1. Introduction
Contracts play a fundamental role in copyright law, for without them the production and dissemination of works to the public would be most problematic. Indeed, contracts enable authors to transact with the party who is best suited to commercially exploit their works, as well as to set the conditions under which they want to disseminate these to the public. An age-old practice has developed among authors to conclude agreements with publishers and other categories of producers with a view to authorizing the latter to exploit their works. Such agreements usually take the form of either an assignment of rights in favour of the producer or an exclusive licence to exploit the latter to exploit their works. In recent years, rights owners have also taken up the practice of marketing their works to end-users subject to the terms of a standard form contract. Standard form contracts play an increasing role in the mass-market distribution of copyright works, particularly in the digital networked environment.

In application of the principle of freedom of contract, parties are free to negotiate the content of their agreement, so as to best suit their needs and to ensure the most efficient exploitation and dissemination of their works. Circumstances may occur, however, where the strict application of the principle of freedom of contract can lead to unfair results for at least one of the parties. It is indeed not uncommon to see that authors are compelled to grant the producer a broad transfer of rights on all existing and future works, with respect to all known, or yet to be invented, modes of exploitation. End-users are also faced with restrictive licensing terms, which purport to set aside the privileges that the law grants them pursuant to the limitations on copyright. The main source of friction derives from an imbalance in the bargaining power of the contracting party, where one party is able to impose the content of the agreement on the other party – usually the author and the end-user – usually to the latter party’s disadvantage.

How does European copyright law deal with such situations? Does European copyright law set formal or material norms with which contracting parties must comply in order to reduce the risk that the agreement be unreasonably burdensome for one of the parties? If the answer is in the affirmative,
what are these norms and do they provide sufficient protection? If not, would there be room to implement such norms at the European level?

This chapter analyses the current state of the law in Europe with respect to the contractual relationships between authors and producers on the one hand, and between rights owners and end-users, on the other hand. Section 2 follows this introduction and examines the relationship between authors and producers. More particularly, it takes a look at the acquis communautaire in this sector, at the interests involved in restrictive contractual practices, as well as the scope for harmonisation in this area. Section 3 deals with the relationship between rights owners and end-users and follows the same structure as the previous section: it presents the acquis communautaire, the interests at hand, and the room for legislative action. Section 4 contains some concluding remarks.

In view of the limited space available, this chapter will not consider the law governing transfers to collecting societies, nor the law applicable to copyright contracts concluded between right holders other than authors, such as book club agreements, film distribution contracts, merchandising deals, etc.

2. Contractual relationship between authors and producers

Authors are rarely in a position to commercially produce and distribute their own works. In order to bring their creations to the market, they often have no choice but to come into contact with those businesses or entities that might be willing to exploit and distribute these works, such as book, sound recording and software publishers, radio and television broadcasters, movie producers, museums and galleries, showbusiness promoters and different public or private corporations. The relationships between authors and producers are usually governed by individual contracts, in which the transfer of rights in favour of the producer constitutes one of the key provisions.

In principle, authors are free to dispose of their right as they see fit, that is, to enter into the contracts that will lead to the best allocation of those rights and to the best use of their work. An agreement concluded in the true spirit of the principle of freedom of contract normally presupposes that it has been reached at the close of a free and voluntary negotiation process conducted in

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1 This section is based on L.M.C.R. Guibault and P.B. Hugenholtz with the collaboration of M.A.R. Vermunt and M. Berghuis (2002), Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union, Study commissioned by the European Commission, Amsterdam.

good faith between equal and perfectly informed contracting parties. But this premise no longer holds true in today’s world. Indeed, most of the time, copyright contracts are not concluded between equal and perfectly informed contracting parties. Severe inequalities of bargaining power, of practical experience and of technical knowledge may have an impact on the authors’ capacity to express consent at the time when the contract is concluded. Producers have a tendency to demand broad transfers of rights from authors, arguing that broad transfers give them the legal certainty necessary to make the required investment for the production and distribution of protected works. In practice, only successful authors possess sufficient bargaining power to influence the content of the contract. Most often, authors find themselves in a weak bargaining position and must accept the terms imposed on them by the producer.

2.1 Authors’ contract law in the acquis communautaire

Exploitation contracts have so far never been subject to overall harmonisation within the Community. The European legislator has until now refrained from intervening on the issue of transfers of rights and of contractual agreements between authors and producers, because contractual and civil matters have traditionally fallen under the exclusive competence of the Member States. Member States have until now enjoyed the freedom to adopt under their own national legal systems protective measures to the benefit of authors or performing artists regarding either the scope of transfer of rights or the formation, execution and interpretation of contracts concluded with broadcasters, publishers and other producers.

As we shall see in Section 3.1 below, the Directive on the legal protection of computer programs addresses issues of contractual relations by granting

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5 P.B. Hugenholtz (2000), Sleeping with the Enemy, Oratie Amsterdam UvA, Vossiuspers AUP, p. 11.
minimum rights to users, as does the Directive on the legal protection of databases.9 By regulating the initial ownership of rights over cinematographic or audiovisual works and by allowing Member States to establish a presumption of transfer of rights from the authors and performers to the producer of the audiovisual work, the Directive on public lending and rental rights indirectly addresses the issue of the contractual relationship between authors and producers.10 Moreover, article 4 of this Directive establishes a new concept with respect to the rental of protected material, by granting authors an unwaivable right to equitable remuneration in case the author transfers his rights. The adoption of this provision was justified by the fact that it is usually not sufficient simply to determine who should be the initial owner of a right in a work. The legislation must in addition ensure that the first rights owner is actually able to benefit from his or her right.11

