



FORMATION AND VALIDITY OF ON-LINE CONTRACTS

INSTITUTE FOR INFORMATION LAW, AMSTERDAM, JUNE 1998

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ISBN 90-74243-16-9

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1. INTRODUCTION

1.1 Preface

In the Spring of 1997 the Institute for Information Law (IViR) of the University of Amsterdam joined the Imprimatur Consortium as its associate legal partner. The legal work carried out by the Institute has been granted the status of a separate Imprimatur work package (WP 1A). In its research the Institute has identified and focused on a number of legal problems considered immediately relevant to the design and operation of an electronic copyright management system (ECMS), e.g., on-line intermediary liability, contracts and copyright exemptions, encryption and privacy. This survey deals with yet another legal issue relevant to an ECMS, i.e. the formation and validity of on-line contracts.

In this report we define an “on-line contract” as a contract between two parties concluded by exchanging electronic messages relating to offer, acceptance and terms of the contract via a public network such as the Internet. Currently much uncertainty exists concerning on-line contracting. More and more transactions are being completed over the Internet or other networks. So-called “mouse click” agreements will probably become standard in the near future. In this survey we will examine whether a contract can be formed on-line by a simple click of the mouse and what the validity is of such a contract.

In this chapter the objective and the context of this survey will be further explained.

This report was written by Dr Bernardine Trompenaars, senior jurist at the Ministry of Transport in The Hague¹, under supervision of Dr P. Bernt Hugenholtz, Institute for Information Law of the University of Amsterdam.

1.2 Objective

The objective of this report is to ascertain whether on-line licences are enforceable. First we want to establish whether under *current* national legal systems on-line licences are enforceable (chapter 2). Secondly we want to find out whether we may expect that in the near future two recently adopted international legal instruments, one by UNCITRAL and the other one by the European Union, will further contribute to the enforceability of on-line contracts.

In June 1996 the United Nations Commission on International Trade Law adopted the "UNCITRAL Model Law on Electronic Commerce". In this report this Model Law will be discussed. The latest developments in the work of UNCITRAL in the field of electronic commerce will also be pointed out (chapter 3).

In 1997 the European Commission published two communications in the field of electronic commerce, titled: "A European initiative in electronic commerce"² and "Ensuring security and trust in electronic communication"³. In these policy documents the Commission announces its intention to set up a Community legal framework in the field of electronic commerce. In May 1997 Directive

¹ All opinions expressed in this report are strictly personal.

² COM (97) 157, 16.4.1997.

³ COM (97) 503, 14.10.1997; <http://www.ispo.cec.be/eif/policy/97503toc.html>

97/7/EC on the protection of consumers in respect of distance contracts was adopted by the European Parliament and the Council of the European Union.⁴ This Directive can be considered a forerunner of the Community legal framework on electronic commerce. It is this European legal instrument that will be examined in this report (chapter 4).

This report examines whether the UNCITRAL Model Law on Electronic Commerce and the European Directive on distance contracts contribute to the enforceability of on-line contracts. We will also discuss whether these international legal instruments are relevant for the IMPRIMATUR Business Model, especially the licensing involved in the on-line transaction between media distributor and purchaser.

We will start with a brief description of the context in which this survey has been carried out: the IMPRIMATUR Business Model (§ 1.3), followed by some remarks about the legal qualification of the relationship between media distributor and purchaser (§ 1.4).

1.3 IMPRIMATUR Business Model and licensing

In the IMPRIMATUR Business Model⁵ current business practices for trading and licensing multimedia documents are reflected. The Business Model identifies the main active parties, their relationships and corresponding transactions in the electronic copyright management system trading environment. The main actors are the creator, the creation provider, the rights holder, the IPR database, the unique number issuer, the media distributor and the purchaser. In this report we focus on the relationship between the two last-named actors: the media distributor and purchaser.

There are various types of media distributors: technical service providers, multimedia contents archives (libraries, museums) and multimedia content providers (publishers). Within the IMPRIMATUR Business Model the multimedia content provider is the most probable kind of media distributor.⁶

The purchaser can be an intermediate user or a final end user. Retailers, database producers, publishers, libraries etc. can be intermediate users. A consumer is a final end user. The legal approach towards these categories (professionals and consumers) may differ. National and international legal instruments may contain different regimes for professionals on the one hand and consumers on the other hand. Consumers often receive extra legal protection. This report contains illustrations of special legal treatment of consumers (chapters 2-4).

