s intended use,¹⁴⁴ and thereby introduces an individual, subjective element into an environment usually governed by mass standard contracts. On the other hand, the test also leaves room to consider more objective factors, such as price, shared social values, voluntary industry guidelines as instruments of self-regulation, industry practice, and the “normal use” of a product.¹⁴⁵ Normal use can refer to consumptive use in a narrow sense, such as, for example, the ability to listen to, read, or watch digital products.¹⁴⁶ Normal use can also extend to consumptive uses in a broader sense, including the making of private copies.¹⁴⁷ What constitutes normal use of a product depends not merely on consumer perception but also on external factors, such as the state of the market, the state of technology,

140. Sale of Consumer Goods Directive, *supra* note 101, arts. 3(1), 2(2)(d).

141. *Id.*, art. 7(1).

142. 2006 *Green Paper*, *supra* note 103, at 24.

143. *Cf. supra* Section II.C.

144. *See* Sale of Consumer Goods Directive, *supra* note 101, art. 2(2)(b).

145. *Cf. GIROT*, *supra* note 123, at 47-50.

146. *See, e.g.*, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Nanterre, 6e ch., Sept. 2, 2003, Françoise M. (Fr.), *available at* http://www.legalis.net/breves-article.php3?id_article=33; Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, 5e ch., 1e sec., Jan. 10, 2006, Christophe R. (Fr.), *available at* http://www.legalis.net/breves-article.php3?id_article=1567 (both cases holding that a DRM-protected CD that cannot play on a car radio is “defective” under the French rules on nonconformity (Article 1646 of the Civil Code), in part because consumers had not been informed about this prior to purchase).

147. Peter Rott, *Die Privatkopie aus der Perspektive des Verbraucherrechts*, in INTERESSENAUSGLEICH IM URHEBERRECHT [BALANCE OF INTERESTS IN COPYRIGHT LAW] 267, 268 (R. Hilty & A. Peukert eds. 2004)

and the nature of comparable goods.¹⁴⁸ A limiting element is the reasonableness of consumers' expectations—not all expectations of consumers merit protection; consumers must have reasonable grounds to expect a certain quality from a product.

If a court were faced with the question of whether consumers should legitimately expect to make private copies, it might consider the following arguments. European consumer surveys have demonstrated that the making of copies for private use—be it for social purposes (sharing with close family or friends), making back-up copies, or time-shifting—is an important element of how consumers have grown accustomed to using digital content.¹⁴⁹ Consequently, a court might conclude that the making of private copies constitutes “normal use.” However, the mere fact that consumers have grown accustomed to certain forms of use is no guarantee that such uses will remain “normal” in the future. For example, if music or software on a CD is sold at a considerably lower price than other comparable products, one could argue that consumers must also expect the CD to be of a lower quality or to have more limited functionality. Here, the ability to make private copies might arguably not be a reasonable consumer expectation. In the (unlikely) scenario that all digital content were subject to technological copy control protection, consumers would no longer have good reason to believe that the making of private copies is still “normal.” Even then, however, consumers might still be entitled to expect being able to make private copies in situations where levies are imposed on blank carriers, which is still the case in most Member States of the EU.¹⁵⁰ In countries that have a private copying limitation that allows copying of

148. E.H. Hondius, *Consumentenkoop van Roerende Zaken [Consumer Purchase of Goods]*, in *HANDBOEK CONSUMENTENRECHT. EEN OVERZICHT VAN DE RECHTSPPOSITIE VAN DE CONSUMENT [CONSUMER LAW. AN OVERVIEW OF THE LEGAL POSITION OF THE CONSUMER]* 93, 104-05 (E.H. Hondius & G.J. Rijken eds. 2006).

149. DUFFT ET AL., *DIGITAL VIDEO USAGE*, *supra* note 1, at 26-28; DUFFT ET AL., *DIGITAL VIDEO USAGE*, *supra* note 1, at 26-28.