Although the contractual practices regarding the transfer of authors’ rights to producers are generally not regulated at the European level, the importance of contractual agreements as a means to determine the conditions of use of protected works clearly transpires from the text of some of the directives adopted in the field. The Cable and Satellite Directive12 contains several Recitals in which mention is made of contractual relations. Recital 9 proclaims that ‘the development of the acquisition of rights on a contractual basis by authorisation is already making a vigorous contribution to the creation of the desired European audiovisual area’ and that ‘the continuation of such contractual agreements should be ensured and their smooth application in practice should be promoted wherever possible’. Recital 19 of the same Directive sets out a number of principles of interpretation of international co-production agreements. According to the European lawmakers, international co-production agreements are to be interpreted in the light of the economic purpose and scope envisaged by the parties upon signature. However, the Directive contains no particular rule of interpretation for contracts pertaining to the division of rights between co-producers. Recital 30 reaffirms the need to promote contractual arrangements regarding the authorisation of cable retransmission. The only provision included in the text of the Directive regarding contractual agreements is article 12(1), according to which Member States are required to

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ensure by means of civil or administrative law, as appropriate, that the parties enter and conduct negotiations regarding authorisation for cable retransmission in good faith and do not prevent or hinder negotiations without valid justification.

The Directive on the harmonisation of certain aspects of copyright and related rights in the information society\(^\text{13}\) contains a number of references to the conclusion of contractual arrangements as a means to determine the conditions of use of protected works. However, it does not regulate the contractual relationship between authors and producers. Recital 30 of the Directive merely states that the rights referred to in the Directive may be transferred, assigned or subject to the granting of contractual licences, without prejudice to the relevant national legislation on copyright.

All in all, the main provisions of the existing directives in the field of copyright offer little or no protection to authors regarding the conclusion of exploitation contracts, nor do they contain any rule regarding the formation, execution and interpretation of exploitation contracts. They merely imply, and no more, that the economic rights of authors may be freely transferred to third parties. In some cases, these directives even have the effect of operating a presumption of transfer of rights to the benefit of certain categories of producers. Moreover, while the general rules of civil law can, in certain circumstances, be of some use to soften the harshness of restrictive agreements, these rules are generally not sufficient to protect the interests of authors in their contractual relations with producers. It is therefore not surprising to note that a number of national legislators have filled the gaps left by private law with the adoption of measures to protect authors in their contractual relations concerning the exploitation of their works.

2.2 Restrictive exploitation contracts and authors’ interests

The scope of rights that are assigned, conferred or otherwise transferred through contract by authors to producers constitutes one of the key aspects of the legal relationship involved in the exploitation and distribution of works and performances. Such transfers generally pertain to the creator’s economic rights: these are undeniably the most relevant rights to obtain in view of the commercial exploitation and distribution of a protected work. Indeed, without some form of transfer of right or of permission to perform certain acts with respect to the protected work, the producer would be committing an infringement of the creator’s right every time that he reproduced, communicated, displayed or distributed the subject matter to the public. However, the creator’s exercise of certain attributes of his or her moral right may also have

\(^{13}\) O.J.C.E. L 167/10, 22 June 2001.
an impact on the producer’s capacity to exploit the work efficiently. Therefore, the producer may require that the author not only agree to a transfer of his economic rights, but also to a waiver of certain attributes of his moral rights. In addition, authors are sometimes asked to waive the right to remuneration that the law grants them instead of an exclusive right on their subject matter.

To minimise the risk of producers taking unfair advantage of their stronger position, authors can be recognised as a weaker party to transactions relating to the exploitation of their productions. It is indeed no use granting rights to authors if the latter are unable to draw from the exploitation of these rights all the benefits to which they are entitled under the law. In addition to the general principles of contract law, many Member States have implemented a number of specific measures designed to protect authors and performing artists in their contractual relations with publishers, broadcasters and producers. Such measures of protection range from default rules applicable to publishing contracts, such as those codified in the early 20th century in Germany, to the imperative rules for the protection of authors, found in France, Belgium, Spain and other countries of the droit d’auteur tradition. Among the protective measures adopted in these and other Member States are rules governing formalities, restrictions on transfers, remuneration, interpretation (scope) of contracts, effect of transfer in relation to third parties, and termination of contract. In application of these rules and the general rules of contract law, courts in various Member States of the European Union have consistently ruled that contracts between authors and publishers, which were concluded in ‘analogue’ times, do not cover new electronic uses, such as the right to communicate works on-line.¹⁴

2.3 Towards a European authors’ contract law?
Existing disparities in the laws relating to copyright contracts may lead to different outcomes depending on which national law applies to the initial allocation of rights and further transfer of rights in international copyright cases. Because copyright contracts are primarily governed by the national laws of the Member States, such disparities may have an adverse effect on the working of the Internal Market. The possibility of transferring rights according to several mechanisms, the existence in some Member States of presumptions of transfer and of waiver of rights and the varying degrees of regulation applicable to contractual practices in the field may all carry consequences for the exploitation of works and performances within the European Community.

¹⁴ For a more comprehensive overview of the protective measures in force at Member State level, see Guibault and Hugenholtz, supra note 1.
2.3.1 IMPACT OF DISCREPANCIES ON THE INTERNAL MARKET

It is impossible, without conducting an economic survey among stakeholders, to assert with any certainty whether the existing differences in the law of copyright contracts in the Member States of the European Union affect the functioning of the Internal Market. Intuitively, we would tend to believe that the disparities in national legislation may not be so important as to affect the efficient functioning of the Internal Market. A first indication that the impact on the Internal Market may be somewhat limited is that, to our knowledge, neither the European Court of Justice nor the national courts have had to decide a case where the application of the rules on copyright contracts of one Member State raised problems in another Member State.

