ANTI-CIRCUMVENTION MEASURES AND RESTRICTIONS IN LICENSING CONTRACTS AS INSTRUMENTS FOR PREVENTING COMPETITION AND FAIR USE

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I. CONTRIBUTORY INFRINGEMENT

In the good old days of copyright, manufacturers of devices used by others for the purpose of copyright infringement could, in theory, be sued for contributory (or secondary) infringement. Under this concept, German manufacturers of tape recorders were hauled into court, as were manufacturers of Betamax video recorders and MP3-players in the United States and of high-speed twin-tape recorders in Great Britain. The reason why the plaintiffs in the American and English cases eventually failed was that the devices could also be used for non-infringing purposes and therefore could not be prohibited outright. Nevertheless, the concept of contributory infringement has one important advantage: it exactly parallels the legal liability of the primary infringer, thus never exceeding the scope of copyright protection and fair use.5

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1. Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ] [Supreme Court] 17, 266 (399) (F.R.G.); cf. HAIMO SCHACK, URHEBER- UND URHEBERVERTRAGSRECHT, marginal no. 683 (2d ed. 2001).


At first glance, the making and distribution of devices capable of circumventing copyright protection systems seems to be an easy case of contributory infringement. But the technological protective measures might have been circumvented in order to enable fair use reproductions of the work, thus creating an affirmative defense to primary copyright violation. It is not surprising, then, that the theory of contributory infringement has, as far as I know, in practice not been applied to circumvention devices, the courts instead taking refuge with the statutes against unfair competition.

The copyright industry, having lost its battle against manufacturers of copying devices, understandably pushed for effective and maximum protection of its anti-circumvention measures embedded in the hardware or software in order to prevent unauthorized copying. Technological measures would need no extra legal protection if they were 100% effective and crack-proof. But in practice they are not and probably never will be. As soon as the copyright industry seals its products under a protective wrap, hackers will restore free access. The copyright industry, of course, fears just that. Should the legislator come to its rescue?

II. STATUTES PROTECTING ANTI-CIRCUMVENTION MEASURES AS SUCH

1.) Before 1996, circumvention devices as such had been prohibited by law only in a few isolated cases: in the United States, in order to protect the Serial Copy Management System under the Audio Home Recording Act of 1992, and, more important in our context, under the EC software directive of 1991. As implemented, e.g., in Germany, any means of which the sole intended purpose is to facilitate the unauthorized removal or circumvention of any technical device which may have been applied to protect a computer program may be seized and destroyed. The emphasized words show the inherent weakness of this provision. Most often, there are at least some other legitimate purposes, and as the provision allows for all kinds of permitted uses under the

6. See P. Wand, So the Knot be Unknotted: Germany and the Legal Protection of Technological Measures, 33 INT'L REV. INDUS. PROP. & COPYRIGHT L. 305, 312 (2002) [hereinafter So the Knot], as to contributory infringement in circumvention cases in Germany.

7. What it got instead, for the first time in the German Copyright Act (UrhG) of 1965, were copyright levies imposed on video and audio recording devices and media. See § 54(1) UrhG; cf. 17 U.S.C. §§ 1003(a), 1004 (2000) (much narrower in the U.S. with the Audio Home Recording Act of 1992).


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norms restricting the copyright in computer programs,10 it is again no wonder that it has proved to be of little practical relevance.11

2.) The legal situation changed fundamentally with the World Intellectual Property Organization ("WIPO") Copyright Treaty of December 20, 1996 ("WCT"), which entered into force for the United States on March 6, 2002. Art. 11 WCT sets out obligations concerning technological measures:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.12

Decisive is the last half-sentence: the Treaty obligation does not go further than the scope of copyright.13 Protection of technological measures is mandated only insofar as they are intended to protect the copyright owners' exploitation rights, but not as to acts "permitted by law." The national rules on fair use14 may thus still prevail over the protection of anti-circumvention devices.