150. *Compare* Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, 5e ch., 1e sec., Jan. 10, 2006, Christophe R. (Fr.), *available at* http://www.legalis.net/breves-article.php?id_article=1567 (holding as an argument against a potential conflict between private copying and legitimate interests of rightholders that because French law imposes levies on blank carriers, holders of the exclusive reproduction right receive a remuneration each time that a blank carrier is being bought), *with* Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, 3e ch., 2e sec., Apr. 30, 2004, Stéphane P. (Fr.), *available at* http://www.legalis.net/breves-article.php?id_article=722, *and* Tribunal de première instance [T.P.I.] [ordinary court of original jurisdiction] Brussels, May 25, 2004, *Rôle de Réfères* 2004, 46 (Belg.) (both cases holding that the fact that levies are paid to copyright holders does not indicate legislative intent to grant the “right to private copying”).

digital content, the existence of such a provision in law can be another valid reason for consumers to expect that private copying remains possible, even in a world ruled by Digital Rights Management (DRM).

It is ambiguous whether and to what extent the private copying limitation in the Information Society Directive supports consumers' reasonable expectations to make private copies.¹⁵¹ On the one hand, a reasonably observant and circumspect consumer will understand that the making of a large number of copies to later distribute or sell would go beyond copying for private use. In other cases, however, the relationship between the private copying limitation, the three-step test, the limitation's interface with contract, and the rather cryptic provision of Article 6(4) of the Information Society Directive are confusing, to say the least.

Courts may interpret the normative role of copyright law's private copying exemption in consumer law in two different ways. One possibility is that courts will resolve the unclear legal situation against the consumer and conclude that, because there is no clear "right to private copying" in copyright law, consumers cannot expect to be able to make private copies of, for example, DVDs or CDs.¹⁵² The difficulty with this approach is that to expect judgment no more sophisticated than that of a layman from the consumer leaves the reasonable expectation test devoid of any meaning. The other possibility is that a court might conclude that the interpretation of the private copying limitation is not a matter for private parties to decide, but rather for the lawmaker. If the lawmaker wishes to prioritize the commercial interests of right holders in preventing private copying, the lawmaker must clarify this in copyright law itself. Until then, consumers

151. *See supra* Section II.C.

152. *See, e.g.*, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, 3e ch., 2e sec., Apr. 30, 2004, Stéphane P. (Fr.), *available at* http://www.legalis.net/breves-article.php3?id_article=722, *aff'd*, Cour de Cassation [CC] [highest court of ordinary jurisdiction] Paris, 1e ch., Feb. 28, 2006, Stéphane P. (Fr.), *available at* http://www.legalis.net/breves-article.php3?id_article=1583 (holding that the private copying exception is no right and that consumers cannot reasonably expect making private copies of a DVD because this would conflict with the normal exploitation of such a DVD and hence with the legitimate interests of rightholders); Tribunal de première instance [T.P.I.] [ordinary court of original jurisdiction] Brussels, May 25, 2004, *Rôle de Réfères* 2004, 46 (Belg.) (denying a claim of consumers to being able to make private copies, because consumers had no right to private copying and finding the primary purpose of the private copying exception is to signify that the consumer is not required to ask for permission for the making of private copies). *See also* Cour d'appel [CA] [regional court of appeal] Paris, 4e ch., sec. A, Apr. 4, 2007, Stéphane P. (Fr.), *available at* http://www.legalis.net/breves-article.php3?id_article=1909 (holding that the private copying exception may be used solely as defense but not as a legal basis for affirmative actions against suppliers).

might reasonably expect to be able to make private copies, even if DRM technologies are employed by distributors of digital media.¹⁵³

