

**THE UNFAIR PLAY OF DRM TECHNOLOGIES**  
**REREADING THE RULES OF THE GAME FROM THE CONSUMER’S PERSPECTIVE**

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**Abstract:** In the rapidly expanding information society, intellectual property law plays an increasingly important role in the production, distribution and use of creative material. As a consequence, it faces new possibilities and challenges. One of the most troublesome is connected with the development of the Digital Rights Management Systems and Technological Protection Measures applied to control the distribution and use of electronic works.

In this framework, the anti-circumvention provisions enacted at the American, European and international level to safeguard digital content from uncontrolled distribution and unlawful use could have perverse effects and serious implications for the consumer community. When these provisions are applied and embedded to media products, they can erode some fundamental rights of consumers and can restrict traditional usages. This paper analyzes whether and to what extent the consumer rights are negatively affected by “digital terms and conditions” enforced with technology and contract law. To balance this inequity the research speculates on the application of consumer protection law as a possible contributory instrument to reduce imbalance between parties.

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## **Introduction**

This paper focuses on the side effects for consumers and the possible solutions connected with the diffusion of Digital Rights Management Systems (DRMs) used to secure digital content and also to manage individual users' behavior.

These kind of technological fences underlie a very large number of attractive and innovative services for consumers such as online music and video stores, pay-per-view and video on demand services. DRMs can be applied for many purposes and in different ways, some of which could be beneficial or detrimental for consumers depending on specific circumstances. DRM systems have offered new distribution and pricing models that take advantage of new technology. Unfortunately, some digital content formats have embedded capabilities to limit the ways in which digital content can be used reducing the consumer's choice (interoperability problems). Use may be restricted, for example, for a time period, to a particular computer or other hardware device, or may require a password or an active network connection. Furthermore DRM can also individually control users' behavior presenting a powerful threat to freedom of expression as well as privacy. Such situations can conflict with legitimate consumer rights and interests. Because consumers have the right to benefit from technological innovations without abusive restrictions, I suggest considering consumer protection law as an effective and immediately usable solution to reduce some of the imbalances between parties.

To solve this unfairness, we could assume different approaches. The question could be addressed (not necessarily solved) by using three different contexts: copyright law, competition law and consumer protection law. In this working-paper I only use the consumer protection law perspective. Therefore, the following pages consider in detail how legislative solutions under U.S. and E.C. law have expanded the legislative boundaries of intellectual property rights and embedded technical and contractual constraints into digital media. In particular, I discuss how "digital terms and conditions", DRM systems and their legal framework have weakened the balance between exclusive rights and public interest. In this context consumer protection could contribute to filling the gap, even if it can not be considered a complete cure.

## 1. DRM Technologies, Contract and Consumer Protection

Contemporary transnational economy is often in contrast with national legal orders, which are unable to rapidly conform to the changes of the society. Contract has been able to adapt to the changes in society produced by the industrial revolution as well as in the present-day potential of the digital world.<sup>1</sup> This is the reason why contract has become the principal instrument for legal innovation and legal standardization.<sup>2</sup>

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

The flow and control of information is essentially based on the following instruments: contract, technology and copyright law.<sup>3</sup> The digital revolution has reshaped the hierarchy by putting aside the law and promoting contract and technology. Copyright law has just become an instrument to strengthen the control based on contract and technology.<sup>4</sup>

Actually, the anti-circumvention legislations, enacted in the United States<sup>5</sup> and Europe<sup>6</sup>, combined with the use of technological protection measures and rights management systems have had the effect to move the issue from copyright law to contract law. As a consequence, if digital content is protected by rights management systems, and rights management systems are protected by technological and legal

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<sup>1</sup> See George W. Goble, *The Nature of Private Contract* 14 STAN. L. REV. 631, 634 (1962) (book review) (noting how contract has become the most seasoned and effective law).

<sup>2</sup> See Francesco Galgano, *La Globalizzazione nello Specchio del Diritto* 93-94 (2005); On the relationship between Legal and Technical Standardization see Margaret J. Radin, *Online Standardization and the Integration of Text and Machine*, 70 Fordham L. Rev. 1125, 1138 (2002).

<sup>3</sup> See Stefan Bechtold, *Digital Rights Management in the United States and Europe*, 52 Am. J. Comp. L. 323, 352 (2004); Roberto Caso, *Modchip e Diritto d'Autore. La Fragilità del Manicheismo Tecnologico nelle Aule della Giustizia Penale*, 7 Ciberspazio e Diritto 183, 216 (2006).

<sup>4</sup> See generally Lawrence Lessig, *Code and Other Laws of Cyberspace* (1999).

<sup>5</sup> Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998). codified as amended in a new chapter 12 to Title 17 of the U.S.C. §§ 1201-1205 (2000).

<sup>6</sup> European Directive 2001/29/EC on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10.

measures, consumer's capacity to exercise legitimate rights or exceptions could be compromised. Content owners can unilaterally determine and dictate terms and conditions limiting consumers' behaviors. Furthermore, in the digital marketplace, consumers are increasingly obliged to deal with unfair and obscure licensing agreements, misuse of personal data, device and digital content which are not designed to communicate together and, above all, with lack or insufficient information about products and services.<sup>7</sup>

To balance this iniquity I want to concentrate on the aspects of consumer protection and fair contractual conditions. DRM-controlled applications have the potential to formulate rules<sup>8</sup> and to enforce contractual conditions<sup>9</sup> locking content beyond its copyright period or disrespecting existing exceptions, such as the "right" to make copies for private use, parody, quotation, scientific or teaching purposes.<sup>10</sup> Furthermore a DRM enforced contract is often realized on unfairness in the process of contract formation and on unfairness in the "invisible" contract terms connected with the use of technological protection measures. Whereas "visible" terms are immediately valuable by consumers, "invisible" terms and conditions are, not only terms that cannot be readily comprehended, but, in this case, they are also terms implemented without providing consumers notice of the possible limitations of the copy-protected content. In few words, the restrictions imposed by technological measures are frequently unclear to consumers. This lack of information can induce consumers to take buying decisions which they would not have taken had they been better informed.

The perverse effect of this technology controlled contract is to preclude the traditional copyright balance between right-holders' interests on the one hand and the interest of users and society on the other hand. This is a traditional balance that has been a part of

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<sup>7</sup> See Bureau Européen des Unions Des Consommateurs, BEUC Memorandum for the EU German Presidency, BEUC/X/066/2006, Nov. 2006, available at <http://www.beuc.org/BEUCNoFrame/Common/GetFile.asp?ID=21523&mfd=off> [hereinafter BEUC Memorandum]

<sup>8</sup> The so called "normative effect of technology". On the power of technology, see generally Lessig, supra note 3; Joel R. Reidenberg, *Lex informatica: The Formulation of Information Policy Rules Through Technology*, 76 *Tex. L. Rev.* 553 (1998).

<sup>9</sup> See extensively Lucie M.C.R. Guibault, *Copyright Limitations and Contracts: an Analysis of the Contractual Overridability of Limitations on Copyright* (2002).

<sup>10</sup> See Ottolia & Wielsch, supra Intro., note 16 (arguing that a contract or a license might be provided and signed by the user while acquiring the DRM).

Anglo-American fair use doctrine as well as of the copyright exemptions in European copyright law.

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

In order to reach this goal I think it is necessary to develop a new legal framework to reestablish consumers' rights. In the meantime we can immediately achieve some good results applying consumer protection law and in particular the legal remedies to protect the weaker contractual party. In the following pages I provide a comparative analysis between the European and the U.S. provisions, confronting the U.S. state law doctrine of unconscionability, European consumer protection law<sup>11</sup> and other traditional limitations on contractual rights.<sup>12</sup>

## **2. Side Effects Induced by DRM Technologies**

Three concrete examples of the effects of the use of DRM technologies in consumer products follow. I outline some courts decisions connected with cases where consumers never received the correct information concerning the limitation imposed through the use of DRMs.

### **2.1 iTunes**

The first is the case of iTunes Music Store, a famous virtual record shop where customers can buy and download either complete albums or individual tracks from many major artists of different genres.<sup>13</sup>

This service enforces its standard contract terms by means of a DRM system called “FairPlay” and, according to the terms of service, the provider reserves the right, at its

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<sup>11</sup> The principal consumer protection measures in European Community law are divided into two main categories referred to generally applicable directives and directives containing rules regarding specific sectors or selling methods.

<sup>12</sup> See Association of American Publishers, Contractual Licensing, Technological Measures and Copyright Law, at <http://www.publishers.org/home/abouta/copy /plicens.htm>.

<sup>13</sup> See Apple's iTunes Music Store, <http://www.apple.com/itunes/store/> (last visited Jan. 11, 2007). Online services are present also outside the United States and Europe with over 40 services.

sole discretion, to modify, replace or revise the terms of use of the downloaded files:<sup>14</sup>

Apple reserves the right, at any time and from time to time, to update, revise, supplement, and otherwise modify this Agreement and to impose new or additional rules, policies, terms, or conditions on your use of the Service. Such updates, revisions, supplements, modifications, and additional rules, policies, terms, and conditions (collectively referred to in this Agreement as "Additional Terms") will be effective immediately and incorporated into this Agreement. Your continued use of the iTunes Music Store following will be deemed to constitute your acceptance of any and all such Additional Terms. All Additional Terms are hereby incorporated into this Agreement by this reference.<sup>15</sup>

This kind of unilaterally imposed changes in conditions of use on legitimate downloaded files can be enforced just by changing the DRM settings. In the EC market, this behaviour is prohibited by law and considered unfair, in particular when applied in a standard form contract not subject to negotiation. According to the Directive 93/13/EEC on unfair terms in consumer contracts,<sup>16</sup> the case could be included in the indicative and non-exhaustive list of the terms which may be regarded as unfair, reproduced in the Annex to the Directive.<sup>17</sup> Explicitly, the Directive talks about terms which have the object or effect of "enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract"<sup>18</sup> or of "enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided".<sup>19</sup>

Based also on this fact, on 25th January 2006 the Norwegian Consumer Council presented a complain with the Consumer Ombudsman (Mr. Bjørn Erik Thon) against iTunes Music Store Norge for breach of fundamental consumer rights.<sup>20</sup> Although Norway is just an EEA (European Economic Area) member its copyright and consumer

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<sup>14</sup> See Lars Grøndal, DRM and contract terms, INDICARE, Feb. 23, 2006, at [http://www.indicare.org/tiki-read\\_article.php?articleId=177](http://www.indicare.org/tiki-read_article.php?articleId=177) (analyzing the relationship between contract terms and DRM in on-line music stores and specifically in iTunes music store term of service.).