3.) The Contracting States may, of course, grant more protection than they are required to do under the WCT. That is just what the United States (whose WIPO delegates in Geneva had argued for a stricter protection15) did with the Digital Millennium Copyright Act of 1998 ("DMCA").16 This Act not only prohibits circumvention,17 but also grants absolute protection of technological measures that effectively control access to a work or protect a right of a copyright owner.18 It is sufficient under the statute that the infringing device "is primarily designed or produced for the purpose of circumvention," that it "has

10. See, e.g., for Germany UrhG, supra note 7, at §§ 69(d) and 69(e). In addition, § 69(f) of the UrhG does not allow for damages.
11. Cf So the Knot, supra note 6, at 311.
13. T.C. Vinje, Copyright Imperilled?, 21 EUR. INTELL. PROP. L. REV. 192, 201 (1999); J. de Werra, The Legal System of Technological Protection Measures Under the WIPO Treaties, the Digital Millennium Copyright Act, the European Union Directives and Other National Laws (Japan, Australia), 189 REVUE INTERNATIONALE DU DROIT D'AUTEUR (R.I.D.A.) 66, 98 (2001); Reinbothe & Lewinski, supra note 12; WIPO Copyright Treaty, Dec. 20, 1996 [hereinafter WCT], art. 11, marginal no. 28.
14. See WCT, art. 10.
only limited commercially significant purpose or use other than to circumvent a technological measure.\textsuperscript{19}

This legal protection of anti-circumvention measures as such permits proprietary control over any kind of information, protected or not under copyright, granting the content provider what might be termed a “paracopyright” without the built-in limitations and restrictions of traditional copyright law.\textsuperscript{20} The proviso in § 1201(c)(1) that “nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title” is of no help, as it has been held to apply only to copyright infringement actions and not to actions for violation of technological measures.\textsuperscript{21} Neither do the other saving clauses\textsuperscript{22} provide an adequate fair use defense to the circumventing user.\textsuperscript{23}

4.) Before addressing the question what to do about this arguably overbroad protection,\textsuperscript{24} we shall look at how the European Union (“EU”) and its Member States try to fulfill their obligations under the WCT. The EU, itself a Contracting Party to the WIPO Treaties, has taken a more cautious but somewhat enigmatic approach. Like its DMCA counterpart, the 2001 EC Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society\textsuperscript{25} exceeds the obligations under the WIPO Treaties.\textsuperscript{26} But it at least tries in Art. 6, paragraph 4, to reconcile the obligation in paragraph 1 to “provide adequate legal protection against the circumvention of any effective technological measures” with the entitlement to fair use. In the first place, the Directive relies on voluntary measures taken by the rightholders, including agreements between rightholders and other parties concerned. In case such measures are not taken voluntarily, the Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary the means of benefiting from certain exceptions and limitations. There are, however, two

\begin{itemize}
\item \textsuperscript{19} 17 U.S.C. § 1201(a)(2)(A) and (B), (b)(1)(A) and (B) (2000).
\item \textsuperscript{20} Netanel, \textit{supra} note 15, at 26.
\item \textsuperscript{21} That has been the result in \textit{Universal City Studios, Inc. v. Reimerdes}, 111 F. Supp. 2d 294, 322-24 (S.D.N.Y. 2000); Note, 114 HARV. L. REV. 1390-97 (2001); \textit{Universal City Studios, Inc. v. Corley}, 273 F.3d 429, 443 (2d Cir. 2001). Both cases concern decryption of DVDs through direct information and hyperlinks; \textit{cf.} Netanel, \textit{supra} note 15, at 25 n.100.
\item \textsuperscript{22} 17 U.S.C. § 1201(c)(2), (4) and (a)(1)(C) (2000).
\item \textsuperscript{23} \textit{Cf.} Netanel, \textit{supra} note 15, at 75-77.
\item \textsuperscript{24} \textit{See infra} Part III.3.
\item \textsuperscript{26} Consider the definition of “technological measures” in art. 6(3) of the Directive, the words “or permitted by law” (\textit{supra} Part II.2) being absent! \textit{Cf.} de Werra, \textit{supra} note 14, at 140; Haimo Schack, \textit{Schutz digitaler Werke vor privater Vervielfältigung: zu den Auswirkungen der Digitalisierung auf § 53 UrhG}, \textsc{Zeitschrift für Urheber- und Medienrecht} 497, 505 (2002) [hereinafter Schack-ZUM].
\end{itemize}
important qualifications: the beneficiary must have had legal access to the protected work, and the fair use rights are not safeguarded where the work has been transmitted to him online "on agreed contractual terms." 27