Finally, both consumers and sellers themselves can influence the quality standard that consumers can reasonably expect. For example, under the Directive on Sale of Consumer Goods,¹⁵⁴ if a consumer indicates to the seller before purchase the intent to make back-up copies of a CD or to rip the CD to play on an MP3 player, and the seller agrees, then the consumer has a legally enforceable contractual expectation that no DRM technology will prevent him from making copies. More likely, however, the seller or manufacturer will inform consumers of what they may expect from the product or service. For example, sellers or manufacturers may do this through advertising or labeling of the product, assuming the information is specific enough. If a consumer is notified in advance that a product or service does not permit private copying, or sets limits thereto, the consumer cannot later claim that his expectations have not been met.¹⁵⁵ In other words, suppliers of CDs and DVDs can easily avoid liability under the rules on nonconformity by preemptively informing consumers prior to purchase that a CD or DVD cannot be copied. If suppliers do not label their products as such on their own initiative, a number of European directives expressly require suppliers to inform consumers about the main characteristics of a product or service, an obligation which arguably includes information about the ability to make copies.¹⁵⁶

If a product lacks a quality that consumers are entitled to expect, consumers have a choice of remedies under either national or European consumer law. One remedy is to have the good restored to conformity with

153. See, e.g., Cour d'appel [CA] [regional court of appeal] Paris, 4e ch., sec. B, Apr. 22, 2005, Stéphane P. (Fr.), available at http://www.legalis.net/breves-article.php3?id_article=1432. Here, the court held that although the private copying exception is not a full-fledged right of consumers, it is also not entirely at the disposal of suppliers. According to the court, it is the legislator's prerogative to formulate limitations to the private copying exception or the modalities of limiting the private copying exception ("cette exception légale ne peut être limitée qu'aux conditions précisées par les textes"). Moreover, the complete blocking of any possibilities of making private copies was an impermissible behavior under French copyright law. See also Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, 5e ch., 1e sec., Jan. 20, 2006, Christophe R. (Fr.). Based on its reading of Article 6(4) of the European Information Society Directive, the court concluded that technological protection measures must respect the French private copying exception. The court found that DRM measures that prevent private copying are not in compliance with French copyright law.

154. Sale of Consumer Goods Directive, *supra* note 101, arts. 2(1), 2(2)(b), 3(1).

155. *Id.*, art. 2(3); Rott, *supra* note 147, at 267, 283; Schaub, *supra* note 123, at 14.

156. See *infra* Section III.B.3.

the contract free of charge or to have the good replaced.¹⁵⁷ For example, if a DRM mechanism that impedes the making of private copies is deemed to be the cause of the defective quality, a consumer may demand removal of the DRM measure or a new copy of the product without copy control. If this is impossible or burdens the seller with disproportionately high costs, the consumer may demand a price reduction or may return the product against the purchase price.¹⁵⁸ Under the laws of some Member States, consumers are also entitled to the compensation of damages.¹⁵⁹

2. *Fairness of Contractual Terms*

Maintaining “fairness” in commercial dealings between consumers and suppliers is the main objective of the EC Directive on Unfair Terms in Consumer Contracts (the “Unfair Terms Directive”).¹⁶⁰ Under the Unfair Terms Directive, “fairness” is understood as the balance of the parties’ rights and obligations that arise under a contract.¹⁶¹ The Directive protects consumers against the contracting away of important consumer rights or against otherwise uncompensated one-sided obligations in standard form contracts.¹⁶² The Directive’s underlying assumption is that standard form contracts do not allow for individual negotiation on the part of the consumer.¹⁶³ This makes the consumer more vulnerable to one-sided, disadvantageous obligations. The key question here is whether a contractual clause that prohibits or restricts the making of private copies is “unfair” under the Directive. If so, the clause will not be binding upon the consumer.¹⁶⁴

Part of the Directive is an annex comprising a “blacklist” of contractual terms that are presumed unfair.¹⁶⁵ Most relevant to the discussion of “fairness” of restrictions on private copying is the blacklisted term that reserves the right to unilaterally change the terms and conditions of the contract, for example, the number of copies that a consumer can make.¹⁶⁶

157. Rinkes, *supra* note 107, at 111-112.

158. *Id.* at 112.