<sup>15</sup> See iTunes Music Store Terms of Service, Article 20 at <http://www.apple.com/ca/support/itunes/legal/terms.html>.

<sup>16</sup> Council Directive 93/13/EEC, On Unfair Terms in Consumer Contracts, 1993 O.J. (L95/29).

<sup>17</sup> Council Directive 93/13/EEC, art. 3(3), 1993 O.J. (L95/29).

<sup>18</sup> Council Directive 93/13/EEC, annex letter j, 1993 O.J. (L95/29).

<sup>19</sup> Council Directive 93/13/EEC, annex letter k, 1993 O.J. (L95/29).

<sup>20</sup> See Jo Singstad, iTunes' questionable terms and conditions, Jan. 25, 2006 available at <http://forbrukerportalen.no/Artikler/2006/1138119849.71> (last visited Jan. 8, 2007). The text of the complain is available at <http://forbrukerportalen.no/filearchive/Complaint%20against%20iTunes%20Music%20Store>.

protection law fully complies with the EC Copyright and Consumer *Acquis*.

Mr. Thon has ruled that some of the Apple iTunes terms and conditions are in contrast to section 9a of the Norwegian Marketing Control Act.<sup>21</sup> This act implements in the Norwegian systems the Directive 93/13/CE on unfair terms in consumer contract. Section 9a stipulates that:

Terms and conditions which are applied or are intended to be applied in the conduct of business with consumers can be prohibited if the terms and conditions are considered unfair on consumers and if general considerations call for such a prohibition.

When determining whether the terms and conditions of a contract are unfair, emphasis shall be placed on the balance between the rights and obligations of the parties and on whether the contractual relationship is clearly defined or not.

According to this act, the Consumer Ombudsman, upon request from an authority or consumer organizations, can intervene and prohibit the use of unfair terms and conditions in consumer contracts.<sup>22</sup>

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

This decision, even if the case is still pending, is one of the several small steps on a long path, but it could be considered a very significant step.<sup>23</sup> In fact, it is important to note that Norway's complaint comes after similar recent case law in Europe.<sup>24</sup>

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<sup>21</sup> See Act No. 47 of 16 June 1972 relating to the Control of Marketing and Contract Terms and Conditions available at <http://www.forbrukerombudet.no/index.gan?id=706&subid=0>

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

<sup>23</sup> See *Id.*, at 566-567 (admitting that, even if consumer authorities can protect only consumer, the case could have a pan-European consequence since European consumer protection law are wide harmonized).

<sup>24</sup> Apple is facing legal action on several fronts. Sweden and Denmark Consumer Authorities are considering to follow the Norway's judgment. On a different front, iTunes seems to have some

## 2.2 Sony-BMG rootkit

This example, confirms that consumer protection in digital media could be found outside copyright law. The case is connected to the use of a copy-protection technology called XCP (i.e. Extended Copyright Protection) in the Sony-BMG CDs.<sup>25</sup> When consumers tried to play the copy protected CDs on their computers, this DRM system automatically installed software and then hides this software to make it more difficult for consumers to remove it. The side effect of this software was to interfere with the normal way in which the Microsoft Windows operating system plays CDs, opening security holes that allow viruses to break in. It was also able to collect information from the user's computer. Even if Sony BMG disclosed the existence of this software in the EULA, the agreement does not disclose the real nature of the software being installed, the security and privacy risks it can create, the practical impossibility of uninstalling and many other potential problems for the user's computer. On the contrary EULA misrepresents the real nature of the software including ambiguous and restrictive conditions.

When users and consumer organizations were seized of the matter, they filed more than twenty lawsuits against Sony BMG in Canada, the United States and Europe.<sup>26</sup>

Following the discovery of the use of this surreptitious copy protection technology, in November 2005, the Attorney General of Texas filed a class action lawsuit against Sony-BMG<sup>27</sup> under Texas' Consumer Protection Against Computer Spyware Act of 2005

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problems about the lack of interoperability see e.g. Conseil de la Concurrence, Décision N° 04-D-54 du 9 Novembre 2004 relative à des pratiques mises en œuvre par la société Apple Computer, Inc. dans les secteurs du téléchargement de musique sur Internet et des baladeurs numériques, available at <http://www.conseil-concurrence.fr/pdf/avis/04d54.pdf>.

<sup>25</sup> For some detailed legal and technical comments of the rootkit case see Megan M. LaBelle, The "Rootkit Debacle": The Latest Chapter in the Story of the Recording Industry and the War on Music Piracy, 84 Denv. U.L. Rev. 79 (2006); J. Alex Halderman & Edward W. Felton, Lessons from the Sony DRM Episode (Ctr. for Info. Tech., Princeton Univ., Dep't of Computer Sci., Working Paper, 2006) available at <http://itpolicy.princeton.edu/pub/sonydrm-ext.pdf>; Jeremy F. deBeer, How Restrictive Terms and Technologies Backfired on Sony BMG Music (Part 1), 6 INTERNET & E-COM. L. IN CAN. 93 (2006); Jeremy F. deBeer, How Restrictive Terms and Technologies Backfired on Sony BMG Music (Part 2), 7 INTERNET & E-COM. L. IN CAN. 1 (2006);

<sup>26</sup> See John Edward Sharp, There Oughta Be a Law: Crafting Effective Weapons in the War Against Spyware, 43 Hous. L. Rev. 879, 885 (2006). In the case in point, the EC directive on the liability of defective products could be also applied. See Council Directive 85/374/EEC of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 1985 O.J. (L 210) 29.

<sup>27</sup> Texas v. Sony BMG Music Entm't, Dist. Ct., Travis Co, Texas available at <http://www.sony.com/classactions/texas/complaint.pdf>

("Texas Spyware Act").<sup>28</sup> In the United States, other private actions were consolidated and settled.<sup>29</sup> Many of these class-action lawsuits were filed in California by Electronic Frontier Foundation asserting the violation California's Consumer Protection Against Computer Spyware Act.<sup>30</sup>

The point is particularly interesting for the article's thesis because, to my knowledge, these are some of the first cases based on consumer law as an instrument of defense against DRM technologies. Actually, the US approach to the problem has been mainly examined, at least up to now, under the copyright spectrum.<sup>31</sup>

### 2.3 EMI Music France

The last example is the French case *CLCV v. EMI Music France*. The consumer association *Consommation, Logement et Cadre de Vie* (CLCV) filed a lawsuit claiming that EMI Music France had not provided sufficient and correct information to consumers concerning technological protected CDs and their playability restrictions. In particular the judge of the Court of First Instance considered that not informing consumers about the fact that a content medium like a CD cannot be played on some devices can represent a «tromperie sur les qualités substantielles des CD», that is a deception on substantial qualities of CD.<sup>32</sup> For this reason it can constitute a misleading behavior about the nature and substantial qualities of the product as recognized by the article L213-1 of the French Consumer law (*Code de la Consommation*)<sup>33</sup>. The Court of appeal in Versailles

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<sup>28</sup> Tex. Bus. & Com. Code, § 48.001 et seq. The statute sets up the crimes for the following conducts: (1) unauthorized collection or culling of personally identifiable information; (2) unauthorized access to or modifications of computer settings; (3) unauthorized interference with installation or disabling of computer software; (4) inducement of computer user to install unnecessary software; and (5) copying and execution of software to a computer with deceptive intent. It also allows civil remedies.

<sup>29</sup> Settlement Agreement P I.A-B, In re Sony BMG CD Techs. Litig., No. 1:05-cv-09575-NRB (S.D.N.Y. 2005), available at <http://www.sonybmgcdtechsettlement.com/pdfs/SettlementAgreement.pdf>

<sup>30</sup> Cal. Bus. & Prof. Code § 22947-22947.6. For details on the complaint see Electronic Frontier Foundation, Sony BMG Litigation Info, <http://www.eff.org/IP/DRM/Sony-BMG> (last visited December 6, 2006).

<sup>31</sup> See Natali Helberger, The Sony BMG Rootkit Scandal, INDICARE, Jan. 9, 2006, at [http://www.indicare.org/tiki-read\\_article.php?articleId=165](http://www.indicare.org/tiki-read_article.php?articleId=165) (citing Julie E. Cohen, The Place of the User in Copyright Law, 74 Fordham L. Rev. 347 (2005) and Joseph P. Liu, Copyright Law's Theory of the Consumer, 44 B.C. L. Rev 397 (2003)).