A media distributor may acquire digital works protected by copyright from a creation provider. This transaction will be subject to license terms and conditions set by the rights holder. The media distributor will store the works he acquires in databases on a server. He may want to sell the works via public networks such as the Internet. For that purpose he may advertise these digital works in a catalogue which is accessible on the network. Net users, whether professionals or consumers, may browse the catalogue, and purchase digital works on-line. After payment of the price requested for the copy, the media distributor will generate a personalised copy of the work and will allow the purchaser to download it.

⁴ Directive 97/7/EC, OJ EC 1997, L 144/19.

⁵ Version 2, IMP/4039-A, 21.11.1997, available at: <http://www.imprimatur.alcs.co.uk>

⁶ See I.c. (n. 4), § 4.6.1.1.

A purchaser will be subject to a licence holding the terms and conditions under which the purchased digital work is to be used. The terms will restrict the user from making further copies for distribution and exploitation. They may also limit the duration of the license and the territory of use, and they may limit liabilities and disclaim warranties. These license terms are set by the rights holder. They will be presented to the user by the media distributor. In electronic commerce these terms will be presented to the user on-line, most probably before payment can be made and before the work can be downloaded.

1.4 Complex relationship between media distributor and user

The relationship between media distributor and user (purchaser)⁷ is somewhat complex. On the one hand there is an on-line transaction directly between the media distributor and the user, on the other hand use of the work by the purchaser is subject to license terms and conditions which are set by the rights holder but are presented to the purchaser by the media distributor.

One could argue that the transaction between media distributor and purchaser is a sale of goods transaction; the purchaser orders a good from the seller, the seller delivers the good to the purchaser and the seller receives a price in exchange. However there are essential differences between a sale of a good and a transaction involving digital information. In the first place a good is a tangible property whereas information is an intangible property. Secondly the purpose of a sale of goods is to pass title in tangible property. A transaction involving an intangible property entails a licence. Unlike a sale transaction, a transfer of digital information from one party to another is not unconditional. The purpose of a transaction in digital information is not to pass title but to grant rights and privileges in the use of the information to the licensee.⁸

The conceptual differences between sale of goods and a transaction involving digital information described above have been the main motive for the US National Conference of Commissioners on Uniform State Laws to draft a new article especially dealing with transactions in information⁹: 2B UCC, distinct from article 2 UCC which deals with the sale of goods.¹⁰

In this report we will qualify the transaction between media distributor and user as a combination of a "service" and a license. It is the media distributor who renders a service to a user by allowing him to download a digital work.¹¹ The use of this work is however subject to license terms and conditions set by the rights holder. These terms are presented to the user by the media distributor.

⁷ The more neutral notion "user" is to be preferred above "purchaser". See e.g. definition of "user" in article 1, para. 2, German Information and Communication Services Act (www.iid.de/rahmen).

⁸ See Uniform Commercial Code Revised Article 2B - Preface (Dec. 1, 1995), I-II, at <http://www.law.uh.edu:80/ucc2b/1201/pref1201.html>

⁹ The first draft of Article 2B UCC (December 1, 1995) was restricted to transactions in digital information. The latest drafts cover all transactions in information, so regardless of technology.

¹⁰ See chapter 2 of this report.

¹¹ See e.g. the notion of "teleservices" in article 1 of the German Information and Communication Services Act (www.iid.de/rahmen). See Sander, C.J., *Beschermde kopen op afstand: binnen handbereik*?, *Nederlands Tijdschrift voor Europees Recht* 1997, no. 11, p. 261-264.

2. ENFORCEABILITY OF ON-LINE LICENSES

2.1 End user licenses in the electronic era

An owner of intellectual property rights relating to a work will choose to commercialize the work by way of licensing. (The rightsowner may be a creator, producer or publisher.) Licensing means that in return for payment (license fee) the end user will acquire the right to use the work. The end user's right to use is however not unlimited. In a license agreement a rightsowner will set the terms and conditions under which the end user is allowed to use the products: e.g. the licensor may restrict the copying or modification of the work, he may limit the duration of the license and the territory of use, he may limit liabilities and disclaim warranties.

Generally an end user will buy a work from a retailer. This means there is no direct contact between a rightsowner and an end user. It is not by the rightsowner himself but through the retailer that the end user is confronted with the terms and conditions that the rightsowner sets to the use of his work.

The question is whether it is possible to close a valid license agreement between a rightsowner and an end user in such a setting. In the software industry this *is* the common setting: a producer sells his software products to an end user through a retailer. Since software producers want to set terms and conditions to the use of their products by consumers, a special type of end user license has been developed. It is known under the name "shrinkwrap license".¹² This license is based on the assumption that an end user will be bound by the terms and conditions set by the rights owner from the moment the end user opens the shrinkwrap in which the software is packed. If the end user does not agree with the terms he has the opportunity to promptly return the software to the retailer for a refund.