The rather lengthy provision of Art. 6(4) of the Directive leaves the impression that the EU did not know exactly what to do. The first hope is that the problem might go away without any legislative action as the rightholders voluntarily dismantle their anti-circumvention measures in order to allow for fair use. That is most probably not going to happen, at least not to the extent needed. Then comes the stick. As the EU did not know how to square the circle of protecting anti-circumvention measures and fair use at the same time, it hopes that the Member States will find the solution. Only in the case of online transmissions does the EU want to rely on the freedom of contract. But again, in the reality of Internet commerce this principle leaves much to be desired. 28

5.) The Member States which must implement the directive by December 22, 2002, therefore, are not in an enviable position. The German government's bill of July 31, 2002, tries to mirror its implementing legislation as closely as possible to the Harmonization directive, the declared aim being to favor the latter's uniform interpretation in all Member States. 29 Section 95a(1) of the bill prohibits circumvention only of technological measures intended for protection of a protected work 30 or other subject matter under the Copyright Act and only if the purpose of circumvention is to make use of the copyrighted good. The drafters stress the point that circumvention is allowed if it is done to access and use works in the public domain or for scientific purposes, e.g., in cryptography.

But this laudable aim is counteracted by the categorical prohibition in § 95a(3) of the manufacture and distribution of circumvention devices and services. 31 Thus, even where circumvention itself might be legal, the vast majority of users would be deprived of the devices and expert help needed to exercise their rights. Here, at the preemptive prohibition of anti-circumvention devices, lies the root of the problem. 32

27. Art. 6(4) subparagraph 1 and subparagraph 4. See supra, note 9 (as to computer programs).
29. Compare the last paragraph of the official comment to § 95(a) of the bill, Bundesratsdrucksache 684/02. Materials on the ongoing copyright law reform are available at http://www.urheberrecht.org/topic/Info-RiLi/ (last visited May 7, 2003).
32. See infra Part III.1.
In § 95b the drafters oblige the rightholders to provide the beneficiaries of certain restrictions and limitations of copyright with the necessary means for making use of them. The list of privileged restrictions in § 95b(1) is meant to be exclusive. This novel distinction between first and second class copyright limitations might give rise to the erroneous impression that the not-mentioned limitations are less important. That is clearly not the case. Conspicuously absent from the list in § 95b(1) are, e.g., the quotation rights (§ 51 UrhG) and the right to make a digital copy for personal use (§ 53(1) UrhG). Section 95b therefore does not protect the whole range of fair use nor does it apply to situations where the information under protective wrap is in the public domain or even outside the scope of copyright. Section 95b as it is designed right now can therefore, at best, be a partial solution to our problem.

In addition, the drafters deliberately abstained from specifying what the necessary means are and how they should be provided. Having online and offline options in mind, the drafters in the official comment praise the flexibility of their approach. In truth, however, they just know as little as the EU does for what exactly to require the rightholders to do. Whatever that is, there are civil and criminal sanctions in §§ 95b(2) and 111a in case of non-compliance.

In sum, the European and German legislation evidences a greater awareness than the DMCA of the problem of preserving the public’s right to fair use. But the proposed solutions are far from perfect. In the United States as well as in Europe, the protection of technological measures through this new paracopyright is destroying the balance between copyright monopoly and fair use.

III. PARACOPYRIGHT DESTROYING THE BALANCE OF COPYRIGHT

1. Enlarging the Monopoly

In Washington, as in Brussels, the legislators have succumbed to the forceful lobbying efforts of the copyright industries. The innocuous looking protection of anti-circumvention measures has the practical effect of vastly enlarging the monopoly of the content providers at the expense of the public domain. Once the link between the protection of copyright and of protective measures is severed, any information under lock and key is given indirect protection. That way legislators not only strengthened the rights of the copyright owners, but also, in fact, created

33. Cf. LINDHORST, supra note 30, at 125.
34. Comment to § 95b, third paragraph.
35. Tellingly, in Germany civil remedies against circumvention will not be based on § 97 of the UrhG, but on § 823(2) Civil Code in combination with §§ 95a(1), (3), 111a of the UrhG, supra note 7; see LINDHORST, supra note 30, at 142.
new monopolies in unprotected information, in simple databases, in works in the public domain, and in areas formerly open to fair use. The trick was to prevent access where copyright, for good reason, only prevents unauthorized use. The result is an all-encompassing perpetual paracopyright\textsuperscript{36} that considerably restricts the public domain.