<sup>32</sup> See Association CLCV v. EMI Music France, Tribunal de Grande Instance de Nanterre 6eme Chambre jugement du 24 Juin 2003, available at [http://www.legalis.net/jurisprudence-decision.php?id\\_article=34#](http://www.legalis.net/jurisprudence-decision.php?id_article=34#)

<sup>33</sup> Article L213-1 Code de la Consommation (*Loi n° 92-1336 du 16 décembre 1992 art. 322 Journal Officiel du 23 décembre 1992 en vigueur le 1er mars 1994*): "Sera puni d'un emprisonnement de deux

confirmed the decision of the Tribunal de Grande Instance de Nanterre, rejecting the arguments of EMI Music France. It also ordered EMI Music to pay 3000 Euro as damages and to appropriately label the outside packaging of its products.<sup>34</sup>

### **3. Must Consumers Accept any Digital Terms and Conditions?**

Traditionally, it has been recognized that a consumer buyer, that is a person acquiring goods or service for private use, might require additional form of protection to those offered to a commercial buyer.<sup>35</sup> Consumer protection measures could play a useful role in reconciling the interest of intellectual property rights-holders and users. Unfortunately, the interaction between consumer protection and DRM remain relatively unexplored because of early stage of the investigation among scholars.<sup>36</sup> However, the predominant purpose of the directives and other rules issued in the EC consumer law area relate exactly to the protection of the economic interests of consumers.<sup>37</sup>

As argued above, technological protection measures have a series of upsetting and unexpected uses. For example, most software programs are subject to End User License Agreements (hereinafter EULAs), and the common consumers' attitude towards EULAs is to agree without reading them. But a EULA is a classic example of a contract of adhesion that does not come as the result of a negotiation between the vendor and the user.<sup>38</sup> A mass-market software company writes the EULA to license copies of its goods,

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ans au plus et d'une amende de 250 000 F au plus ou de l'une de ces deux peines seulement quiconque, qu'il soit ou non partie au contrat, aura trompé ou tenté de tromper le contractant, par quelque moyen en procédé que ce soit, même par l'intermédiaire d'un tiers : 1° Soit sur la nature, l'espèce, l'origine, les qualités substantielles, la composition ou la teneur en principes utiles de toutes marchandises ; 2° Soit sur la quantité des choses livrées ou sur leur identité par la livraison d'une marchandise autre que la chose déterminée qui a fait l'objet du contrat ; 3° Soit sur l'aptitude à l'emploi, les risques inhérents à l'utilisation du produit, les contrôles effectués, les modes d'emploi ou les précautions à prendre."

<sup>34</sup> S.A. EMI Music France v. Association CLCV, Cour d'Appel de Versailles 1ère chambre, 1ère section, 30 Septembre 2004, available at <http://www.foruminternet.org/telechargement/documents/cavers20040930.pdf>

<sup>35</sup> See Geraint Howells & Thomas Wilhelmsson, EC Consumer Law 3 (1997).

<sup>36</sup> A first interesting attempt has been made at the workshop entitled "Fair DRM Use" held on 28 May 2005 in Amsterdam. See Mara Rossini & Natali Helberger, Fair DRM Use. Report on the 3rd INDICARE Workshop, Amsterdam (28 May 2005) available at [http://www.indicare.org/tiki-download\\_file.php?fileId=146](http://www.indicare.org/tiki-download_file.php?fileId=146); See also Lucie Guibault & Natali Helberger, Consumer protection and Copyright Law, available at <http://www.ivir.nl/publications/other/copyrightlawconsumerprotection.pdf> (last visited May 31, 2006).

<sup>37</sup> See Howells & Wilhelmsson, *supra* note 35, at 85.

<sup>38</sup> See Robert A. Hillman & Jeffrey J. Rachlinski, Standard-form Contracting in the Electronic Age, 77 N.Y.U.L. Rev. 429 (2002) (remarking on the easy adaptation of traditional contract law to electronic

so it can restrict their customers' rights of transfer and use. Essentially, the only possibility for the end user is to take it or leave it. DRM can be used to enforce EULA clauses or even policies that are not legally enforceable.

Generally, the use of technological protection measures could increase the power of rights-holders to set excessive conditions on the users. The combination of a contract and technological protection measures could represent a powerful mixture for a fully automated system of secure distribution, rights management, monitoring, and payment for protected content.<sup>39</sup> So, DRM, *de facto*, could also be seen as the imposition of “unilateral[] contractual terms and conditions.”<sup>40</sup> As already pointed out, when users access content protected by a technological protection measure, the content provider, in practice, imposes a contractual provision by a click-through or click-wrap agreement.<sup>41</sup>

In this sense, “technological protection measures can be considered a condition of the widespread use of contract-based distribution models on the Internet.”<sup>42</sup> Therefore, the unfairness that these measures introduce in the different positions should be considered by policymakers if they want to support this kind of business model.<sup>43</sup> Some

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transactions). On EULA, see John J.A. Burke, *Reinventing Contract*, 10 *Murdoch U. Elec. J.L.* 2, ¶ 18 (2003), [http://www.murdoch.edu.au/elaw/issues/v10n2/burke102\\_text.html](http://www.murdoch.edu.au/elaw/issues/v10n2/burke102_text.html); Robert W. Gomul kiewicz & Mary L. Williamson, *A Brief Defense of Mass Market Software License Agreements*, 22 *Rutgers Computer & Tech. L.J.* 335 (1996).

<sup>39</sup> See P. Bernt Hugenholtz, *Copyright and Electronic Commerce: An Introduction*, in *Copyright and Electronic Commerce: Legal Aspects of Electronic Copyright Management* 1, 2 (P. Bernt Hugenholtz ed., 2000).

<sup>40</sup> See Jacques de Werra, *Moving Beyond the Conflict Between Freedom of Contract and Copyright Policies: In Search of a New Global Policy for On-Line Information Licensing Transactions: A Comparative Analysis Between U.S. Law and European Law*, 25 *Colum. J.L. & Arts* 239, 244 (2003). Other commentators have criticized this approach. See Margaret Jane Radin, *Regulation by Contract, Regulation by Machine*, 160 *J. Inst. Theoretical Econ.* 1, 12 (2004) (stating that DRM is a replacement for contract).

<sup>41</sup> Under this legal fiction, the consumer can agree to the terms of contract in a very similar way to the shrink-wrap license. On the latter form of licensing agreement, see Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 *S. Cal. L. Rev.* 1239 (1995). Some commentators argue that, even if “DRM usage contracts are usually made over the Internet and are therefore not shrink-wrap licenses in the strict sense...[they could be] analogized...to their online counterpart: the so-called ‘click-wrap’ licenses.” Bechtold, *supra* note 3, at 343 (remarking also that “[m]ost DRM usage contracts are such click-wrap licenses”). On the electronic contracting environment, see Hillman & Rachlinski, *supra* note 38, at 464 (2002).

<sup>42</sup> De Werra, *supra* note 40, at 250. On the standardization of on-line contracts, see Cristina Coteanu, *Cyber Consumer Law and Unfair Trading Practice* 45 (2005).

<sup>43</sup> For a European perspective on whether copyright limitations and exceptions can be contracted or overridden through contract law or technological protection devices, see Lucie M.C.R. Guibault,

commentators have reasonably argued that, unless the legislature clarifies the issue, “the copyright regime would succumb to mass-market licenses and technological measures.”<sup>44</sup> It will be necessary, for example, to reconsider the norms protecting consumers and weak contracting parties, particularly dealing with a contract able to impose unlimited restrictions on the contents. As already done in other similar situations, it is necessary to rebalance the function of copyright law, or rather, to identify the limits of contracts as means of exploiting intellectual property rights. Otherwise, the risk is that consumers will lose all the privileges granted under its regime.<sup>45</sup> Normally copyright law allows certain exceptions whereby users can use copyright works freely without rights holder authorization.<sup>46</sup> Both common law and civil law countries have more or less several exceptions in common such as exceptions for educational and scientific purposes, exception for citation and private copying exception. Generally these exceptions consent to consumers to make copies or utilize copyrighted material in some circumstances.

Problems come out when a technological protection measure is in place because it eliminates these fair use rights or copyright exceptions. Given that the circumvention of these measures is strictly prohibited, the beneficiary of a copyright exception on a technologically protected content would have no possibility to benefit from these exceptions without exposing to sanctions. European law does not resolve these problems: the safeguard provided by article 6(4) of the EC Copyright Directive, which deals with the relationship between technological protection measures and copyright exceptions<sup>47</sup>, is vague and difficult for an individual to claim. Furthermore the article stipulates that regulations must come from right-holders and, only subsidiarily, are subject to

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Contracts and Copyright Exemptions, in *Copyright and Electronic Commerce*, supra note 39, at 125, 149-52.

<sup>44</sup> Id. at 160.

<sup>45</sup> De Werra supra note 40, at 244.

<sup>46</sup> See e.g. 17 U.S.C. 107 (2000) and, at an international level, the Article 9(2) of the Berne Convention also called “Three-Step Test”, Article 10 and 10bis.

<sup>47</sup> “Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by right-holders, including agreements between right-holders and other parties concerned, Member States shall take appropriate measures to ensure that right-holders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b), or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.” See Council Directive 2001/29, art. 6(4), 2001 O.J. (L 167) 17-18 (EC).

intervention of the State. It is evident that such disposition may cause a delegation of governmental decision making to a non-governmental entity with a consequent privatization of the government's role in protecting intellectual property.

Only few Member States have implemented effective rules to protect the interest of consumers of digital content.<sup>48</sup> Some countries such as Greece and Ireland have implemented the Directive into national law requiring that right holders make available means to beneficiaries to benefit from the exceptions.<sup>49</sup> On the contrary, Austrian and Dutch law does not set any exception to the anti-circumvention provisions. Concerning private copying exception, Denmark, for instance, does not mention any provision; UK Copyright Act expressively refers to "time-shifting" as the only private copying exception.<sup>50</sup> In Italy the Legislative Decree 68/2003, transposing the EC Copyright Directive, authorizes a copy of a digital protected content for personal use only if "*the user has obtained legal access to the work and the act neither conflicts with the normal exploitation of the work nor unreasonably prejudices the legitimate interests of the rightholder.*"<sup>51</sup> These are just some examples and it is quite unclear how these rules will be applied in practice. In particular if right holders do not adopt voluntary measures to allow the use of exceptions, Member States can adopt different policies that vary widely

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<sup>48</sup> For a state of the art as to implementation status at the date of September 22, 2004, see URS GASSER & MICHAEL GIRSBERGER, TRANSPOSING THE COPYRIGHT DIRECTIVE: LEGAL PROTECTION OF TECHNOLOGICAL MEASURES IN E.U.-MEMBER STATES. A GENIE STUCK IN THE BOTTLE? (Berkman Working Paper No. 2004-10) available at <http://ssrn.com/abstract=628007>; Silke von Lewinski, Rights Management Information and Technical Protection Measures as Implemented in EC Member States, 35 INT'L REV. OF INTELL. PROP. & COMPETITION L. 844 (2004); Margreet Groeneboom, Comparing the EUCD implementation of various Member States, INDICARE, Mar. 21, 2005 at [http://www.indicare.org/tiki-read\\_article.php?articleId=88](http://www.indicare.org/tiki-read_article.php?articleId=88); Concise European Copyright Law 392, 393 (Thomas Dreier and P. Bernt Hugenholtz eds. 2006).