A second indication comes from the fact that there appears to be a general consensus among Member States on a number of important issues. For example, the requirement of form of a transfer of right should cause no problem, since the majority of Member States require formalities of some sort (usually a written deed) for assignments or licences to be valid, or validly proven. With respect to the substance of the contract, contracting parties can also rely on the fact that a majority of States only permit the subsequent transfers of rights to third parties if the author has given his consent, unless such subsequent transfer is part of the sale of the whole or part of the producer’s business. A majority of Member States allow for the termination of contracts in case the transferred right is not used within a certain period. Most countries also permit the waiver of certain attributes of the authors’ or the performers’ moral rights in the context of copyright contracts, subject to certain conditions and restrictions. In most Member States, even those of the copyright tradition, courts are instructed or inclined to interpret transfers of right in a restrictive manner. The restrictive interpretation of copyright contract may be based on an express provision laying down the in dubio pro auctore principle or the ‘purpose-of-transfer’ rule, or on the general principles of contract law, such as bona fides (good faith), fairness and equity, or the generally accepted notion that the law has a duty to protect the weaker party.

The greatest uncertainty that contracting parties may have to face in the context of cross-border activities arises from differences in rules on the ownership of rights in works created under employment, rules on the scope of the transfer and the ability to transfer rights in future works or unknown modes of exploitation, and rules on remuneration. Uncertainty may also arise from the fact that, in some instances, author-protective measures constitute mandatory rules that may not be set aside by contract, while in other countries, they are merely default rules. To illustrate this point, the British Music Rights Society, which represents British composers, songwriters, music publishers, and their collecting societies, has given the following example:
UK law requires the assignment/exclusive licence to be in writing (ss 90 (3) and 92 (1) CDPA respectively). In contrast, under German law it is not possible to assign copyrights (§ 29 UrhG), and a licence cannot encompass any form of exploitation not in existence at time of the granting of the licence (§ 31 (4) UrhG). This example shows the difficulty in harmonising this aspect of contract law, regardless of the complex nature and finesse of copyright law. Additionally, in our experience there has been no evidence of problems caused by this difference in law.\textsuperscript{15}

The lack of legal certainty due to disparities in national laws may to some extent be compensated by the fact that parties have the freedom to choose the law applicable to copyright contracts. This freedom, however, may not – and perhaps should not – be without limitation. The Rome Convention of 1980 governs most aspects relating to copyright contracts, except clearly non-contractual issues such as the determination of authorship and ownership. The freedom to choose the law applicable to contracts is central to the Convention, albeit subject to certain limitations: rules of mandatory law may not be circumvented; priority rules prevail. Whether and to what extent national rules on copyright contracts qualify as such is debatable. In the end, this is for the courts to decide.

A third indication of the limited impact on the Internal Market of legislative differences in the area of copyright contract law could be inferred from the discussions that have recently taken place concerning the need for European action in the area of general contract law.\textsuperscript{16} Several documents originating from governmental bodies, businesses and consumer groups were submitted in response to the European Commission’s Communication on European Contract Law.\textsuperscript{17} Generally speaking, the governmental bodies dealing with the implications for the Internal Market of diversities of contract law affirmed that there are problems, or at least that there may be. However, only a minority of contributions mentioned specific problems. Among the problems mentioned by the commercial sector were diversity in the implementation of the directives and the different applicable laws and jurisdictions, which could prove to be a serious impediment to cross-border trade. Indeed, the implementation of most if not all directives has led to some discrepancies between


\textsuperscript{17} See: European Commission, Summary of the responses to the Commission’s Communication on European contract law (COM(2001) 398 final), Brussels, 29 April 2002.
the Member States. Such discrepancies are almost unavoidable, for Member States are in principle free to implement European directives as they see fit. Interestingly, the need to harmonise existing rules on copyright contracts was not mentioned at all during the consultations.

2.3.2 SCOPE FOR HARMONISATION

Considering the scant evidence that legislative differences in the area of copyright contract law lead to significant discrepancies in the Internal Market, there may be little scope for harmonisation of the rules on copyright contracts across the European Member States at this stage. The harmonisation of this body of rules may be unnecessary and even undesirable for two additional reasons. First, any harmonising measure in the field of copyright contract law must rest on a solid bedrock of harmonised substantive copyright law. Although the European legislature has been successful in approximating important aspects of the law of copyright and related rights, most recently by adopting the Directive on the harmonisation of copyright and neighbouring rights in the Information Society, important areas of the law remain un-harmonised.

This is particularly true for two main pillars of copyright that are particularly relevant, and in fact, directly related to the field of copyright contracting: initial ownership of rights and moral rights. It is hard, if not impossible, to imagine harmonisation of copyright contract law without prior, or simultaneous, approximation of rules on moral rights and ownership which have not been harmonised at the European level, with the exception of the rules on ownership of audiovisual works. The collective administration of rights constitutes another aspect of the exploitation of copyright that is yet to be addressed at the European level. It is a known fact that the nature and scope of the agreements signed between members and collective societies vary considerably from one society to the next and from one country to the next.18 In other words, to effectively address the issue of copyright contracts, the European legislator would have to intervene in copyright law on a very broad scale, or run the risk of adopting piecemeal and less satisfactory measures. In addition, any further harmonisation of the rules on copyright would risk leading to similar inconsistencies of implementation at the national level as the ones previously observed, whereby the expected level of harmonisation would fail to be achieved.

Second, the principle of subsidiarity provides a strong argument against harmonisation. Most aspects of copyright contract law fall indeed within the

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18 See: L. Guibault (1997), Agreements between Authors or Performers and Collective Rights Societies: Comparative Study of some Provisions, Report prepared for ALAI Canada, Québec; ALAI Canada, p. 84.
exclusive competence of the national legislatures. Copyright contract law is, strictly speaking, part of the law of contracts in general. In addition, the legal protection granted to authors and performing artists derives, in many jurisdictions, from labour and social law. Moreover, many aspects of copyright contract law are predicated, at least in part, upon cultural considerations, such as the desire to protect independent authorship against increasingly dominant media and entertainment conglomerates. At present, apart from a few areas of special European concern, such as consumer law, commercial agency and electronic commerce, contract law remains firmly a matter for the national legislatures. Whereas the principle of subsidiarity is a central element in matters of pure contract law, it is particularly compelling in matters of social and cultural policy. In view of the fact that there seems to be no real indication that the functioning of the common market urgently requires the approximation of the laws of Member States in this area, it is therefore questionable whether an action from the European legislator towards the harmonisation of the rules on copyright contracts would be consistent with article 5 of the Treaty establishing the European Community.