As already mentioned,\textsuperscript{37} allowing for circumvention in some cases is an insufficient safety valve, as long as the manufacture and distribution of circumvention devices are strictly prohibited. Without the necessary tools and knowledge, normal users are left helpless – and growing increasingly restive.

2. \textit{Counterattack on First Amendment Grounds}

With the dangers of the existing legislation not having been fully recognized in time (i.e., in 1996 and 1998), the opponents of the copyright industry have mounted a counterattack on constitutional grounds. The argument for re-enlarging the public domain is drawn from the First Amendment’s freedom of speech and information.\textsuperscript{38} Primarily directed against the Sonny Bono Copyright Term Extension Act of 1998,\textsuperscript{39} considered by the U.S. Supreme Court,\textsuperscript{40} this First Amendment attack may be and is made with the same force against the DMCA’s new paracopyright.\textsuperscript{41}

This is an up-hill battle, since not every misconceived legislation is necessarily unconstitutional. Until now, courts have consistently held that the Copyright Act itself answers the constitutional question, the provisions on fair use and the non-copyrightability of facts and ideas

\textsuperscript{36} Supra Part II.3.

\textsuperscript{37} Supra Part II.5.

\textsuperscript{38} Recently in Germany, the boundaries of fair use attempted to be expanded on quite similar grounds of Art. 5(1) of the German Constitution (GG); see the most questionable decision of the Bundesverfassungsgericht (BVerfG) of June 29, 2000, in Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 2001, 149 – Germany 3; put into the correct perspective by the decision of BGH of January 24, 2002, GRUR 2002, 605, 606 = Juristenzeitung (IZ) 2002, 1005, with annotation Schack, at 1008 - Verhüllter Reichstag. For a similar expansion in Austria, on the basis of Art. 10 of the European Convention on Human Rights, see Oberster Gerichtshof (OGH) June 12, 2001, GRUR Int. 2002, 341, 342 et seq. - Medienprofessor. - Cf. generally DETLEF KRÖGER, INFORMATIONSFREIHEIT UND URHEBERRECHT 221 et seq., 263 (2002); and also, as to the freedom of press under Art. 5(1) second sent. GG, 97 BVerfGE 228, 260 (= ZUM 1998, 240, 249 – Kurzberichterstattung), this decision breaks the information monopoly in sports events granting broadcasters a limited transmission right; cf. KRÖGER, op. cit., at 177 et seq., 188.


achieving a fair balance of the competing interests. 42 However, the more
the doctrine of fair use as the traditional safety valve of First
Amendment concerns 43 gets clogged, the more probable the
constitutional intervention will become. With the copyright industry
having pushed and the legislators having gone too far, the counterattack
might damage the structure of copyright, bringing with it legal
uncertainty and, in the end, less copyright protection than before.

3. How to Preserve the Values of Copyright Law

Copyright is a content-neutral regulation of speech 44 insofar as it
restricts certain uses of any copyrighted work. As long as the Copyright
Act leaves enough room for non-infringing uses, especially for
quotations, private copying, and making derivative works, 45 there should
be no serious First Amendment concerns. The situation becomes critical,
however, when access to information is barred and the public has to pay
for the key. Accordingly, the recent copyright term extension may still
be within the constitutional limits while the paraphernalia created by the
DMCA is not.

This leads to two conclusions. First, the courts should, in the
statutory framework of fair use, carefully address First Amendment
concerns to lead to an interpretation in harmony with constitutional
principles. 46 Second, copyright law must be rescued from being held
hostage by technology barring access to information. 47 If the legislature
is unwilling, the Supreme Court will eventually come to the rescue
declaring the paraphernalia unconstitutional and, hopefully soon,
restoring the public domain.

In any case, the present situation is untenable, denying the users the
means of self-help and requiring them to bring a civil action in order to
regain some of their rights to fair use. 48 But breaking the technological
lock is going to solve only part of the problem.