<sup>49</sup> See Groeneboom, supra note 48.

<sup>50</sup> Id. See also Nora Braun, The Interface Between the Protection of Technological Measures and the Exercise of Exceptions to Copyright and Related Rights: Comparing the Situation in the United States and the European Community, 25 Eur. Intell. Prop. Rev., 496, 501 (2003) (illustrating the different implementation of Art. 6(4) within the European Community); Concise European Copyright Law, supra note 48, at 393.

<sup>51</sup> See Decreto Legislativo n. 68/2003, art. 71(4)-sexies, Official Gazette of the Italian Republic No. 87 of April 14, 2003. "Fatto salvo quanto disposto dal comma 3, i titolari dei diritti sono tenuti a consentire che, nonostante l'applicazione delle misure tecnologiche di cui all'articolo 102-quater, la persona fisica che abbia acquisito il possesso legittimo di esemplari dell'opera o del materiale protetto, ovvero vi abbia avuto accesso legittimo, possa effettuare una copia privata, anche solo analogica, per uso personale, a condizione che tale possibilità non sia in contrasto con lo sfruttamento normale dell'opera o degli altri materiali e non arrechi ingiustificato pregiudizio ai titolari dei diritti." For the cited translation see Groeneboom, supra note 48.

from country to country.<sup>52</sup> This is one of the reasons why the Directive purpose for harmonization seems to have failed.

However, the real problem is that, even in case consumers have some privileges under national law, copyright exceptions can be replaced with different conditions in accordance with a contract between users and content providers.

One of the consequences of the use of technological protection measures is that any rights that consumers may have under copyright law could be replaced by a commercial agreement between the parties with a modifying consequence on the balance of rights.<sup>53</sup>

Based on the above discussion, it is clear that there is an essential contradiction: if the technological measures against copying are legal, and, at the same time, there is a set of consumers' legitimate privileges to use content, what kind of solution is possible? The issue is that users are not allowed to eliminate the legal protection to validate these privileges. Even when consumers have the exception to make private copies, technological protection measures can effectively hinder consumers in exercising this "right"<sup>54</sup>. The legal environment seems to support this adverse practice because rights-holders are not legally obliged to assist a user in exercising his exception of copying for private use. As a consequence, that "right" becomes illusory.<sup>55</sup> From a U.S. perspective, court decisions are quite unclear on the point. However it is unambiguous that, at least to my knowledge, they have just ruled that there is no "generally recognized right to make a copy of a protected work, regardless of its format, for personal noncommercial use"<sup>56</sup>. Also European and most national laws do not yet provide a clear answer to the matter.

A possible solution could be to see DRM systems as means to put into effect a contract between the content provider and the end user in a very similar way to "shrink-wrap

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<sup>52</sup> See on this point: Concise European Copyright Law, supra note 23 at 392 (commenting the implementation of article 6(4) in the Members States.)

<sup>53</sup> See William Rosenblatt et al., Digital rights management: business and technology 46 (2002).

<sup>54</sup> It is not a right in the strict sense of the word.

<sup>55</sup> See European Consumers' Organization, Digital Rights Management, BEUC/X/025/2004, [http://europa.eu.int/information\\_society/eeurope/2005/all\\_about/digital\\_rights\\_man/doc/beuc.pdf](http://europa.eu.int/information_society/eeurope/2005/all_about/digital_rights_man/doc/beuc.pdf) [hereinafter DRM-BEUC Position Paper]. See also Severine Dusollier, Exceptions and Technological Measures in the European Copyright Directive of 2001 - An Empty Promise, 34 Int'l Rev. Indus. Prop. & Copyright L. 62, 71 (2003).

<sup>56</sup> See *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1135. See also *Recording Industry Ass'n of America, Inc. v. Diamond Multimedia Systems, Inc.*, 180 F.3d 1072 (9<sup>th</sup> Cir. 1999) (arguing that the private, noncommercial recording of copyrighted musical works using digital technology and the Internet constitutes fair use).

licenses” for computer software.<sup>57</sup> The issue will be to set the limit on infringement, if it could be identified as a simple contractual infringement concerning civil law of a private nature, or as a criminal offense. It is necessary to keep in mind the fact that the problem of intellectual property exceeds simple private agreements. It is essential to mention explicitly the contractual obligations of the content user.

Transactions supervised and enforced by technological protection measures in addition to this type of contract could alter the balance of rights between rights-holders and consumers.<sup>58</sup> In particular, in the U.S. systems, some types of technologically-enforced rights transactions supersede the limits of fair use and the first sale doctrine.<sup>59</sup> Nevertheless, DRM, used within a contract, could be used to protect content that is not subject to intellectual property rights protection, and could also erect barriers not only at the entrance level.<sup>60</sup> DRM has the potential to set up an exit barrier because it does not know when copyright terms expire. Therefore it exercises the same control on works that should exit copyright, hampering their entry into the public domain and establishing a *de facto* unending copyright protection.<sup>61</sup>

Returning to the initial question: "Must consumers accept any digital terms and condition?" my answer is no. Consumer law stipulates in details the information that

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<sup>57</sup> See Bechtold, *supra* note 3, at 342 (arguing that DRM usage contracts are employed to establish contractual privity between providers and individual consumers in a mass market protecting content not only by technology, but also by contract). On the increasing use of licensing, see See Comm. on Intell. Prop. Rights and the Emerging Info. Infrastructure, National Research Council, *The Digital Dilemma: Intellectual Property in the Information Age*, at 34 (2000). But see *contra* See Margaret Jane Radin, *Regulation by Contract, Regulation by Machine*, 160 *J. Inst. Theoretical Econ.* 1, 12 (2004) (stating that DRM is a replacement for contract).

<sup>58</sup> See Dan L. Burk, *DNA Rules: Legal and Conceptual Implications of Biological "Lock-Out" Systems*, 92 *Calif. L. Rev.* 1553, 1564 (2004) (observing that by implementing technical constraints on access to and use of digital information, a copyright owner can effectively supersede the rules of intellectual property law); see also Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 *Berkeley Tech. L.J.* 93, 111 (1997).

<sup>59</sup> Rosenblatt et al., *supra* note 53, at 46. The first sale doctrine is codified at 17 U.S.C. § 107 (1992); 17 U.S.C. § 109(a) (1997).

<sup>60</sup> See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996). In this case the court upheld a shrinkwrap license agreement that would protect the plaintiff's CD-ROMs of telephone listings from being posted on the Internet although the Supreme Court had said that this kind of material could not be protected by copyright. See *Feist Publ'ns, Inc. v. Rural Tel. Servs. Co.*, 499 U.S. 340 (1991). On the argument and for examples of contractual terms that conflict with copyright law, see Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 *Cal. L. Rev.* 111, 125-26, 132 (1999). See also Elkin-Koren, *supra* note 58.

<sup>61</sup> John R. Therien, *Exorcising the Specter of a "Pay-Per-Use" Society: Toward Preserving Fair Use and the Public Domain in the Digital Age*, 16 *Berkeley Tech. L.J.* 979, 994 (2001).

must be communicated to consumers. Also in the framework of digital media and DRM technologies, consumer must be informed about the rules associated with the use of the offered digital content. Furthermore some unfair contractual terms can be legally prohibited if they cause a significant imbalance in the parties' rights. In both cases a Court could consider the conduct of the contracting parties and, if necessary, the contract could be considered not binding for the consumer. However, the eventual court decision is most of the times, useless, as far as it comes after several years of litigation, when the product has been for much time in the market, and even more, superseded by a new and more updated product.

In the following paragraphs I will analyze the European and American scenarios considering some legal instruments for the protection of the weak contractual party in digital media transactions.

#### **4. Copyright Law, Contract law and the Structure of DRM Systems**

In general, a content transaction could be identified as a license or a sale, but the controversial nature of the distinction between a license and a sale, when applied to the technology world, could make this doctrinal dispute more confusing.<sup>62</sup> The main difference is that in the first case the content transaction falls under contract law while in the second it falls under copyright law.<sup>63</sup> Vendors, usually, prefer license agreements because they allow to avoid the first sale or the exhaustion right, imposing terms and limitations on consumer's use.<sup>64</sup>

In the U.S. systems, the relationship between copyright law and contract law is highly debated because copyright is a federal matter governed by federal law while contract law is state law, and states cannot limit or expand copyrights through state law.<sup>65</sup> In the U.S.

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<sup>62</sup> See Raymond T. Nimmer, *Intangibles Contracts: Thoughts of Hubs, Spokes, and Reinvigorating Article 2*, 35 *Wm. & Mary L. Rev.* 1337, 1345-46 (1994) (discussing distinctions between sales of tangible goods and licenses of intangible software under U.C.C. Article 2). See Raymond T. Nimmer, *The Law of Computer Technology: Rights, Licenses, Liabilities* § 6:1 (3d ed. 1997).

<sup>63</sup> See Rosenblatt et al., *supra* note 53, at 48 (arguing that the tension between copyright and contract law affects the balance that copyright law seeks to strike).

<sup>64</sup> Ryan J. Casamiquela, *Business Law: A. Electronic Commerce: Contractual Assent and Enforceability in Cyberspace*, 17 *Berkeley Tech. L.J.* 475 (2002).

<sup>65</sup> The U.S. system uses the preemption doctrine, i.e. a constitutional principle codified in 17 U.S.C. § 301 (2000), stating that copyrighted material is governed exclusively by this title and it preempts "the common law or statutes of any State."

system the preemption doctrine is in force. It is a constitutional principle, codified in 17 U.S.C. § 301, by which Congress may impose its intent to totally or partially supplant state law.<sup>66</sup> In practice, states do not have the constitutional authority to legislate on some subjects just to save the unifying function of federal law.