In sum, issues of authors’ contract law are best addressed at the national level, since the national legislator is in the best position to reconcile the principles of copyright law with those of contract law, labour law and social law, while taking account of the relevant cultural considerations. This was also the view adopted by the European Commission, for in its 2004 Communication to the Parliament and Council on the management of copyright and related rights in the Internal Market, it declared that:

For the time being, the degree of common ground regarding the rules on copyright contracts across Member States appears to be sufficient, so as not to necessitate any immediate action at Community level. While, at this stage, national developments have not given rise to any particular concern from the point of view of the functioning of the Internal Market, the Commission will nevertheless have to continue to keep the matter under review.

It should also be emphasised that the conclusion of collective agreements between representatives of authors or performers on the one hand and

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publishers, broadcasters or producers on the other, tends to provide the most satisfactory solution for all parties concerned. Recent experience shows that satisfactory collective agreements are often reached in the absence of any author-protective measure, as in the Netherlands, but also sometimes despite the very existence of elaborate author-protective measures, as in France. Finally, it should be stressed that, in deference to the principle of freedom of contract, the most sensitive and crucial issue in a copyright contract should always remain exempt from any type of legislative intervention: the actual amount of remuneration paid to the author or performer. Consequently, collective bargaining offers perhaps the only guarantee that the interests of authors will be duly taken into account when the time comes to determine the level of remuneration.

3. Relationship between rights owners and end-users

Increasingly, copyrighted works are put on the market subject to contractual terms of use. In fact, the deployment of Digital Rights Management (DRM) systems not only presupposes the application of technological protection measures to protected works, but it also entails the use of contractual agreements spelling out the acts that users are permitted to accomplish with respect to the licensed material. The digital network’s interactive nature has created the perfect preconditions for the development of a contractual culture. Through the application of technical access and copy control mechanisms, rights owners are capable of effectively subjecting the use of any work made available in the digital environment to a set of particular conditions of use. While the Information Society Directive contains extensive provisions on the protection of Technological Protection Measures (TPMs) and rights management information, it fails to deal with the use of contracts in the context of DRM systems or otherwise. At most, the Directive contains a few statements

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encouraging parties to conclude contracts for certain uses of protected material. Since neither the Directive nor the relevant international instruments on copyright and related rights, such as the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), prescribe any rules on the subject, the specific regulation of licensing contracts has been left to the Member States. Thus, the contractual framework generally remains voluntary and market-driven, knowing that the principle of freedom of contract constitutes a cornerstone of European contract law.

Although the Information Society Directive does not regulate the issue of end-user contracts as such, it does create a legal framework within the boundaries of which rights owners are able to license their rights to end-users. This framework essentially consists in rules regarding the scope of protection of copyright and related rights, including limitations on rights, as well as TPMs, most of which are default rules that parties to an agreement are free to set aside. How does this framework influence the form and content of end-user licences used in the context of DRM systems? To what extent do these contractual arrangements take account of the interests of end-users? Are most contractual arrangements compatible with the general policy goals pursued by the Directive?

3.1 End-user contracts in the acquis communautaire

There exists very little acquis communautaire in the area of licensing contracts for the end-use of copyright-protected material. The absence of specific rules on this topic may partly be explained by the fact that contract law is traditionally perceived as a matter falling under the competence of the individual Member States and that the mass-marketing of copyright-protected works subject to the terms of a licence of use is a relatively recent phenomenon. The lawmakers of the European Union intervened for the first time in contractual relations between rights owners and end-users with the adoption in 1991 of the Computer Programs Directive. Article 9(1) of the Directive expressly provides that ‘any contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5 (2) and (3) shall be null and void’.25 Aside from the growing practice of licensing computer programs to users, no significant contractual practice concerning the use of other copyrighted material had developed at that time to justify a clarification as to the imperative character of other limitations. In view of the growing practice of marketing mass-market

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25 See also Recital 26 of the Directive: ‘Whereas protection of computer programs under copyright laws should be without prejudice to the application, in appropriate cases, of other forms of protection; whereas, however, any contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5 (2) and (3) should be null and void’.
databases subject to contractual terms of use, however, the European Community adopted a similar provision under the Database Directive. Article 15 states that ‘any contractual provision contrary to Articles 6 (1) and 8 shall be null and void’.

Since then, more and more works of all kinds are distributed to the mass-market under conditions set by contractual agreements, particularly in the online environment. One might have expected that, in light of this growing practice, the European legislator would have addressed the issue of the relationship between the rules of copyright law and contract law and clarified the weight to give limitations on copyright. The Information Society Directive contains, however, very few provisions referring to the conclusion of contractual licences as a means of determining the conditions of use of copyright-protected works. The Directive makes no mention of the possibility of concluding licences of use with respect to the exclusive rights granted therein. With respect to the limitations on copyright, Recital 45 declares that ‘the exceptions and limitations referred to in Article 5(2), (3) and (4) should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the right holders insofar as permitted by national law’. The text of this Recital gives rise to interpretation. Some commentators believe that, according to Recital 45, the limitations of articles 5(2) to 5(4) can be overridden by contractual agreements. Others consider that, pursuant to this Recital, the ability to perform legitimate uses that do not require the authorisation of rights holders is a factor that can be considered in the context of contractual agreements about the price. Whether the requirement that a contractual agreement must have the goal of securing the fair compensation of rights holders means that contractual agreements with the purpose of overriding legitimate uses are impermissible is, according to these authors, questionable.