159. *Id.* at 116. *See, e.g.*, Burgerlijk Wetboek [BW] [Civil Code] bk. 5, tit. 6, art. 74 (Neth.); Bürgerliches Gesetzbuch [BGB] [Civil Code] Aug. 18, 1896, Reichsgesetzblatt, [RGBl] § 437(3) (F.R.G.).

160. Unfair Terms Directive, *supra* note 101, rec. 9.

161. *Id.*, art. 3(1).

162. *Id.*, rec. 9.

163. *Id.*

164. *Id.*, art. 6(1).

165. *Id.*, art. 3(3), Annex.

166. *Compare id.*, Annex (1)(k) with iTunes Store, Terms of Service, term 20, <http://www.apple.com/legal/itunes/us/service.html> (last visited June 21, 2007). *See also*

Apart from this clause, the annex has little to say about the fairness of a contractual waiver of the private copying exemption.¹⁶⁷

The compatibility of restrictive terms with the principle of objective good faith under Article 3(1) of the Unfair Terms Directive requires courts to weigh the legitimate interests or reasonable expectations of consumers against those of copyright holders. Article 3(1) of the Unfair Terms Directive reads: “A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.” Like the rules on nonconformity, the standard of reasonable consumer expectations again serves as a benchmark to assess fairness.¹⁶⁸ The reasonableness of a consumer’s expectation to make private copies depends not only on the scope of the private copying limitation, but also on other factors. Again, courts may consider the price of the product or service, the number of copies allowed, what is “normal” in comparable products or services, the purpose for which a product or service is bought, the reasons for copying—for example, to make back-up copies, to share,¹⁶⁹ or for creative uses—among other factors.¹⁷⁰ The legal scholar Lucie Guibault, who studied the interplay of the rules on unfair contracts and copyright law in depth, concludes convincingly that the answer is likely to vary between Member States.¹⁷¹ The outcome would largely depend on the legal climate in each Member State, the attitude of its courts to consumer issues, and the willingness of its courts to also consider more fundamental rights of consumers, such as freedom of speech or the right to privacy.¹⁷²

3. *Rules on Consumer Information*

In addition to rules on product conformity and unfair terms, European consumer law includes a variety of rules on consumer information. The primary goal of these rules is to improve consumer autonomy and freedom

Lars Grøndal, *DRM and contract terms*, INDICARE MONITOR, Feb. 24, 2006, at 13-14, available at http://www.indicare.org/tiki-download_file.php?fileId=174.

167. See also GUIBAULT, *supra* note 13, at 254.

168. Schaub, *supra* note 123; GIROT, *supra* note 123, at 62-66.

169. Rott even goes so far to argue that the principle of good faith could protect the interest of consumers in sharing contents with their direct social environment. Rott, *supra* note 147, at 282.

170. GUIBAULT, *supra* note 13, at 255. Compare GIROT, *supra* note 123, at 46-49.

171. GUIBAULT, *supra* note 13, at 256.

172. It would exceed the scope of this paper to deal with this question in more depth. Instead, see the excellent comparative analysis of Guibault. GUIBAULT, *supra* note 13, at 256, 263. See also Rott, *supra* note 147, at 280.

of choice,¹⁷³ predicated on the assumption that suppliers are at an advantage because they know more about the product or service than consumers know. Information asymmetries can prevent consumers from choosing the products or services that correspond best to their individual preferences. Providing adequate information is also a form of empowering consumers as catalysts of functioning competition, which may explain why the rules on consumer information are integral to EC consumer law.¹⁷⁴ As the European Court of Justice has observed, “[U]nder [European] Community law concerning consumer protection the provision of information to the consumers is considered to be one of the principal requirements.”¹⁷⁵