In the copyright framework, preemption can have effect when federal law diverges from state contract law<sup>67</sup> in order to “guarantee [ ] a homogeneous federal copyright law system that does not leave any vague areas between state and federal protection.”<sup>68</sup> This implies that in the United States this principle could be strictly related to the contractual extension of copyrights beyond those granted by the Copyright Act, or the reduction of the rights that users have conventionally benefited from apart from contract.<sup>69</sup>

In this sense, some commentators assert that preemption could play an important role in solving the conflict between contract and copyright law,<sup>70</sup> but cannot and will not solve the problem alone.<sup>71</sup>

However, the main issue is to decide if DRM could be seen as part of a contract between buyer and seller. If so, in the U.S. systems, federal copyright law is not involved because the relation is based on contract law. This also implies that, after the expiration of copyright, the right-holder would no longer have any right under copyright law, but the contract could still be effective and enforceable despite the expiration.

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<sup>66</sup> The principle derives from the Supremacy Clause: U.S. Const. art. VI, cl. 2.

<sup>67</sup> On the relationship between copyright and contract law pre-emption, see Elkin-Koren, *supra* note 58; I. Trotter Hardy, *Contracts, Copyright, and Preemption in a Digital World*, 1 *Rich. J.L. & Tech.* 2 (1995), <http://www.richmond.edu/jolt/v1i1/hardy.html>; Lemley, *supra* note 60; Maureen A. O'Rourke, *Copyright Preemption After the ProCD Case: A Market-Based Approach*, 12 *Berkeley Tech. L.J.* 53 (1997); David A. Rice, *Digital Information As Property And Product: U.C.C. Article 2B*, 22 *U. Dayton L. Rev.* 621, 646-647 (1997) (proposing that 301(a) of the Copyright Act may preempt enforcement of certain contract terms that limit user's exercises if the contract term was part of a contract of adhesion used on a market-wide basis.); Maureen A. O'Rourke, *Striking a Delicate Balance: Intellectual Property, Antitrust, Contract and Standardization in the Computer Industry*, 12 *Harv. J.L. & Tech.* 1 (1998); see also Raymond T. Nimmer, *Breaking Barriers: The Relation Between Contract And Intellectual Property Law*, 13 *Berkeley Tech. L.J.* 827 (1998).

<sup>68</sup> Elkin-Koren, *supra* note 58, at 102 n. 45.

<sup>69</sup> See Hardy, *supra* note 67.

<sup>70</sup> One of the most eloquent court decisions applying the copyright preemption doctrine to contract law is the case *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996). It is considered the first published opinion to directly affirm that a "shrinkwrap" license, with its allegedly contracted-for restrictions on re-use of copyrighted information, is enforceable. For a plain analysis of this decision, see Elkin-Koren, *supra* note 58; Michael J. Madison, *Legal-Ware: Contract and Copyright in the Digital Age*, 67 *Fordham L. Rev.* 1025 (1998).

<sup>71</sup> See Lemley, *supra* note 60, at 136.

It is interesting to note that the problem concerning use of contracts to create a private copyright protection was already pointed out in the same DMCA Report. It stated that:

[T]he movement at the state level toward resolving questions as to the enforceability of non-negotiated contracts coupled with legally-protected technological measures that give right-holders the technological capability of imposing contractual provisions unilaterally, increases the possibility that right-holders, rather than Congress, will determine the landscape of consumer privileges in the future.<sup>72</sup>

On the other hand, in the EC system, the tension between contract law and copyright is less obvious, because in Europe the regulation of contractual practices in the matter of copyright is not unusual, even if freedom of contract is the general rule while contractual restraint is the exception.<sup>73</sup> However the relationship between copyright exemptions and usage contracts is still quite ambiguous.<sup>74</sup> In fact, in addition to the mandatory provisions of the Directives on computer programs<sup>75</sup> and databases,<sup>76</sup> the same copyright law suggests a “little guidance for the determination of the validity of a contract that restricts the lawful exercise of a limitation on copyright.”<sup>77</sup> In this context, it is evident in continental Europe that there is an increasing trend within the market to create private copyright protection through contract.<sup>78</sup> In addition, some commentators underlined that also copyright law can contribute to setting a standard of consumer protection, even if copyright law is not explicitly intended to protect consumers.<sup>79</sup> For example the US Digital Millennium Copyright Act includes provisions stipulating exceptions to the

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<sup>72</sup> U.S. Copyright Office, DMCA Section 104 Report, at xxxi-ii (2001), available at <http://www.egov.vic.gov.au/pdfs/sec-104-report-vol-1.pdf>. This report was issued following the DMCA mandate of section 104, to evaluate the effects of the amendments made by the DMCA on the operation of sections 109 and 117 of the Copyright Act, with regard to digital technologies.

<sup>73</sup> For a European point of view on the relation between contract and copyright law, see Lucie Guibault, Pre-emption Issues in the Digital Environment: Can Copyright Limitations be Overridden by Contractual Agreements under European Law, in *Molengrafica* n. 11. *Europees Privaatrecht. Opstellen over Internationale Transacties en Intellectuele Eigendom*, 225, 226-27 (F.W. Grosheide & K. Boele-Woelki eds., 1998).

<sup>74</sup> See Bechtold, *supra* note 3, at 366.

<sup>75</sup> Council Directive 91/250/EEC, On the Legal Protection of Computer Programs, 1991 O.J. (L 122).

<sup>76</sup> Council Directive 96/9, On the Legal Protection of Databases, 2001 O.J. (L 167) (EC).

<sup>77</sup> See Guibault, *supra* note 9, at 214; see also de Werra, *supra* note 40, at 318.

<sup>78</sup> For an analysis of this inclination within the European scene, see generally Giovanni Pascuzzi & Roberto Caso, *I Diritti sulle Opere Digitali: Copyright Statunitense e Diritto d'Autore Italiano* (2002); Roberto Caso, *Digital Rights Management: il Commercio delle Informazioni Digitali tra Contratto e Diritto d'Autore* (2004).

<sup>79</sup> Pamela Samuelson, quoted in Rossini & Helberger, *supra* note 36, at 12-13.

protection of technological measures for reasons of privacy or parental control,<sup>80</sup> provisions that are undoubtedly consumer-oriented.<sup>81</sup> Moreover traces of consumer protection could be found also in the European copyright systems<sup>82</sup>: Art. 6.4 of the EC Copyright Directive can be interpreted to serve some consumer interests because it encourages right-holders to voluntarily adopt any measure deemed necessary “to make available to the beneficiary of an exception or limitation..., the means of benefiting from that exception or limitation...”<sup>83</sup> and invites Member States to ensure compliance.<sup>84</sup> As already pointed out, the problem about this article is the unsatisfactory way in which it was implemented.

As observed by the Bureau Européen des Unions de Consommateurs (BEUC), the current course of DRM development “seems to aim at creating a new relationship between right-holders and consumers, with altered consumer rights, freedoms and expectations and towards the general replacement of copyright law with contract law and codes.”<sup>85</sup> The issue is directly related to cases in which the contract is shaped not as the consequence of negotiation between parties, but rather as a form of imposition of unilaterally defined contractual terms and conditions. In this case the licensor is effectively using the contract, the license, to manage his rights. Furthermore, in the DRM contract structure, technology has the power to enforce the terms of the contract without any support from the legal system. In general, as already discussed above, DRM technology, in combination with restrictive terms of service conditions, does not support business models based upon the first sale doctrine or the exhaustion principle, disabling

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<sup>80</sup> See 17 U.S.C.A 1201(h), (i).

<sup>81</sup> See Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 *Berkeley Tech. L. J.* 519, 542 (1999) (arguing that DMCA created two consumer-oriented exceptions, one to enable parents to circumvent access controls when necessary to protect their children from accessing harmful material on the Internet, and the other to enable circumvention to protect personal privacy).

<sup>82</sup> See Rossini & Helberger, *supra* note 36, at 13.

<sup>83</sup> “...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.” Council Directive 2001/29, art. 6, 2001 O.J. (L 167) 10, 17-18 (EC).

<sup>84</sup> For a detailed discussion on the structure of Article 6.4 of the E.C. Copyright Directive, see Alvisè Maria Casellati, *Protezione Legale delle Misure Tecnologiche ed Usi Legittimi. L’articolo 6.4 della Direttiva Europea e sua Attuazione in Italia*, 74 *Dir. Aut.* 360, 372-377 (2003).

<sup>85</sup> DRM-BEUC Position paper, *supra* note 55, at 3.

consumers from reselling material.<sup>86</sup>

## **5. When DRMs and Contract Terms Jeopardize Consumer Rights: U.S. and EU Approaches**

What we see in the contractual structure of DRM is something similar to a standard form contract, already popular in commercial and consumer transactions, and particularly diffused in technological transfers, licensing intellectual property, and service agreements.<sup>87</sup> It is rather unquestionable that DRM systems and technological protection measures are frequently used to enforce standard contract terms. I believe that the current consumer protection law can offer the correct instrument to national authorities to mediate in disputes over unfair consumer contract, in particular when DRM systems are involved and their use is misrepresented or not disclosed to consumers.

### **5.1 U.S. Approach Towards Digital Terms and Conditions**

The American legal system, generally, has allowed the use of standard form agreements and has enforced their terms.<sup>88</sup> Federal and state legislatures have enacted statutes to protect the consumer against aggressive contracting, unfair practices and his own ignorance in certain transactions.<sup>89</sup> These competences are shared with the Federal Trade Commission, a law enforcement agency charged by Congress to protect the public against deceptive or unfair practices and anticompetitive behaviour.<sup>90</sup> The most important instrument of the Federal Trade Commission in order to apply and to enforce the standard of fairness has been its rule making authority, even if the recent inclination is to prefer

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<sup>86</sup> See Dan L. Burk, *Anticircumvention Misuse*, 50 *UCLA L. Rev.* 1095, 1100 (2002) (citing David Nimmer et. al., *The Metamorphosis of Contract into Expand*, 87 *Cal. L. Rev.* 17, 137 (1999), arguing that licensing a work may be attractive to a copyright holder because the first sale doctrine does not apply if a copy of a work is leased rather than sold).