In the specific case of the limitations adopted in favour of non-profit-making establishments such as publicly accessible libraries and archives, Recital 40 specifies that such limitations should ‘not cover uses made in the context of on-line delivery of protected works or other subject matter. Therefore, the conclusion of specific contracts or licences should be promoted

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26 J. Gaster (1998), Der Rechtsschutz von Datenbanken: Kommentar zur Richtlinie 96/9/EG mit Erläuterungen zur Umsetzung in das deutsche und österreichische Recht, Munich, Carl Heymanns Verlag, p. 186.


which, without creating imbalances, favour such establishments and the disseminative purposes they serve’. As the Explanatory Memorandum to the Proposal for a Directive specifies, this does not mean that libraries and equivalent institutions should not engage in on-line deliveries. However, it is the Commission’s opinion that ‘such uses can and should be managed on a contractual basis, whether individually or on the basis of collective agreements’. In practice, representatives of public libraries and archives, and of publishers’ associations, have signed contractual agreements relating to the use of copyright-protected material in several Member States, like Germany, the UK and the Scandinavian countries.

Recital 53 and article 6(4) of the Directive both deal with the use of technological measures to ensure a secure environment for the provision of interactive on-demand services. The first paragraph of article 6(4) also encourages the development of a contractual practice between rights holders and users when it states that ‘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 view of the wording of article 6(4), the European Commission seems to put the emphasis on the negotiation of agreements between rights owners and parties concerned as a means to achieve its objective of encouraging rights owners to provide the means to exercise certain specific limitations on copyright. The way to contractual negotiations is only realistic when users are easily identifiable, like libraries and archives, broadcasting organisations, and the like. However, this is not necessarily the case for all users who may invoke the right to benefit from a limitation pursuant to article 6(4), like private individuals who wish to make a private copy.

Article 6(4), fourth paragraph, of the Directive takes away the obligation of rights owners and Member States to ensure that the beneficiaries of certain enumerated exceptions are given the means to exercise such limitations in respect of works protected by a TPM, whenever such works are ‘made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them’. The term ‘agreed contractual terms’ in this provision could be interpreted as requiring the negotiation of a licence of use. In practice, however, most contracts in the digital networked environment take the form of ‘take-it-or-leave-it’ licences, where users only have the choice of accepting or refusing

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the terms of the licence presented to them on the Internet. While this provision establishes a rule of precedence between the use of contractual arrangements and the application of technological protection measures, no rule has been established anywhere in the Directive concerning the priority between contractual arrangements and the exercise of limitations on rights.

While the initial intention of the European legislator appears to have been to encourage economic players to move towards a more finely tuned and individualised form of rights management, it is doubtful whether the legal framework actually put in place by the Directive is capable of catering to the interests of all parties involved, especially those of users. After only a few years following the adoption of the Information Society Directive, the Commission made the following observation:

At the same time, in their present status of implementation, DRMs do not present a policy solution for ensuring the appropriate balance between the interests involved, be they the interests of the authors and other right holders or those of legitimate users, consumers and other third parties involved (libraries, service providers, content creators…) as DRM systems are not in themselves an alternative to copyright policy in setting the parameters either in respect of copyright protection or the exceptions and limitations that are traditionally applied by the legislature.30

3.2 Restrictive licensing practices and end-user interests
Besides restricting end-users to a private and non-commercial use of the protected material, end-user licences typically contain a prohibition on reproducing, copying, distributing, publicly communicating, transforming or modifying the content without prior written permission from the rights owner. Although the wording used in most licences does not specifically prohibit such acts as the use of a work for educational purposes, or for purposes of quotations, news reporting, parody, private study or research, a general prohibition on any kind of reproduction or communication to the public could be interpreted as such. This wording seems to imply that protected works made available on these on-line services are accessed and used only by passive consumers, who limit themselves to reading, listening to or viewing the downloaded material. This assumption, however, does not hold true in practice. Mass-marketed protected material is not only accessed and used by consumers, but also by professional and semi-professional users, such as journalists, writers, composers, librarians, teachers etc. As the digital environment keeps developing, more and more protected material will be made available

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on-line to an ever wider public. End-users are not merely consumers, understood in the strict sense of the word, but encompass a broad range of categories of users. Restrictive contract terms may therefore impede such legitimate uses as music review, media studies and film critique, to name just a few examples. In order to be able to make any kind of legitimate use of a work, end-users should unequivocally be allowed to benefit from the limitations on rights recognised in copyright and related rights law.

In practice, the exercise of this type of control over the use of copyrighted works could bring about several undesirable consequences such as preventing competition or encroaching upon the users’ fundamental rights. When a rights owner decides to make his work accessible to the public, he must do so in a manner that will not hinder competition. As an author points out, DRM can raise competition law issues because ‘copyright holders have, by the very nature of the rights they hold in their copyright works, a monopoly over what can and cannot be done with their work. Adding a DRM system to an electronic song, which dictates on what medium it can be used while preventing it from being converted to another format, looks set to cause problems.’ Accordingly, a contractual prohibition on quoting or making reproductions of a work for legitimate purposes such as comment, criticism or news reporting, would not be acceptable if it resulted in a reduction in competition and manifested an anti-competitive behaviour on the part of the licensor.

A restrictive licence of use may also affect the users’ fundamental rights, more particularly their freedom of expression. The users’ freedom of expression might be considered to be affected if, for example, individual licensees were unable to voice an opinion, a criticism or a comment on a matter touching the public interest. Numerous court decisions emphasise that not only the message conveyed, but also the form of expression are recognised as a protected exercise of freedom of expression under article 10 of the European Convention on Human Rights (ECHR). A contract term that restricts or

34 Müller & Ors v Switzerland, European Court of Human Rights, 24 May 1988, Series A no. 133, § 27; Oberschlick v Austria, European Court of Human Rights, 23 May 1991, Series A No. 204, § 57 where the Court writes: ‘Article 10 (art. 10) protects not only the substance of the ideas and information expressed, but also the form in
prohibits the exercise of a statutory limitation on copyright essentially takes away the privilege of the user to accomplish a particular act with respect to a copyrighted work. Arguably, rights owners expect that the grant of such licences of use will allow them to exercise greater control over the use of their work so as to increase exploitation revenues and to prevent piracy. While rights owners are certainly entitled to protect their economic interests, privacy or reputation within the bounds set by copyright law, it is highly questionable whether a restriction on the right to quote or to make a parody or news report would be considered ‘necessary’ and ‘proportional’ to the interest served by the contract, in the sense of article 10(2) of the ECHR.