Both the Distance Selling Directive¹⁷⁶ and the Electronic Commerce Directive¹⁷⁷ include important rules imposing obligations upon suppliers to provide consumers with the necessary information. Both Directives apply to the selling of products *and* services. The Electronic Commerce Directive can be applied to various electronic services, including electronic newspapers, video-on-demand services, and music download stores such as Apple’s iTunes, but also to the online sale of books, software, CDs, and DVDs. The Distance Selling Directive also addresses contracts for the purchase of products and services, in particular contracts that are concluded by means of electronic communication (e.g., e-mail, online order, telephone).¹⁷⁸ Failure to comply with duties to inform triggers sanctions under the aforementioned rules on nonconformity as well as the rules on unfair or misleading business practices in Articles 5(3)(a) and 5(1) of the Directive on Unfair Commercial Business Practices.¹⁷⁹ The Distance Selling Directive itself does not provide for any sanctions against sellers other than an extension of the period during which consumers can exercise a right of withdrawal, a right of consumers to cancel the contract within a

173. Reich, *supra* note 118, at 258-59.

174. Barents, *supra* note 112, at 16; Rinkes, *supra* note 107, at 51; Wilhelmsson, *supra* note 122, at 200-01.

175. Case 362/88, GB-INNO v. Confederation du Commerce Luxembourgoise, 1990 E.C.R. I-00667, para. 18.

176. Distance Selling Directive, *supra* note 101, art. 4.

177. Electronic Commerce Directive, *supra* note 101, art. 5.

178. Distance Selling Directive, *supra* note 101, arts. 1, 2(1), 2(4), Annex I.

179. Neither the Distance Selling Directive nor the Electronic Commerce Directive provide for remedies or sanctions where a supplier fails to comply with information duties. Instead, the Directives oblige Member States to ensure the availability of adequate and effective means to demand compliance. *See, e.g., id.*, art. 11(1).

minimum of seven working days without giving any reason and without penalty, except the cost of returning the goods.¹⁸⁰

Consumers have the unwaivable right to be informed about prices and the main characteristics of the goods or services.¹⁸¹ “Main characteristics” are those features of a product or service the absence of which would cause the consumer to make a different transactional decision.¹⁸² These “main characteristics” include measurable characteristics that concern functionality or possibilities of usage.¹⁸³ At present, little European or national case law in Europe sheds light on whether contractual or DRM restrictions on copying are “main characteristics” of a product or service. As mentioned earlier, a number of surveys have demonstrated that the ability to make private copies appears to be an important factor in the purchasing decisions of consumers.¹⁸⁴ This suggests that suppliers must inform consumers if a product or service does not permit copying or restricts the number of copies allowed.¹⁸⁵ Note that the ability to make copies as a main characteristic of a product or service and the legitimacy thereof are two different things. Arguably, a duty to inform exists irrespective of whether a court might find in an individual case, through application of the three-step test, that the interests of a copyright holder outweigh the in-

180. *Id.*, art. 6(1). Note, however, that the right of withdrawal does not apply to the supply of most information products or services, including audio or video recordings or computer software which have been unsealed by the consumer and the supply of newspapers, periodicals, and magazines. *Id.*, art. 6(3).

181. *Id.*, arts. 4(1)(b), 12(1).

182. Jan Kabel, *Misleiding [Misleading Advertisement]*, in PRAKTIJK RECLAMERECHT [ADVERTISEMENT LAW IN PRACTICE], Supp. 45, 226 (Jan Kabel ed. 1989).

183. *Id.* at 258-60.

184. *See supra* Section III.B.1.