<sup>87</sup> DRM has been defined as “a souped-up standard form contract.” Ian Kerr & Jane Bailey, *The Implications of Digital Rights Management for Privacy and Freedom of Expression*, 2 *Info. Comm. & Ethics in Soc’y*, 87, 89 (2004).

<sup>88</sup> For an overview of standard terms in American law, see Edward Allan Farnsworth, *Contracts* (4th ed. 2004).

<sup>89</sup> See Burke, *supra* note 38. See also Robert L. Oakley, *Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts*, 42 *Hous. L. Rev.* 1041, 1061 (2005) (arguing that the United States does not have a general law governing unfair contract terms with any specificity).

<sup>90</sup> See Stanley Morganstern, *Legal Protection for the Consumer* 1 (2<sup>nd</sup> ed. 1978); Hans W. Micklitz & Jürgen Kessler, *Marketing practices regulation and consumer protection in the EC member states and the US* 419 (2002); Douglas J. Whaley, *Problems and Materials on Consumer Law* 58 (4<sup>th</sup> ed. 2006).

administrative action, seen as more flexible and efficient.<sup>91</sup> The rulemaking procedures, the administrative actions, the injunctions and other mechanisms to obtain consumer compensation are all potential effective instruments to protect also digital consumers from unfair or deceptive practices.

On this matter the “doctrine of unconscionability”<sup>92</sup> has the effect of extending the protection of weak contractual parties as far as possible,<sup>93</sup> giving judges the power to determine boundaries of this remedy.<sup>94</sup> This doctrine provides a way for courts to control unfair contracts and contract conditions. It allows a court to prevent the enforcement of a contract, or specific provisions, if the judge finds that the contract or any part of the agreement to have been unconscionable. The problem with unconscionability as a legal doctrine comes in determining the meaning of the unconscionability. The U.C.C., in fact, does not define it. Courts have described it as “an absence of meaningful choice on the part of one of the parties together with contract terms that are unreasonably favorable to the other party”.<sup>95</sup> However, Courts have demonstrated a reluctance to find

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<sup>91</sup> Micklitz & Kessler, *supra* note 90, at 424, 433.

<sup>92</sup> Codified in UCC § 2-302 (1978). For more regarding unconscionability, see Arthur Allen Leff, *Unconscionability and the Code – The Emperor's New Clause*, 115 U. Pa. L. Rev. 485, 505 (1967) (coining the terms "procedural" and "substantive" unconscionability); Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. Chi. L. Rev. 1, 51-60 (1993); Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. Law & Econ. 293 (1975); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. Chi. L. Rev. 1203, (2003); Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations On The Freedom to Contract*, 24 J. Legal Stud. 283 (1995); John A. Spanogle, *Analyzing Unconscionability Problems*, 117 U. Pa. L. Rev. 931 (1969); Carol B. Swanson, *Unconscionable Quandary: U.C.C. Article 2 and the Unconscionability Doctrine*, 31 N.M. L. Rev. 359, 367 (2001).

<sup>93</sup> See David W. Slawson, *Binding Promises: The Late 20th Century Reformation of Contract Law* 57 (1996) (describing the doctrine's introduction in the 1960s and subsequent adoption); see also Hillman & Rachlinski, *supra* note 38, at 456 (noting that unconscionability doctrine “affords courts considerable discretion to strike unfair terms directly rather than covertly by stretching less-applicable rules in order to reach a fair result”).

<sup>94</sup> See Cristiana Cicoria, *The Protection of the Weak Contractual Party in Italy vs. United States Doctrine of Unconscionability. A Comparative Analysis*, 3 Global Jurist Advances (2003), <http://www.bepress.com/gj/advances/vol3/iss3/art2>. The doctrine of unconscionability is a doctrine of contract law that makes a contract term unenforceable when is demonstrated the occurrence of both procedural and substantive unfairness. See Black’s Law Dictionary 1524 (6th ed. 1990). For the distinction of these two kind of unconscionability, see Leff, *supra* note 92, at 487-88.

<sup>95</sup> *Williams v. Walker-Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965). Unconscionability has been recognized also as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them. See *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 472 S.E.2d 242, 245 (S.C. 1996).

unconscionability in standard commercial transactions<sup>96</sup> but, it is indubitable that this institution may be able “to enlarge the spectrum of protection available to the consumer, being an incisive and effective legal instrument against unequal bargaining, and abuse of superior contractual position”.<sup>97</sup> Nevertheless, in the opinion of the majority, unconscionability does not seem well standardized to the goal of mitigating the insidious effects of form contracts and copyright licensing practices.<sup>98</sup>

Contract law also offers guaranties and protection from potentially unfair clauses in standard form contracts.<sup>99</sup> Particularly in the case of standardized agreements, the rule of the section 208 of the Restatement (second) of contracts permits the court to pass directly on the unconscionability of the contract or clause rather than to avoid unconscionable results by interpretation.<sup>100</sup> Furthermore, the section 211 of Restatement (Second) of Contracts<sup>101</sup> sets out a standard that, though not frequently applied,<sup>102</sup> *de facto* overlaps with unconscionability doctrine, but does so in different terms and under different language.<sup>103</sup> The effects of the restatement<sup>104</sup> are summarized as follows: “a person who

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<sup>96</sup> James J. White & Robert S. Summers., Handbook of the law under the uniform commercial code 474 (2d ed. 1980) 474 (“findings of unconscionability should be rare in commercial settings”); see also Sandra J. Levin, Examining Restraints on Freedom to Contract as an Approach to Purchaser Dissatisfaction in the Computer Industry, 74 Cal. L. Rev. 2101, 2108 (1986) (asserting that “courts have exhibited a reluctance to find unconscionability in standard commercial transactions”); Lewis A. Kornhauser, Unconscionability in Standard Forms, 64 Cal. L. Rev. 1151, 1153-57 (1976).

<sup>97</sup> See Cicoria, *supra* note 94, at 7.

<sup>98</sup> See, for example, Korobkin, *supra* note 92, at 1208, 1256. See also Guibault, *supra* note 9, at 262 (arguing that the assessment of the fairness of a licence term under the doctrine of unconscionability takes no account of copyright policy issues and revolves only around matters of contract law and market inquiry); J.H. Reichman & Jonathan A. Franklin, Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information, 147 U. Pa. L. Rev. 875, 927-929 (1999) (perceiving its inability to respond to intellectual property rights issues and proposing a doctrine of “public interest unconscionability”).

<sup>99</sup> Restatement 2d of Contracts, § 208. See generally John E. Murray, Jr., The Standardized Agreement Phenomena in the Restatement (Second) of Contracts, 67 Cornell L. Rev. 735, 762-79 (1982); see also Hillman and Rachlinski, *supra* note 38, at 454-63 (investigating the three main doctrines American courts use to review potential abuses in standard-form contracts: unconscionability, Restatement (second) of contracts, section 211(3) and the doctrine of reasonable expectations).

<sup>100</sup> See Restatement 2d of Contracts, § 208 cmt. a.

<sup>101</sup> *Id.* § 211.

<sup>102</sup> Only forty-three published judicial opinions had interpreted Section 211(3) of the Restatement, twenty-five of those were penned by Arizona courts, and most of those dealt with insurance coverage disputes. See James J. White, Form Contracts under Revised Article 2, 75 Wash U L Q 315, 324-25 (1997).

<sup>103</sup> See Nimmer, *supra* note 67, at 874. The called doctrine of “reasonable expectations” and its variation described in Section 211 of the Restatement (Second) of Contracts have been incorporated into (substantive) unconscionability analysis by most courts. See Korobkin, *supra* note 92, at 1257-58.

<sup>104</sup> See Section 211 cmt. f.

manifests assent to a standard form is bound by the terms of that form, except with respect to terms that the party proposing the form has reason to believe would cause the other party to reject the writing if it knew that the egregious term were present”.<sup>105</sup>

This standard can offer an additional basis for avoiding some terms in standardized agreements, in particular in front of some unclear and surreptitiously undiscovered contract terms connected with the use of a technological protection measure.<sup>106</sup>

Some U.S. courts have ruled that form terms unknown to the consumer are unenforceable if the consumer is uninformed of even the existence of terms and this unawareness is reasonable.<sup>107</sup> The doctrinal explanation is that contract terms must be “reasonably communicated” to be legally binding and that this requisite is not achieved when the consumer has no reason to know of the presence of such terms.<sup>108</sup> An opening in this direction can be read in the proposed bill, Digital Media Consumers' Rights Act.<sup>109</sup> This is a quite recent U.S. legislative answer to the problem of misrepresentation and nondisclosure of information related to copy protected digital media. The Rep. Rick Boucher's proposed bill attempts to restore the historical balance in copyright law and ensures the proper labeling of “copy-protected compact discs”. It requires labels on copy-protected compact discs and attempts to rebalance the legal use of digital content and scientific research prevented by the Digital Millennium Copyright Act. In particular, the main aim of the bill is to ensure that consumers are fully aware of the limitations and restrictions they may discover when purchasing copy-protected digital media because manufacturers are not currently obligated to place these kinds of notices on packaging. Most consumers are not aware of what media stores and file formats they will be limited

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<sup>105</sup> See Nimmer, *supra* note 67, at 874.

<sup>106</sup> Courts have already applied Restatement section 211(3) to invalidate standardized contract terms modifying existing law in software transactions. E.g., *Angus Medical Co. v. Digital Equip. Corp.*, 840 P.2d 1024, 1030 -31 (Ariz. Ct. App. 1992) (holding contract term shortening the statute of limitations from six years to 18 months unenforceable). Cf. *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388 (Ariz. 1984) (adopting the Restatement). See Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. Cal. L. Rev. 1239 (1995).

<sup>107</sup> See Korobkin *supra* note 92, at 1268.

<sup>108</sup> See *Ciro Silvestri v Italia Società Per Azioni Di Navigazione*, 388 F2d 11 (2d Cir 1968) (establishing that terms must be "reasonably communicated" to purchasers).