The contractual language used in a majority of licences may have a chilling effect on users who would like to use the protected material for otherwise legitimate purposes than strictly private non-commercial use.

3.3 Preserving the balance of interests
The widespread use of restrictive standard form contracts in the on-line environment poses a threat to some of the basic objectives of copyright policy. If technological measures are prone to undermine essential user freedoms, the same is true *a fortiori* for standard form licences. The Legal Advisory Board (LAB) in its *Reply to the Green Paper* had already warned that ‘there is good reason to expect that in the future much of the protection currently awarded to information producers or providers by way of intellectual property will be derived from contract law’.35 In fact, the use of DRM systems in combination with on-line standard form contracts may accentuate information asymmetries, indirect network effects, high switching costs and lock-ins, leading to market failures and thereby preventing well-functioning competition.36 Absent certain limits to freedom of contract, lawful end-users may be forced to forego some of the privileges recognised by law, in order to be able to use protected material.

In order to restore the balance of interests between rights owners and lawful end-users, the relationship between the protection by copyright law, TPMs, and contract needs to be re-assessed. What would be the most appropriate measure to achieve the objective of restoring the balance of interests? In which

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35 Reply to the Green Paper on copyright of 20 November 1996 of the LAB, § 9A.

body of law would such a measure best be integrated: copyright law, contract law or consumer law? In the following pages, we discuss the pros and the cons of some of the options available to the European legislator to limit the freedom of contract in order to preserve the balance of interests between rights owners and content providers, on the one hand, and lawful end-users of protected material, on the other hand. These options vary between adopting a rule in consumer protection law; regulating standard form contracts in private law; declaring limitations on copyright imperative; and promoting the development and acceptance of codes of best practice.

3.3.1 CONSUMER PROTECTION RULE

As copyrighted works are increasingly being distributed on the mass market subject to the terms of standard form contracts, end-users of protected material are likely to be confronted more and more by contract clauses that attempt to restrict the privileges normally accorded to them under copyright law. The only choice of an end-user is often to refuse to transact under the conditions set out in the standard form contract. In view of the users’ inferior bargaining power and information asymmetry, the question is whether and to what extent the introduction of a rule in consumer protection law could improve the user’s position with respect to such restrictive contract clauses. Consumer protection rules typically purport to operate on two levels: first, to increase the consumer’s pre-contractual information and, second, to offer protection against unreasonable one-sided contract terms. A Community legislative intervention could be envisaged on both levels, namely to impose an obligation to inform consumers of the licensing conditions before they proceed to a purchase, to regulate the content of the licences.

Imposing a duty on rights owners to disclose particular information or to observe specific formalities at the time of the conclusion of the standard form contract does contribute to reducing inequalities between parties, insofar as it increases transparency and compensates for the lack of information or experience on the part of the end-user. While they were absolutely unknown to the area of copyright just a few years ago, consumer protection measures related to copyright matters have recently become more frequent. This is the case for example of article 95(d) of the German Copyright Act, which, as a result of the implementation of the Information Society Directive, now requires that all goods protected by technological measures be marked with clearly visible information about the properties of the technological measures. Not only have legislative solutions been put forward to this end, but judicial decisions also play a role in protecting consumers. In France, the Court of Nanterre upheld a complaint introduced by the French consumer association, UFC Que Choisir, against Sony UK and Sony France on the ground that the former had failed to inform consumers about the lack of interoperability of their products and
services to other devices. The court found Sony liable for misleading the consumers by ‘the fact that Sony did not explicitly and clearly inform the consumer that the music players sold could read only the music files downloaded on the only legal site Connect’. Sony UK was also held liable for failing to explicitly state in its contract that the music files downloaded from the Connect website could be read only by music players with the dedicated Sony trade mark.37

However, the obligation to supply information imposed by German law or by the French courts has so far addressed only the restrictions imposed by technology and not the restrictions imposed inside contractual agreements. These rules do not eliminate the risk that rights owners abuse their economic and bargaining position by making systematic use of licence terms that are unfavourable to end-users.38 Since, in practice, pre-contractual information regarding restrictive terms of use of copyrighted material would only have limited effect on the end-users’ situation, another type of intervention may be called for. One possibility could be to extend the regulations concerning unfair consumer contract terms to cover copyright matters. In principle, the provisions of the European Directive on unfair contract terms39 cover mass-market licences for the use of copyrighted material, provided that the conditions of application are met. A term is to be regarded as unfair under the Directive if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract to the detriment of the consumer. The list presented in an annex to the Directive is meant to give an indication of the clauses that are deemed or that are presumably deemed abusive or unfair. Unfortunately, none of the terms appearing in this annex is likely to apply in the case of a consumer faced with a restrictive copyright licence term.

The Community legislator could introduce an item in the list of unfair clauses, according to which a term in a non-negotiated contract would be deemed unfair if it departed from the provisions of the copyright act. This provision could be incorporated into the ‘black’ list of contractual clauses, for example, those that are deemed unfair under consumer protection law and where the presumption cannot be rebutted. Such a presumption of unfairness would have the advantage of having a broad application, relating not only to limitations on copyright, but also to any other provisions of the copyright act.

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such as those concerning the term of protection. One inconvenient aspect of this option would be, however, that it would only apply to consumers, that is, ‘any natural person who, ( . . . ), is acting for purposes which are outside his trade, business or profession’. Accordingly, a handicapped person could invoke this protective measure, but only insofar as she acts for purposes which are outside her trade, business, or profession. Should she need to use a protected work – albeit lawfully obtained via an on-line service under restrictive terms – for professional purposes, the provision would be of no help. Unless the national law of the Member States was expressly declared to apply, this provision would therefore not benefit legal persons and professionals, like small businesses, public libraries, archives and educational institutions that make use of the services of on-line content providers and that may be disadvantaged by the restrictive licence terms.