In § 2.2 the shrinkwrap license will be discussed in more detail. We will especially focus on the question whether a shrinkwrap license is legally valid. We will have a look at its acceptance in various national jurisdictions. It is important to know whether the concept of a shrinkwrap license is valid since in electronic commerce a new type of license is developing that is more or less derived from the shrinkwrap license. This is the so-called "on-line license". (It is also named "mouse-click", "click-wrap" or "web-wrap" license). This type of license is based on the assumption that an end user will be bound by the license terms and conditions set by the rightsowner from the moment he has clicked the botton in the text on his PCscreen indicating "I AGREE" to or "I ACCEPT" (the license terms and conditions set by the rightsowner).

In § 2.3 we will compare the on-line license with the shrinkwrap license and discuss the enforceability of on-line licenses. In § 2.4 the enforceability of on-line licences under Draft article 2B Uniform Commercial Code (draft April 15, 1998) will be examined.

2.2 Enforceability of shrinkwrap licenses

2.2.1 A variety of shrinkwrap licenses

We already explained a shrinkwrap license is based on the assumption that an end user will be bound by the license terms and conditions set by the publisher as from the moment the end user

¹² Also known as: "box-top", "tear-open", "blister-pack" licenses. See Einhorn, D.A., Box-top licenses and the battle-of-the-forms, Software Law Journal 1992, p. 401-418.

opens the shrinkwrap in which the software is packed.

In the software industry various types of shrinkwrap licenses occur. These types differ from each other in the way the license terms and conditions are presented. Here a few types are mentioned. A common type of shrinkwrap licenses refers to the terms and conditions of the license on the outside of the package of the software, the full text of which can be found in the user guide inside the box. This means the shrinkwrap has to be removed first. Generally a written notice to the user is displayed on the outside of the package to read the license carefully before using the software and to return the software promptly to the vendor for a refund in case the user does not agree to the terms of the license. There are also shrinkwrap licenses that set out the complete text of the terms on the outside of the package. These terms can thus be read through the transparent shrinkwrap. Another type of shrinkwrap licenses presents only a small selection of the terms under the transparent shrinkwrap and refers for the remaining terms to the user guide inside the package.

2.2.2 Enforceability of shrinkwrap licenses in national law

USA

Under current US law the enforceability of shrink wrap licenses under US-law is not certain.¹³

Case law

For years courts held that shrinkwrap licenses were not enforceable. In *Vault v. Quaid* (1988)¹⁴ the court held that the shrinkwrap licenses were unconscionable for the user, and therefore unenforceable. In both *Step-Saver v. Wyse* (1991)¹⁵ and the *Arizona Retail Systems v. Software Link* (1993)¹⁶ the courts decided the shrinkwrap licenses were unenforceable because the sales contract between the producer and the user had already been concluded before the user learned about the producer's license terms. According to the courts the shrinkwrap terms could not change the terms of the already existing sale of goods contract.^{17 18}

In June 1996 a federal appeals court for the first time explicitly validated a shrinkwrap license.¹⁹ The facts of this case are the following. *Zeidenberg*, a consumer²⁰, bought a package of *SelectPho-*

¹³ See: Kochinke, C., Günther, A., Shrinkwrap-lizenzen und Datenbankschutz in den USA, *Computer und Recht* 1997, p. 129-137; Levi, S.D., Sporn, R., Can programs bind humans to contract ?, *The National Law Journal*, January 13, 1997, p. B09; <http://www.ljx.com/internet/0113shrink.html>; Farrell, F.S., From shrinkwrap to cyberspace (1996) <http://www.weblocator.com/attorney/briefs/ff2.html>; Raysman, R., Brown, P., Shrinkwrap Licenses revisited, *The New York Law Journal*, August 13, 1996; [http://www.ljx.com/practice/intellectual property/081396.html](http://www.ljx.com/practice/intellectual%20property/081396.html); DAMico Th., Oliver, E., On-line contracts and software licenses, 1996, <http://www.dsmo.com/usip14.htm>; Davies, C., Internet Contracts, *Tolley's Communications Law* 1996, pp. 50-54, 52-53; Einhorn, D.A., Box-top licenses and the battle-of-the-forms, *Software L.J.* 1992, pp. 401-418; Lemley, M.A., Shrinkwraps in cyberspace, *Jurimetrics J.* 1995, pp. 311-323; Scott, M.D., Contemporary issues in domestic transactions for computer goods and services, *Software L.J.* 1990-4, pp. 615-635, 620-624.