<sup>109</sup> Digital Media Consumers' Rights Act of 2005, H.R.1201, 109th Cong. (2005) (available at <http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.1201:>)

to when they make the initial decision to buy a portable device even if it is probably written in the End User License Agreement.<sup>110</sup>

The overall impression is that the American rules of contract formation limit rescission of an otherwise valid contract to a very limited number of cases and with an underreaction.<sup>111</sup>

## 5.2 European Approach Towards Digital Terms and Conditions

The EC framework is based on a set of rules primarily incorporated in the European Community Council Directive on Unfair Terms in Consumer Contracts.<sup>112</sup> It is considered one of the most important consumer contract law directives, formulating a European concept of unfairness.<sup>113</sup> In addition, further EC legislation, which does not have consumer protection as its primary purpose, offers some consumer protection or regulates the power of national authorities to introduce consumer protection regulations.<sup>114</sup> For example the Electronic Commerce Directive<sup>115</sup> covers advertising and marketing to consumers by information society service providers. The Television Without Frontiers

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<sup>110</sup> See Digital Media Consumers' Rights Act Official summary at <http://www.house.gov/boucher/docs/dmcrhandout.htm>; Michael P. Matesky, *The Digital Millennium Copyright Act and Non-Infringing Use: Can Mandatory Labeling of Digital Media Products Keep the Sky from Falling?* 80 Chi.-Kent L. Rev. 515, 532 (2005).

<sup>111</sup> Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, 92 Va. L. Rev. 565, 576, 579, 590 (2006).

<sup>112</sup> Council Directive 93/13/EEC, *On Unfair Terms in Consumer Contracts*, 1993 O.J. (L95/29). A fundamental part of the literature on the Council Directive on Unfair Terms in Consumer Contracts is written by German scholars. A great number of the provisions in the Directive, in fact, are very similar to the provisions of the 1976 German Standard Contract Terms Act – (*Gesetz Zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen*). For comments on the Directive, see e.g. Hans Erich Brandner & Peter Ulmer, *The Community Directive on Unfair Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission*, 28 Common Mkt. L. Rev. 647 (1991); Vincenzo Roppo, *La Nuova Disciplina delle Clausole Abusive nei Contratti fra Imprese e Consumatori*, 40 Riv. Dir. Civ. 277(1994); Giorgio De Nova, *Criteri Generali di Determinazione dell'Abusività di Clausole ed Elenco di Clausole Abusive*, 48 Riv. Trim. Dir. e Proc. Civ. 691 (1994); Roberto Pardolesi, *Clausole Abusive (nei Contratti dei Consumatori): Una Direttiva Abusata?*, 119 Foro it. 137 V (1994); Christian Joerges, *The Europeanization of Private Law as a Rationalization Process and as a Contest of Disciplines – an Analysis of the Directive on Unfair Terms in Consumer Contracts*, 3 Eur. Rev. Private L. 175 (1995); Bernd Tremml, *The EU Directive on Unfair Terms in Consumer Contracts*, 3 Int'l Cont. Adv. 18 (1997); Hugh Collins, *Regulating Contracts*, 256 (1999); Geraint G. Howells and Stephen Weatherill, *Consumer protection law* 261 (2<sup>nd</sup> ed. 2005). See also Oakley, *supra* note 93 at 1065.

<sup>113</sup> See Howells & Wilhelmsson, *supra* note 35, at 88.

<sup>114</sup> See Commission of the European Communities, *Green Paper on European Union Consumer Protection*, COM(2001) 531 final.

<sup>115</sup> Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce) 2000 O.J. (L178) 1.

Directive<sup>116</sup> also coordinates certain aspects of commercial communications through broadcasting means. Moreover, the Brussels Convention<sup>117</sup> and the Rome Convention<sup>118</sup> establish rules, in cases of a cross-border contractual dispute within the EC, to determine which Member State Court should hear the case and which Member State's law will apply to the contract.<sup>119</sup>

The Unfair Term Directive invalidates standardized terms that are unfair and result in a significant imbalance of obligations between the parties to the detriment of the consumer.<sup>120</sup> Specifically, a term is considered unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of consumers.<sup>121</sup> The Directive also contains a non-exclusive grey list of unfair terms.<sup>122</sup> It sets only a minimum baseline, while every EC Member State has national consumer legislation that protects consumers who adhere to standardized conditions. The Commission has stated that "general contractual terms and conditions aim to replace the legal solutions drawn up by the legislator and at the same time to replace the legal rules in force in the Community by unilaterally designed

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<sup>116</sup> Council Directive 89/552/EEC on the co-ordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities 1989 O.J. (L298) 23 as amended by Directive 97/36/EC.

<sup>117</sup> Council Regulation 44/2001/EC on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2001 O.J. (L12) 1.

<sup>118</sup> Convention on the Law Applicable to Contractual Obligations 80/934/EEC [Rome Convention] 1980 O.J. (L266) 1. In Europe, the Rome Convention is the principal instrument by which consumer applicable law issues are determined.

<sup>119</sup> The general rule, set out in Article 3.1 of the Rome Convention, stipulates that: "A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty...". At the same time, Article 5 of the Convention provides for an exception for contracts involving consumers and for which the subject "is the supply of [tangible] goods or services". For contracts involving consumers, in fact, the law preferred by the parties should not adversely affect the mandatory provisions of the State in which the consumer is habitually resident. The application of this rule is questionable in the case of intellectual property licensing agreements. In fact, the convention fail to deal expressly with issues of jurisdiction and choice of law for copyright infringement cases. See Raquel Xalabarder, Copyright: choice of law and jurisdiction in the digital age. 8 Ann. Surv. Int'l & Comp. L. 79, 80 (2002).

<sup>120</sup> The Directive applies only to consumer transactions, i.e. those involving an individual who acquires products for her own personal consumption and not for business or professional use. See Howells & Wilhelmsson, *supra* note 35, at 88-95.

<sup>121</sup> Council Directive 93/13/EEC, art. 3(1).

<sup>122</sup> Council Directive 93/13/EEC, art. 3(3).

solutions with a view to maximizing the particular interests of one of the parties.”<sup>123</sup> This Directive offers some level of protection only to consumer defined in the Regulations as “any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession”.<sup>124</sup> A term included in a standard form contract could be presumed unfair if it produces a “significant imbalance in the parties’ rights and obligations arising under the contract to the detriment of the consumer”.<sup>125</sup> Comparing the regulation of unfair contract terms and the concept related to the unconscionability doctrine under U.S. contract law, we can consider that the European regulation defines a much lower limit for intervention by courts.<sup>126</sup>

Also the Distance Contract Directive<sup>127</sup> and the Electronic Commerce Directive<sup>128</sup> could be applied to products and services offered through on-line contracting and that may include a DRM system.<sup>129</sup> Both Directives include transparency provisions that oblige the provider to comply with the requirements relating to the such information about the main characteristics of the goods or services, the prices, the right of withdrawal, the contract terms and the general conditions. In particular the Distance Contract Directive grants consumers the right to withdraw from certain contracts with a supplier when the contract formation takes place without physical presence of contractual parties.<sup>130</sup>

In this type of contract, the consumer must receive written confirmation or confirmation in another durable medium, such as electronic mail, at the time of performance of the contract. Supplier is obliged to inform consumer in writing about:

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<sup>123</sup> Report from the Commission On the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, at 13 (Apr. 27, 2000), available at [http://europa.eu.int/comm/consumers/cons\\_int/safe\\_shop/unf\\_cont\\_terms/uct03\\_en.pdf](http://europa.eu.int/comm/consumers/cons_int/safe_shop/unf_cont_terms/uct03_en.pdf).

<sup>124</sup> Council Directive 93/13/EEC, art. 2(b).

<sup>125</sup> See Guibault, *supra* note 9, at 254.

<sup>126</sup> See Jane K. Winn and Brian H. Bix, *Diverging Perspectives on Electronic Contracting in the U.S. and the EU*, 54 *Clev. St. L. Rev.* 175, 186 (2006) (finding a much lower threshold for intervention by courts also with reference to federal and state regulation of unfair and deceptive trade practices).

<sup>127</sup> Council Directive 97/7/EC, On the Protection of Consumers in Respect of Distance Contracts, 1997 O.J. (L 144).

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

<sup>129</sup> See Lucie Guibault & Natali Helberger, *Consumer protection and Copyright Law*, 10-14 available at <http://www.ivir.nl/publications/other/copyrightlawconsumerprotection.pdf> (last visited Jan. 11, 2006); See generally Natali Helberger, *Digital Rights Management from a Consumer’s Perspective*, 8 *IRIS plus* (2005), available at [http://www.obs.coe.int/oea\\_publ/iris/iris\\_plus/iplus8\\_2005.pdf.en](http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus8_2005.pdf.en).

<sup>130</sup> Council Directive 97/7/EC, art. 6.1.

arrangements for exercising the right of withdrawal; place to which the consumer may address complaints; information relating to after-sales service; conditions under which the contract may be rescinded.<sup>131</sup> The Electronic Commerce Directive introduces legal certainty by requiring the exchange of certain information in connection with the conclusion of such contracts, in particular it requires on-line suppliers to inform consumers about the name, geographic and electronic address of the provider of the service,<sup>132</sup> a clear and unambiguous indication of the price,<sup>133</sup> indication on any relevant codes of conduct and information on how those codes can be consulted electronically<sup>134</sup> and, finally, the contract terms and general conditions provided to the recipient available in a way that allows him to store and reproduce them. Although these Directives do not expressly deal with copyright licenses, scholars suggest the possibility to extend these regulations to goods and services offered through click-wrap licenses over the Internet.<sup>135</sup>

Recently, the EC consumer protection regulatory framework has been enriched with a new directive on Unfair Commercial Practices<sup>136</sup> concerning unfair business-to-consumer commercial practices in the internal market. This new Directive concerns business-to-consumer transactions whereby the consumer is influenced by an unfair commercial practice which affects decisions on purchasing or not a product, on the freedom of choice in the event of purchase and on decisions about exercising a contractual right. By harmonizing the legislation in this field, it provides a general criterion for determining if a commercial practice is unfair, in order to establish a limited range of unfair practices prohibited throughout the Community. In particular, the principle used to determine whether a practice is unfair, is the “materially distortion of the economic behaviour of consumers”.<sup>137</sup> This criterion refers to the use of a commercial practice that appreciably

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<sup>131</sup> To comply with this regulation, some European music stores have already granted customers the right to return downloaded digital music within seven days. See Gasser, *supra* ch. 1, note 35, at 21.