3.3.2 REGULATING CONTRACTUAL AGREEMENTS

To make sure that not only consumers but all types of end-users of copyrighted material, be they professionals, public libraries, archives or educational institutions, benefit from a protective measure against the use of restrictive terms in standard-form contracts, a second option could be to introduce a provision in the general contract law of the Member States. The contract law in most Member States regulates a number of specific contracts, like lease, sale, insurance and labour contracts. Like the consumer protection rules, the rules governing these specific categories of contracts purport to ensure the proper functioning of the pre-contractual phase, to regulate their content, and to impose formalities where necessary. Member States could be encouraged to introduce a section in their national contract law on the subject of copyright licences. A rule of contract law could be adopted to declare any clause in a non-negotiated licence null and void which, contrary to the requirement of good faith, causes a significant imbalance in the parties’ rights and obligations arising under the contract to the detriment of the other party. Alternatively, the rule could simply dictate that any contractual clause in a standard-form contract is deemed unfair if it departs from the provisions of the national copyright act.

The main problem with this option is that contract law is a matter generally not considered to fall under the competence of the European Union. Although some efforts have been deployed over the past decade to approximate the laws of the Member States in the field of contract law, the European Community has so far been only indirectly involved in the process.40 To date, the initiative

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has been limited to rationalising and tidying up the *acquis* in the field of consumer protection and to producing optional standard contract terms and conditions. This situation renders the adoption by the European Community of a new rule on contract law regulating copyright licences rather unlikely. Moreover, since the basic rules on contract law must still be officially harmonised across the Member States, the creation of such a specific set of rules on copyright licences may not be called for at this time.

3.3.3 DECLARING LIMITATIONS IMPERATIVE

A third option to restore the balance of interests inside on-line contractual agreements would be to declare some or all limitations on copyright and related rights imperative.\(^{41}\) European copyright law recognises very few imperative limitations. These flow from the Computer Programs Directive and the Database Directive. According to a provision in the two Directives, any contractual provision contrary to the provisions laying down these limitations is null and void. The Information Society Directive contains no imperative limitation on copyright. By contrast, some limitations in the Information Society Directive are expressly default rules, like article 5(3)(n), which makes libraries and their patrons dependent on the benevolence of the rights holders. As a result, the vast majority of limitations on copyright in the *acquis communautaire* have been declared neither expressly imperative nor optional. In view of the silence of the Information Society Directive and a general lack of relevant case law, the status of the limitations listed in article 5 remains unclear. Even the status inside contractual relations of the mandatory provision of article 5(1) of the Directive has yet to be clarified.

Interestingly, two Member States, Belgium and Portugal, have actually dealt with the issue in their national copyright laws. In its Act of 1998 implementing the Database Directive, Belgium not only declared imperative every mandatory and optional limitation relating to databases, but it also proclaimed the imperative character of most other limitations included in the Copyright Act.\(^{42}\) According to article 23bis of the Act, articles 21, 22, 22bis and 23, §§ 1er and 3 have a mandatory character. Unfortunately, since its enactment, article 23bis of the Belgian Copyright Act gave rise to no case law, although a few good occasions to test it might have been overlooked. However, with the implementation of the Information Society Directive, and particularly of its article 6(4), fourth paragraph, the Belgian legislator appears to have made one


\(^{42}\) Belgian Copyright Act of 1994, as modified, art. 23bis.
major step backwards in this matter. A second sentence was indeed added to the original text of article 23bis of the Act, which now reads as follows:

The provisions of articles 21, 22, 22bis and 23, §§ 1er and 3 have a mandatory character. It is, however, possible to deviate from these provisions on a contractual basis in relation to works made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

This amendment is probably the result of an erroneous interpretation of the intention of the European legislator. The Belgian legislator must have confused, in article 6(4), fourth paragraph of the Directive, the absence of obligation to provide the means to benefit from a limitation in cases where the work is made available on-line according to the terms of a contract, with the possibility to contract around the limitations. The first measure has in fact little to do with the second. If a rights holder does not have to provide the means to exercise a limitation, either by providing a decryption key or a TPM-free version of the work, this does not imply that rights holders should be free to contractually take away the privileges granted by the law. In any case, all this leads to an odd result. While the Belgian legislator recognises the importance of protecting the beneficiaries of limitations on copyright in their off-line contractual relations, it leaves basically intact the freedom of contract in on-line relationships, where the need for protection of users is much more pressing. Consequently, the Belgian law is probably doomed to remain a dead letter.43

The provision of the Portuguese Copyright Act is more convincing and probably much more effective than its Belgian counterpart. Article 75(5) of the Portuguese Act No. 50/2004 declares null any unilateral contractual provision eliminating or impeding the normal exercise of the free uses mentioned in the Act. As the wording indicates, this provision applies with respect to all limitations recognised in the Portuguese Copyright Act. This legislative modification occurred during the implementation of the Information Society Directive, and is premised on the observation that often the unequal bargaining power of the parties will mean that only one of them will be able to determine the terms of a contract to the possible detriment of the other party. As Akester points out, although it does not expressly say so, this provision is meant to avoid unilateral decisions as regards exceptions and limitations.44

But the Portuguese legislator showed more consistency in its policy decisions, when implementing article 6(4), fourth paragraph of the Information Society Directive. Article 222 of the Portuguese Copyright Act provides as follows:

This scheme does not apply to copyright works made available to the public on agreed contractual terms, in such a way that members of the public may access them from a place and at a time individually chosen by them.

The two Portuguese provisions precisely fill the gap left by the Information Society Directive. They ensure that, while rights owners are under no obligation to provide the means to exercise certain limitations with respect to a work that is protected by a TPM and made available on-line on agreed contractual terms, they may not eliminate or impede the normal exercise of the free uses mentioned in the Act on the basis of these ‘agreed contractual terms’. In other words, rights owners may protect their works by TPMs, but they may not contractually prohibit users from exercising a limitation.