¹⁴ 847 F. 2d 255, 270 (5th Cir. 1988). See Kochinke/Günther, l.c. (n. 13), p. 134; Einhorn, l.c. (n. 13), pp. 411-414; Scott, l.c. (n. 13), pp. 620-624; Guibault, L., Contracts and copyright exemptions, *IMPRIMATUR* report, Institute for Information Law, Amsterdam, December 1997, pp. 30-33.

¹⁵ 939 F. 2d 91 (3rd Cir. 1991).

¹⁶ 831 F. Supp. 759 (D. Ariz. 1993).

¹⁷ These decisions were based on article 2-207 UCC (additional terms in acceptance or confirmation).

¹⁸ Comments on these decisions: Kochinke / Günther, l.c. (n. 13), p. 133.

¹⁹ *ProCD, Inc. v. Zeidenberg* 86 F. 3d 1447 (7th cir. 1996). See review by Raysman/Brown, l.c. (n. 13).

²⁰ Unlike the three cases mentioned above which deal with a commercial user as licensee. Raysman/Brown, l.c. (n. 13), suggest the *ProCD*-case may extend beyond consumer software transactions.

ne, a CD-ROM database produced by ProCD. The CD-ROM was delivered to him in a package. The text on the package referred to the licence terms in the user guide inside the package. The licence stated that by using the discs, the user would agree to be bound by the terms of the license; if the user could not agree to these terms, he should promptly return the discs and the user guide to where he had obtained it. Once the CD-ROM was activated, the PC-screen showed again a text referring to the license terms (to be found in the user guide or the help menu).

Zeidenberg distributed the CD-ROM data on the Internet in spite of the explicit prohibition in the terms of the license to commercialize the data. Therefore ProCD started action against Zeidenberg for breach of the license. Zeidenberg held the shrinkwrap license was unenforceable since he did not know its contents at the time of the sale.

The court of first instance decided the license was unenforceable. The court held that the license was not part of the contract of sale because the purchaser had not been able to know its contents before the sale was concluded.

The US Court of Appeals for the Seventh Circuit however decided the shrinkwrap license was enforceable. The court admitted Zeidenberg had not been able to know the contents of the license at the moment he bought the CD-ROM. But at the moment he concluded the contract he had been aware that the license terms would be part of the contract. He had not rejected the goods after inspecting the package, learning of the license (in the user guide and on the screen) and trying out the software. By this conduct Zeidenberg had accepted the terms. In his opinion Judge Easterbrook refers to article 2-204 UCC (1):

"A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract"²¹

Judge Easterbrook explains:

"A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance. And that is what happened. ProCD proposed a contract that a buyer would accept by using the software after having an opportunity to read the license at leisure. This Zeidenberg did."

The Court of appeals held that "shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example if they violate a rule of positive law, or if they are unconscionable)".²²

Although the trend against the enforceability of shrinkwrap licenses seems to be stopped by the decision in ProCD v. Zeidenberg, uncertainty remains. As Frank Farrel Jr. put it:

"The Zeidenberg case could certainly lead one to conclude that there is a difference of opinion among the Circuits. Until this matter is resolved, which may require a decision by the United States Supreme Court, it is not advisable for commercial software vendors to put all of their "commercial eggs" in the basket of enforceability of shrinkwrap licenses."

Statutory law

²¹ 1996 U.S. App. LEXIS 14951.

²² 86 F.3d 1449. According to Kochinke/Günther, l.c. (n. 13) , pp. 131-132 this decision is primarily based on pragmatic economic grounds and not on sophisticated legal reasoning.

Efforts of individual American states to codify the enforcement of shrinkwrap licenses have not been successful. Louisiana's Software License Enforcement Act (1987) was invalidated because one of its provisions was held to be preempted by the US Copyright Act.²³ The Software License Enforcement Act of Illinois was repealed.²⁴

At the federal level a new effort is now being undertaken. The National Conference of Commissioners on Uniform State Laws is in the process of drafting an article specifically dealing with licensing in electronic transactions: article 2B UCC. This provision should remove the lasting uncertainty with respect to the (in)validity of shrinkwrap licences. It will be discussed in § 2.4.