185. *See, e.g.*, Cour d'appel [CA] [regional court of appeal] Paris, 4e ch., sec. B, Apr. 22, 2005, Stéphane P. (Fr.), available at http://www.legalis.net/breves-article.php?id_article=1432. Here, the court held that the “copy-ability” of a DVD is an essential characteristic of a DVD. The court also found that labeling the DVD with “CP” (“copie prohibée”—copying prohibited) does not constitute compliance with a supplier’s obligation to inform consumers about copy restrictions. Because French consumers know that private copying is permitted under French copyright law, the court found that “CP” could be interpreted to mean something other than “copying prohibited.” *See also In re Sony BMG Music Entm’t*, No. C-0623019, 2007 FTC LEXIS 10 (FTC Jan. 20, 2007), available at <http://www.ftc.gov/os/caselist/0623019/070130cmp0623019.pdf>; Rott, *supra* note 147, at 285; Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, 3e ch., 2e sec., Apr. 30, 2004, Stéphane P. (Fr.), available at http://www.legalis.net/breves-article.php?id_article=722 (holding that whether a DVD can be copied is not an essential characteristic of the DVD because the consumer cannot invoke the private copy exception).

terests of a consumer.¹⁸⁶ Otherwise, the consumer would bear the risk of the present legal uncertainty surrounding private copying. Suppliers should be relieved of their duty to inform only where certain acts of copying are obviously beyond the scope of the private copying limitation, even to the untrained layman.

C. Assessment

Consumer law is a logical choice when looking for ways to give legal effect to information consumers' interests in private copying. Private copying in today's information markets has become a matter of contracts and electronic rules between commercial suppliers and information consumers. Unlike copyright law, consumer law targets the commercial relationship between these two parties with the goal to ensure standards of fairness, equality, and transparency.

Unlike in copyright law, consumer law's yardstick for evaluating information markets is not the legitimate commercial expectations of copyright holders but the legitimate usage expectations of consumers. If consumers can reasonably expect to be able to make private copies, consumer law provides the means to challenge contractual terms that seek to override the limitation allowing private copying or the means to redress unexpected copy restrictions in information products. Consumers may also demand to be informed about possible technical impediments to copying, and whether private copies can be made at all. Furthermore, European consumer law provides for specialized procedures and remedies that consumers can use to defend their interests.

In the end, whether a consumer can reasonably expect to make private copies will largely depend on the facts of a given case. Factors that shape reasonable consumer expectations include the characteristics of comparable goods or services and the price of the product or good concerned.¹⁸⁷ Advertisements and consumer information can also influence consumers' expectations.¹⁸⁸ As these factors are subject to change, the standard of consumer expectations is in constant flux. A more stable factor that will surely also influence consumer expectations is the set of copyright provi-

186. *But see* Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, 3e ch., 2e sec., Apr. 30, 2004, Stéphane P. (Fr.). Here, the court denied that private copying is an essential characteristic because the making of private copies conflicts with the "normal exploitation" of a DVD. Thus, consumers should not benefit from the private copying exception, and no obligation to inform consumers about copy restrictions applies.

187. *See supra* Sections III.B.1, III.B.2.

188. *See id.*

sions relating to private copying limitations in force in a particular jurisdiction. For now, however, existing copyright law continues to give mixed and confusing signals. Consumers may have difficulty making sense of a law that, on the one hand, provides a limitation allowing private copying but that, on the other hand, accepts that this limitation exists at the will of copyright holders, by way of standard form contracts or DRM. For the private copying limitation to play a meaningful role in consumer law cases, the limitation should be sufficiently clear and conclusive as to inform consumers of what they may expect from information goods or services.

Even if courts find that consumers can reasonably expect to make private copies, deviations from this standard are still possible and legitimate. Respect for the contractual freedom and freedom of choice of both consumers and suppliers remains a core principle of consumer law. A consumer can still decide to download from iTunes copy-restricted songs for 99 Eurocents instead of more expensive, "higher quality" iTunes Plus files for €1.29, which allow the making of an unlimited number of copies. What matters under consumer law is that the consumers' transactional decisions are based on their free will, and that these decisions are not influenced by unfair commercial practices, lack of adequate information, or structural imbalances in negotiation power.¹⁸⁹

European consumer law relies to a considerable degree on the rules on consumer information to guarantee that consumers engage only in commercial transactions that are advantageous to themselves. The European information paradigm corresponds with the prevalent image of the European consumer, reasonably observant and circumspect as sovereign decision maker and a countervailing power in the market mechanism. Critical here is whether simply informing consumers that they are not entitled to make private copies sufficiently safeguards the balance that consumer law seeks to maintain.