While the copyright laws of the other Member States do not expressly recognise the imperative character of limitations on copyright, the view that limitations form an integral part of the balance of interests established by the copyright system, from which contracting parties cannot derogate by way of standard-form licences, is slowly gaining acceptance throughout the European Union. While this position is generally well-admitted in countries following the common law tradition, a change of perception in this direction is noticeable in a number of countries following the droit d’auteur tradition. Belgium and Portugal are, of course, prominent examples. In Germany, constant jurisprudence of the Federal Supreme Court and the Federal Constitutional Court emphasises the fact that limitations are an integral part of the German copyright system and that the balance established by the law should not be disrupted without careful consideration. Even in France, where limitations were until recently invariably construed as undesirable but necessary exceptions to the principle of the rights owner’s exclusivity, Professor Lucas now writes:

Le droit d’auteur est un droit réel opposable à tous. Ses limites devraient, en bonne logique participer de la même nature, et donc être tracées par la loi indépendamment du contrat conclu par l’utilisateur avec le titulaire du droit.


In view of the above, the express recognition of the imperative character of statutory limitations may not encounter as much resistance on the part of European lawmakers as one might have initially feared. Should the European legislator decide to declare limitations on copyright imperative in contractual relations, two issues should still be addressed: first, whether all limitations recognised in Community copyright law should be declared imperative; and second, whether such a declaration should apply to all types of contracts, irrespective of whether they are the result of a negotiation process or not.

With respect to the first question, the argument has often been made in the legal commentaries that while limitations represent the legislator’s acknowledgment of the users’ legitimate interests, not all of these interests should be given the same weight.\textsuperscript{47} Since quite a number of limitations included in the Information Society Directive would probably qualify as ‘minor reservations’, there would be no justification to grant these limitations an imperative character. On the other hand, the European legislator could consider recognising the imperative character of the limitations that reflect the users’ fundamental rights and freedoms enshrined in the ECHR, as well as those that have a noticeable impact on the Internal Market or concern the rights of European consumers. This proposal could be without prejudice to article 6(4), fourth paragraph, of the Information Society Directive, which might remain unaffected. However, such a regime would safeguard the integrity of the European legislator’s policy goals with respect to the users’ interest. For, if the legislator has deemed it appropriate to limit the scope of copyright protection to take account of the public interest, there would be no reason in principle why private parties should be allowed to derogate one way or another from the legislator’s intent.

Concerning the second question of whether the imperative character of the limitations on copyright should be made opposable to all types of contracts, the risk of such a broad rule would be that it might frustrate the negotiation and conclusion of valuable contracts.\textsuperscript{48} The principle of freedom of contract and party autonomy should prevail wherever it does not conflict with public policy or public order. When a licensor and a licensee negotiate with a view to concluding a bargain, they usually understand the nature of their respective


\textsuperscript{48} Guibault (2002), \textit{supra} note 33, p. 194.
rights and obligations, including those rights that the licensee agrees to forego. In principle, neither party would enter the agreement if the bargain were not favourable to each of them in the circumstances. On the other hand, the widespread use of standard-form contracts has the potential to severely upset the traditional balance established by copyright law and of standing as an obstacle to the accomplishment of the full purposes and objectives of the legislator’s public policy. These contracts typically attempt to redefine the boundaries of the copyright protection. Consequently, limitations should be declared imperative only with respect to standard-form contracts. This proposal would not only coincide with Portugal’s solution, but also with the position adopted in by the courts in Denmark, where judges have ruled that limitations cannot be unilaterally contracted out by way of imposing restrictive terms and conditions.

3.3.4 PROMOTING THE ADOPTION OF CODES OF CONDUCT
As a last possible option, which could be combined with the previous options, Member States might encourage industry players to develop codes of conduct, which would promote the adoption of fair contractual terms. Self-regulation of the private sector could be more efficient, better fit the electronic environment, and reduce rule-making and enforcement costs. An example could be taken from the Directive on electronic commerce that promotes the adoption of codes of conduct in relation to the conclusion of electronic contracts and the notice and take-down procedures elaborated with respect to the liability of online intermediaries. An additional aspect of this self-regulatory mechanism could deal with the issue of on-line contracting on copyrighted material, and might codify certain imperative user freedoms.

4. Conclusion
As we have seen in this chapter, the current European acquis communautaire is mostly silent on the subject of the contractual relationship between authors and producers on the one hand, and between rights owners and end-users, on the other hand. In other words, there are, at the European level, very few norms that can serve to protect the weaker party to a restrictive exploitation contract or licence of use. With regard to exploitation contracts, authors have long been recognised as the structurally weaker party in their contractual relationship with producers. The silence of the European legislator has therefore been filled in several Member States by the introduction of protective rules in the national copyright act. Moreover, the general principles of civil law often provide additional protection, albeit not always tailor-made to their specific needs. Since there exists a definite common ground of rules among the Member States with respect to the norms applicable to the contractual relationship between authors and producers, and since as a consequence, there is
no evidence that the legislative differences affect the Internal Market, the European Commission has clearly indicated that no action in this sense would be necessary at the present time.

The situation differs with regard to restrictive licences of use. The practice of marketing works to the general public subject to the terms of a licence of use is a relatively new phenomenon, where the end-user is slowly emerging as the weaker party in the transaction. So far, only Portugal has adopted a measure to prevent the use of standard-form contracts excluding the exercise of limitations on copyright to the detriment of the user. In view of the potentially chilling effect that such restrictive licences may have on the end-user’s actions, it may be desirable to adopt a rule protecting the end-users’ interests. Several options were presented in the previous section that could provide a basis for legislative action. In our opinion, the most efficient measure would be to declare null any unilateral contractual provision eliminating or impeding the normal exercise of the limitations recognised in the copyright act.