CBS, Inc., 672 F.2d 1095, 1099 (2d Cir. 1982); Netanel, supra note 15, at 3, 11, 20, 71 (arguing for First
Amendment scrutiny, at 37). The courts often relied on Melville B. Nimmer, Does Copyright Abridge
44. Cortley, 273 F.3d at 454. See Reimerdes, 111 F. Supp. 2d at 327-30; Netanel, supra note 15, at
47-54.
46. Cf. also Netanel, supra note 15, at 83. As to the recent practice in Germany, see BGH, supra
note 38. These principles do not require that any kind of information must be accessible free of charge.
47. Infra Part V.
48. Cf. § 95b(2) of the German bill. Contra P. WAND, TECHNISCHE SCHUTZMAßNAHMEN UND
URHEBERRECHT 148 (2001), and in So the Knot, supra note 9, at 308.
IV. TILTING THE BALANCE BY CONTRACTUAL MEANS

More and more often, especially in electronic commerce, the content providers try to restrict the use of their product by way of contract.\(^4^9\) Contractual and technological measures work in tandem to take away opportunities of fair use the legislators intended the consumers and competitors to enjoy.

1.) The friction between copyright and contract law is most evident in the United States, where state contract law might be preempted by the federal Copyright Act.\(^5^0\) While the Fifth Circuit has declared Louisiana's Software License Enforcement Act\(^5^1\) to be preempted,\(^5^2\) most other courts seem to hold the contrary view, arguing that, as contracts do not create any exclusive rights, there is no preemption.\(^5^3\) Most legal authors, however, favor preemption in order to not undermine the federal policy behind the fair use provisions, such as 17 U.S.C. § 117 for computer programs.\(^5^4\)

Denying preemption would indeed put the legal restrictions and limitations of copyright at the disposal of state law and of the stronger party to the contract. Contract law would, in the end, swallow up copyright and destroy the carefully crafted balance between monopoly and public domain.

2.) Putting aside the special American problem of preemption, the question is whether contracting away fair use can be seen as unconscionable or whether, at least, licensing restrictions in a form of adhesion contracts, such as shrinkwrap and clickwrap licenses, are invalid. While the common law regards freedom of contract most highly, civil law jurisdictions are much more prone to adjust the scales once they perceive an inequality of bargaining power. Accordingly, German law, while in principle allowing for contractual modifications of fair use,\(^5^5\) explicitly prohibits contracting away certain limitations, especially with

\(^{49}\) For an earlier critique (at the occasion of the withdrawn draft Art. 2B UCC) see Haimo Schack, Copyright Licensing in the Internet Age: Choice of Law and Forum, in CORPORATIONS, CAPITAL MARKETS AND BUSINESS IN THE LAW, LIBER AMICORUM, 490, 499 (Richard M. Buxbaum ed., 2000).

\(^{50}\) 17 U.S.C. § 301(a) (1990).


\(^{52}\) Vault Corp. v. Quaid Software Ltd., 847 F.2d 255, 270 (5th Cir. 1988).


\(^{55}\) Under general principles of law or, as to computer programs, under § 69g(1) in UrhG. As to the limits cf. Schack-ZUM, supra note 26, at 502-03.
regard to computer programs and databases.\textsuperscript{56} In case of adhesion contracts, any deviation from copyright law would come under the heightened scrutiny of § 307 Civil Code.\textsuperscript{57} And, contrary to the prevailing view in the United States,\textsuperscript{58} there is no way in consumer contracts to add unilaterally licensing terms once the contract has been concluded,\textsuperscript{59} even if the seller offers a full refund in case the buyer finds that the restrictions make the product worth less than the purchase price. Shrinkwrap license restrictions are, therefore, arguably invalid under German contract law.\textsuperscript{60} The situation is different, however, for clickwrap agreements actually made at the moment of the contract's conclusion.\textsuperscript{61} Even after having clicked his or her acceptance, the consumer in telemarketing contracts has the right to cancel the acceptance within 14 days.\textsuperscript{62}

All these different restrictions on the freedom of contract in German law\textsuperscript{63} result in preserving at least the essence of the copyright statute's provisions on fair use and the public domain. While that is true in the context of consumer contracts, the result is less certain in commercial contracts between competitors. Here, agreements deviating from copyright law may be found unconscionable under § 307 Civil Code or, in very rare cases, in violation of the Antitrust Act.\textsuperscript{64}

\textbf{V. CONCLUSION}

\textit{If} the technological measures were absolutely crack-proof \textit{and} freedom of contract were unlimited, there would no longer be any need for copyright in digitized works, as individual contracts would govern access to and use of these works. However, technological measures can and will always be circumvented, and copyright law, as well as the

\textsuperscript{56} See UrhG supra note 7, §§ 69d(2), 69g(2); §§ 55a third sent., 87e; and, as to all kind of works, § 95b(1) second sent. of the bill.