<sup>132</sup> Council Directive 2000/31/EC, art. 5.1.

<sup>133</sup> *Id.* at art. 5.2.

<sup>134</sup> *Id.* at art. 10.2.

<sup>135</sup> See Guibault, *supra* note 9, at 302-304; Urs Gasser, *iTunes: How Copyright, Contract, and Technology Shape the Business of Digital Media – A Case Study* 21-22 (Berkman Ctr. for Internet & Soc’y at Harvard Law School Research Publ’n No. 7, 2004), <http://ssrn.com/abstract=556802>.

<sup>136</sup> Directive 2005/29/EC of the European Parliament and of the Council on Unfair Commercial Practices, 2005 O.J. (L149) 22. For first comments see Hugh Collins, *The Forthcoming EC Directive on Unfair Commercial Practices* (2004).

<sup>137</sup> Directive 2005/29/EC, art. 2(e).

impairs the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise.<sup>138</sup> There is no doubt that the Directive could constitute a new starting point in setting some protection standards regarding digital media transactions in the European electronic marketplace.<sup>139</sup> It has been observed that the failure "to inform consumers about the application on a digital support of an anti-copy device, which prevents them from making any copy for time- or place shifting purposes, could amount to a misleading practice that would be prohibited"<sup>140</sup> under this Directive.

## **6. Interoperability & Standards as an Indirect Form of Consumer Protection**

Another different approach in the regulatory framework for consumer protection in digital media world has been proposed by Professor Jane Winn in a recent academic work.<sup>141</sup> She asserts that, "because technological standards constitute a form of regulation that shapes markets and market behavior", regulators and policy makers might also be able "to protect consumer interests in on-line markets by focusing on the content of the technical standards that define the architecture of on-line markets".<sup>142</sup> Standards have for long been recognized as the natural means to enable the emergence of networked systems and platforms. It would be desirable that these discussions be complemented with concrete proposals on how global market can benefit from new paradigms of innovation and merge this with adequate intellectual property rights policy. Technical standards are, in fact, considered one of the foundations of the modern consumer movement, as well as one of the most interesting and innovative forms of consumer protection.<sup>143</sup> Governments

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<sup>138</sup> Id.

<sup>139</sup> See generally Cristina Coteanu, *Cyber Consumer Law and Unfair Trading Practice* (2005).

<sup>140</sup> Guibault & Helberger, *supra* note 128, at 15.

<sup>141</sup> See Jane K. Winn, *Is Consumer Protection an Anachronism in the 21st Century?* (2006) available at [http://www.law.washington.edu/Faculty/Winn/Documents/Winn\\_Consumer\\_Anachronism\\_Intro.pdf](http://www.law.washington.edu/Faculty/Winn/Documents/Winn_Consumer_Anachronism_Intro.pdf).

<sup>142</sup> Id.

<sup>143</sup> See Jane K. Winn, *Information Technology Standards as a Form of Consumer Protection Law*, in *Consumer Protection in the Age of the Information Economy* 99 (Jane K. Winn ed., forthcoming 2006) available at [http://www.law.washington.edu/Faculty/Winn/Publications/Info\\_Tech\\_Std.pdf](http://www.law.washington.edu/Faculty/Winn/Publications/Info_Tech_Std.pdf) (illustrating three case studies that demonstrate the cost and benefits of government intervention in the development and adoption of information technology standards as a competitive strategy for protecting consumer interests). For a broader discussion see also Geraint G. Howells, *Consumer Safety and Standardization -- Protection Through Representation?*, in *LAW AND DIFFUSE INTERESTS IN THE EUROPEAN LEGAL ORDER: LIBER AMICORUM NORBERT REICH 755* (Hans-W. Micklitz et al. eds., 1997); Jessie Vee Coles, *STANDARDIZATION OF CONSUMERS' GOODS; AN AID TO CONSUMER-BUYING* (1932).

should intervene in the development of information technology standards because they could be an effective vehicle to protect consumer interests.

Standardized data formats and interoperability offer advantages for technology consumers as well as for the companies that develop them<sup>144</sup>. Accordingly, some economists argue that:

Consumers generally welcome standards: they are spared having to pick a winner and face the risk of being stranded. They can enjoy the greatest network externalities in a single network or in networks that seamlessly interconnect. They can mix and match components to suit their tastes. And they are far less likely to become locked into a single vendor, unless a strong leader retains control over the technology or wrests control in the future through proprietary extensions or intellectual property rights.<sup>145</sup>

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

On this front, it has been observed that the EC “seems to have missed an opportunity to use information technology standards to enhance compliance with its very broad data protection laws” while “the U.S. appears to be moving in the direction of using management standards to strengthen the enforcement of some of its much narrower information privacy laws.”<sup>146</sup> The EC Copyright Directive avoids, in fact, the requirement of any particular standard yet encourages the compatibility and interoperability of different systems.<sup>147</sup> However, even if from a consumer perspective the goal could be the development and diffusion of a global standard, the content industry is worried that a standardized management system could be more vulnerable to piracy.

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

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<sup>144</sup> See Carl Shapiro & Hal R. Varian, *The Art of Standards Wars*, 41 *Cal. Mgmt. Rev.* 8, 14 (1999).

<sup>145</sup> See Carl Shapiro & Hal R. Varian, *INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY* 233 (1999).

<sup>146</sup> See Winn, *supra* note 137.

<sup>147</sup> See Marie-Thérèse Huppertz, *The Point of View of Software Industry*, in *The Future of Intellectual Property in the Global Market of the Information Society: Who is Going to Shape the IPR System in the New Millennium?* 70 (Frank Gotzen ed., 2003).

Therefore, we have to decide if we want all content rights transactions to fall under contract instead of copyright law, and, if so, we have to find remedies to protect the consumer's rights. "Consumer contracts governing the use of digital material," need to be "fair and transparent."<sup>148</sup> and, probably, the application of consumer protection law could immediately offer an effective solution to reduce imbalance between parties. To ensure consumers to continue engaging in fair uses, it is necessary to circumvent technological restriction when legitimate purposes require it. Consumers must acquire and keep these legal mechanisms in order to avoid abuses.

## 7. Final Remarks

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

In a framework where contract law is replacing intellectual property law, I have looked the difficulties and the possible solutions of maintaining a balance between the inherently contradictory interests of intellectual property rights-holders and the general public. In particular, I have explored the ways in which consumer protection law can safeguard consumer's use of DRM protected digital media. On this point the European Union law<sup>149</sup> includes special rules for specific types of contracts while the U.S. legal system seems to link consumer protection to market mechanism treating the problem in a more general way.<sup>150</sup>

With regard to possible positive actions at European level, it could be necessary to take advantage of the forthcoming review of the European regulatory framework for consumer protection and the recast of the intellectual property *acquis*. As correctly observed by consumers' organizations, the review must be "not merely retrospective but also prospective in assessing how the *acquis* can adapt to changes in the market place".<sup>151</sup> In particular, it is indispensable to evaluate how the *acquis*, "and more fundamental

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<sup>148</sup> DRM-BEUC Position Paper, supra note 55, at 3.

<sup>149</sup> Consumer protection has also received a significant place in the Community's constitution. See Treaty establishing a Constitution for Europe, Article III-235, 2004 O.J. (C 310) 1, 105.

<sup>150</sup> See Winn and Bix, supra note 125, at 190.

<sup>151</sup> See BEUC Memorandum, supra note 6, at 8.

consumer rights underlying the *acquis*, can be applied effectively” also in the digital environment<sup>152</sup> stipulating new rules for the implementation of the digital consumer protection.<sup>153</sup> As it was proposed by the Bureau Européen des Unions de Consommateurs, it is indispensable to include a provision on DRM technologies in the unfair contract directive. The implementation of this proposal would allow the consumer protection authorities to intervene against unfair consumer contract terms if the terms are “code-based” rather than “contract-based”.<sup>154</sup>

In my opinion, consumer protection law could effectively contribute, even if only partially, to provide information, protection and transparency in relation to transaction done by means of electronic instruments and involving DRM technologies.<sup>155</sup> The duty to correctly inform consumers about DRMs can contribute to re-establish consumer confidence in digital media, recalibrating the balance of intellectual property rights in digital media transactions. Consumer, in fact, must benefit from technological innovations without abusive restrictions; in particular technology should not be surreptitiously used to erode established consumer rights.

Consumer protection law may not be the panacea for the management of digital rights, but could contribute - awaiting for new rules - to pave the way for a fairer play in the markets, maintaining alive consumer rights also in the digital environment.

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<sup>152</sup> Id.

<sup>153</sup> See Natali Helberger, Digital Rights Management from a Consumer’s Perspective, 8 IRIS plus (2005), available at [http://www.obs.coe.int/oea\\_publ/iris/iris\\_plus/iplus8\\_2005.pdf.en](http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus8_2005.pdf.en) (arguing the necessity of sector-specific rules designed to take into account specific characteristics of the subject-matter).

<sup>154</sup> See Cornelia Kutterer, Protection of Consumers against Unfair Practices in e-Commerce, Intervention to the Conference: The European Legal Framework for e-Business and Innovation (27-28 Nov. 2006, Brussels) available at <http://docshare.beuc.org/Common/GetFile.asp?PortalSource=2530&DocID=9114&mfd=off&pdoc=1>

<sup>155</sup> Cf. Helberger supra note 152 (asserting that neither copyright law nor general consumer protection law currently offers a common, comprehensive protection standard for users of electronically protected content).