Regarding mandatory information duties as a primary means to safeguard the interests of the information consumer is a matter of concern for a number of reasons. First, to be truly informed, information consumers must have a sound understanding of complex norms, such as the extent and scope of the private copying limitation. Where consumers lack such an understanding, the risk of a creeping sell-out of traditional user freedoms is real. Less scrupulous representatives of the information industry may gradually degrade the general standard of what consumers ought to be able to expect from information services and products. The opposite

189. GIROT, *supra* note 123, at 30-32.

may also be true. Collective consumer power that does not respect basic concepts of copyright law could be the end of many perfectly lawful business models. Second, how much more information can the information consumer take? Information overload can hamper the consumer's abilities as a sovereign decision maker as much as too little information. What information consumers need is not necessarily more information, but more intelligent information—comprehensive information that informs them not only of the product or service itself, but also of its impact on consumers' rights and legitimate interests. Finally, mandatory disclosure laws might act as disincentives for suppliers to produce products that cannot be copied. Through informing consumers in advance, suppliers can avoid liability for nonconformity with consumers' reasonable expectations.

Consumer law may offer meaningful protection of consumers' legitimate interests in the making of private copies by halting the downward spiral of reasonable consumer expectations. One suggestion that merits serious consideration is to add as a category those clauses that depart from the private copying limitation to the Unfair Terms Directive "blacklist" of contractual terms that are presumed unfair.¹⁹⁰ A difficulty with this solution is that it could yield tensions with the short-term interests of consumers.¹⁹¹ Although invalidating contractual clauses that prohibit private copying would certainly do much to rescue the consumer's freedom to make private copies, it could also undermine new, potentially attractive business models, such as iTunes, or deter the industry from making content available online at all. In the end, an absolute ban on contractual clauses that prohibit private copying would result in less choice for consumers. Other possible alternatives include more sophisticated, intelligent solutions to inform consumers, for example in the form of a "fair use" label. A fair use label could incorporate standards that are elaborated in cooperation between representatives from both consumers and the industry. Arguably, the market parties themselves are best situated to determine how many copies might still be considered a fair amount of private use. One source of inspiration could be the "Webtrader" labeling initiative, which is an initiative led by a number of European consumer organizations to develop a trust scheme for electronic commerce services.¹⁹² Busi-

190. Cf. GUIBAULT, *supra* note 13, at 304.

191. Interestingly, on this topic, Wilhelmsson discusses eventual contradictions of public environmental policy and short term goals of consumer law. Thomas Wilhelmsson, *Consumer Law and the Environment: From Consumer to Citizen*, 21 J. CONSUMER POL. 45, 61 (1998).

192. See, e.g., WebTraderUK, About the WebTraderUK Scheme, <http://www.webtraderuk.org.uk/content/Default.asp> (last visited Aug. 8, 2007).

nesses can apply for online certification and the grant of a “Webtrader” label, provided they comply with the Webtrader code of conduct. This code of conduct addresses specific problems of consumers in an electronic commerce setting and is updated whenever new legal or market developments require.¹⁹³

IV. CONCLUSION

Both European copyright law and consumer law offer some comfort to information consumers keen on making private copies, even against overreaching “end user” license terms or oppressive technical protection measures. Private copying exemptions are permitted, but not required, by the Information Society Directive, and currently exist in most Member States. Despite the Directive’s silence on the issue of “overridability,” a few Member States have given limitations allowing private copying imperative status. Other Member States have benefited from the option left to them by the Directive to make these limitations enforceable against DRMs. In all, the law of private copying in Europe remains as diverse as its cultural traditions. If this is harmonization, then it might be time to call the process over.¹⁹⁴

Nevertheless, effectively protecting the freedom to make private copies remains problematic in the context of European copyright law. The copyright model of a set of rights against the world sits uncomfortably with the norms of contract law that form the essence of consumer protection law. User’s *rights*, such as those found in early European Directives, fit uneasily in the copyright system. For this reason, user’s rights have remained exceptional and are not addressed in the more recent Information Society Directive. Except for the limited recourse Article 6(4) may give against the “Übercopyright” norms of DRM, the Information Society Directive leaves consumers at the mercy of copyright holders and distributors unilaterally imposing standard license terms.