\textsuperscript{59} § 305(2) Civil Code.

\textsuperscript{60} MANFRED WOLF, NORBERT HORN & WALTER F. LINDACHER, AGB-GESETZ, § 2 marginal no. 36 (4th ed. 1999); LINDHORST, supra note 30, at 78.


\textsuperscript{62} §§ 312d, 355, with an interesting exception in § 312d(4) no. 2 Civil Code.

\textsuperscript{63} Mandated to a considerable degree by European law.

\textsuperscript{64} §§ 17, 18 no. 3 GWB; cf. Rolf Sack, \textit{Zur Vereinbarkeit wettbewerbsbeschränkender Abreden in Lizenz- und Know-how-Verträgen mit europäischem und deutschem Kartellrecht}, WETTBEWERB IN RECHT UND PRAXIS (WRP) 592, 599 (1999); ULRICH IMMENGRAF & ERNST-JOACHIM MESTMÄCKER, GWB KOMMENTAR ZUM KARTELLGESETZ, § 18 GWB marginal nos. 19 and 27 (3d ed. 2001) (Emmerich).
principle of freedom of contract, must accommodate the constitutional interests in freedom of information and in legitimate fair use of copyright subject matter. The copyright industries will have to live with not getting the absolute monopoly in digital goods they wish for. The circulation of digitized copies cannot be prevented anyway because everybody can easily transform analog into digital copies through scanning and similar processes and then disseminate these copies worldwide with a push of a button.

On the other hand, it is by now obvious that, in some areas, the large-scale private digital copying is going to conflict with the "normal exploitation of the work," especially in the case of sound recordings and, in the near future as compression progresses, also of films. This situation cries for legislative action adjusting the balance between reproduction rights and the limits of fair use in the digital context.

But what does that mean for the protection of technological measures? Giving an absolute legal protection to failed technological measures, which have been circumvented, is clearly wrong. It is not mandated by the WIPO Treaties, as they leave room for uses "permitted by law." Therefore, the protection of technological measures should be subjected to exactly the same restrictions and limitations as the protection of copyright. The overreaching protection of technological measures under the DMCA must be cut back to the copyright norm either by Congress or by the courts after a constitutional attack. If, in practice, the technological measures cannot be tailored so as to preserve fair use, they should not be given any legal protection at all. The most the copyright industries reasonably can ask for is that the law allows their anti-circumvention devices and does not prohibit them outright.

Let the competition between the copyright industries and the hackers go on. Where the former try to restrict the public domain, the latter are trying to restore it. In doing so, both sides very often don't observe the scope of copyright law. Neither side should be given the opportunity to escape copyright law's reach. The legal responsibilities must be governed by copyright law and not transformed by a paracopyright in technological measures that enlarges the monopoly and facilitates setting proprietary media standards, thereby further diminishing competition.

Although the legislature has, until now, failed to effectively protect the public domain, there is another hope: the consumers. They may just

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65. Thus violating Art. 9(2) of the Berne Convention and the corresponding provisions in TRIPs, art. 13; WCT, art. 10(1), WPPT, art. 16(2); and art. 5(5) of the Harmonization Directive.
67. Supra Part II.2.
68. To this effect are § 296ZC(2)-(4) of the British draft (supra note 30) in combination with § 101(3) of CDPA.
69. Cf. Schack-ZUM, supra note 26, at 505, 511.
70. Which in some areas must be reformed! See supra text accompanying note 67.
refuse to buy products which embody anti-copying devices as, e.g., CDs that cannot be played on a personal computer.\(^7\) In order to empower consumers, the German legislation implementing the EC harmonization directive will include a provision requiring that all goods protected by technological measures must be marked with clearly visible information about the properties of the technological measures.\(^7\) Educating the consumers may go a long way in the struggle to reclaim the public domain from the encroachments of technological measures and their too-rashly granted legal protection. In this respect, the market may ultimately provide a useful corrective, where statutory and decisional laws have failed.

\(^7\) Cf. Schack-ZUM, supra note 26, at 506.

\(^7\) § 95d(1) of the bill, supra at note 29. In addition, § 95d(2) requires persons employing technological measures to affix their name and address so that claims under § 95b(2) can be made against them.