But even a copyright system that does consider certain consumer interests will always fall short of fulfilling the real needs of information consumers. In Europe, copyright is chiefly designed as a property right, as are its structure and its discourse. Exclusive rights are the rule, while free-

193. See European Commission, WEBTRADER trust scheme for B2C e-commerce, supported by the Enterprise DG—main results of the pilot operation, <http://ec.europa.eu/enterprise/ict/policy/webtrader.htm> (last visited Aug. 8, 2007).

194. P.B. HUGENHOLTZ ET AL., THE RECASTING OF COPYRIGHT & RELATED RIGHTS FOR THE KNOWLEDGE ECONOMY, REPORT TO THE EUROPEAN COMMISSION (2006), available at http://www.ivir.nl/publications/other/IViR_Recast_Final_Report_2006.pdf.

doms are framed as “exceptions” that must be narrowly construed, especially in the author’s rights tradition. Due to copyright law’s systemic pro-right-holder bias, as reflected in the property model, achieving a proper balance between protecting the interests of copyright holders and the interests of users will always be an uphill struggle for consumer groups. To borrow a phrase from European football, the lingua franca of European culture, consumers will always be playing an “away game” in the copyright arena.

The norms of European consumer law are more conducive to the interests of information consumers in making private copies, at least in principle. However, existing consumer law also has its weaknesses. Although consumer law norms generally apply to the supply of goods and services, they have not been designed with consumers of digital content in mind. Even if consumers may successfully claim a right to make private copies under a variety of consumer protection doctrines, the lack of legal certainty that the existing copyright framework has to offer is mirrored in the framework of consumer law. Particularly troublesome is the test of “reasonable consumer expectations.” This notion is informed by a variety of dynamic exogenous factors, including the state of the law of copyright and evolving business practices, which makes the test a moving target. What may be a consumer’s reasonable expectation to make a private copy one day in Member State A may be wishful thinking in Member State B another day.

Harmonization of Member States’ law and creating a uniform, predictable legal interface between the norms of European copyright law and consumer law would create greater legal certainty in the realm of private copying. A recent study by the Institute for Information Law suggested that one way to achieve this would be to make private copying a mandatory exemption that all Member States must implement and to immunize the exemption against unilaterally set standard terms, for example, by including it in the blacklist of the Unfair Terms Directive.¹⁹⁵ In the meantime, more research is needed that addresses possible means and procedures for consumers and suppliers to reach consensus on a common standard establishing the extent of private copying that consumers can reasonably expect from products and services that incorporate copyrighted works.

Finally, although this Article has examined the issue of private copying from the perspective of a traditional, self-centered, essentially passive consumer, the consumption of information services and products takes

195. GUIBAULT, *supra* note 13, at 169.

place in a broader cultural and social context. In information markets, consumers often act in the combined roles of consumer *and* citizen. To examine this relationship, a query of the potential of consumer law to realize wider public policy aims in relation to information markets would be enlightening. Such a query should examine consumer law's ability to address the goals of distributive justice as a way to ensure consumers' equal access to a diversity of cultural products and services, as suggested in the Charter for Consumer Sovereignty in the Digital World.¹⁹⁶ Such a political—or perhaps even constitutional—conception of consumer law already exists, for instance, in European telecommunications law, which combines traditional consumer protection with the realization of information policy objectives, notably the broad availability of communications services.

196. BMELV Consumer Protection, *supra* note 127.