UK

Under British law the legal qualification of a shrinkwrap license is complex. First there is the doctrine of "privity of contract". This prescribes a direct contractual connection between parties. In the software business there is no such direct connection between producer and user. Software is sold through retailers. Secondly, according to the doctrine of "consideration" in order to achieve a binding license between producer and user, consideration has to be given for such a contract. It is doubtful whether merely breaking a cellophane seal can be said to amount to consideration.²⁵ Judges confronted with a shrinkwrap case, will have to apply these doctrines, but may also want to give effect to a shrinkwrap license. To reconcile these interests is a dilemma under British law.

In December 1995 the first British judgment on the enforceability of shrinkwrap licences was passed: *Beta v. Adobe*²⁶. The facts of this case brought before a Scottish court are the following. Adobe placed an order with retailer Beta for the supply of software produced by Informix. Beta delivered the software package to user Adobe. Adobe ultimately did not want the software, and relying on the producer's shrinkwrap provisions including the right to return the software, tried to return the package. But Beta refused it and later sued Adobe for payment of the invoiced price. Beta contended that the purchaser had made an unconditional order. The supply had been made and so the price was due. Adobe's position was that the shrinkwrap terms were incorporated into the contract at point of sale. The court gave judgement for Adobe. It did give effect to the shrinkwrap license by applying the Scottish doctrine of *ius quaesitum tertio*. This doctrine allows a party to a bilateral contract (i.c. Beta) to create contractual rights for the benefit of a third party (i.c. the producer). This implies the third party is able to enforce these rights directly against the end user.²⁷

In 1997 another shrinkwrap case was decided: *Microsoft v. Electrowide*. In this case the court also gave legal effect to a shrinkwrap license.²⁸

Netherlands

Only one decision dealing with the enforceability of a shrinkwrap license has been reported. It is a judgement by the Amsterdam court of first instance of May 24, 1995 in the case of *Coss Holland*

²³ *Vault v. Quaid* (1988), see n. 14.

²⁴ See *Einhorn, l.c.* (n. 13), p. 412.

²⁵ See Goodger, B., *Beta Plus for Effort: Beta Miners for Clarity ?* [1996] 11 EIPR, pp. 636-639.

²⁶ (1996) F.S.R. 367. See Goodger, l.c. (n. 25); Lea, G., *The impossible intangible: shrinkwrap software revisited*, *Tolley's Communications Law Vol. 1*, no. 6, 1996, pp. 238-242; Grosheide, F.W., *Shrink-wrap license*, *WPNR 1997/6260*, pp. 153-154; Griffiths, D., *Contracting on the Internet*, [1997] 13 EIPR, pp. 4-7, 4.

²⁷ This judgment has been criticized for being but a solution under Scottish law. The doctrine applied is not available in England. See Lea, l.c. (n. 26), p. 241; Goodger, l.c. (n. 25), p. 638. Lea advocates statutory intervention to ensure a clear legal relationship between producer and user.

²⁸ (1997) F.S.R. 580. See Griffiths, l.c. (n. 26), p. 4.

B.V. v. TM Data Nederland B.V.²⁹ The facts of this case are the following. Distributor TM Data supplied software, produced by Raima, to user Coss. According to TM Data the text of Raima's shrinkwrap license terms were enclosed in the packing of the software. Coss denied the terms were present in the packing. When the computer program turned out not to function properly and attempts to repair it failed, Coss claimed damages from TM Data. TM Data refused to pay damages contending that TM Data was not a party to the shrinkwrap license, the license being concluded between Raima and Coss. The court rejected this defence. It held a licence agreement cannot be formed by simply opening the packing of software. A license agreement can only be concluded validly if a user is aware that by opening a packing he becomes party to a license agreement. Moreover the contents of the license terms will have to be clear to the user beforehand.

From this judgement one can conclude that under Dutch law shrinkwrap licenses may be enforceable provided that users are aware of the use of such licenses and know the contents of the license terms before the agreement is formed.³⁰ Dutch commentators opine that a user has to be familiar with the contents of the license terms before or at the moment the license agreement is formed.³¹

2.2.3 Conclusion

From case law in various countries one can conclude that so far in none of the countries discussed the enforceability of shrinkwrap licenses is self-evident. Courts do however seem to recognize the interests of the software industry in the efficient management of transactions, and for that reason are willing to give legal effect to the terms of a shrinkwrap license whenever possible.³²

It should be noted that all cases discussed in this paragraph, except the ProCD v. Zeidenberg case, deal with a license between a producer and a commercial user. It may be expected that in a transaction between a producer and a consumer greater value will be attached to the fact that, and the way in which a consumer is instructed about the applicability of a license and the contents of its terms.

From case law it becomes clear that the enforceability of shrinkwrap licenses will be determined by the following factors:

- the awareness of the user of the existence of a shrinkwrap license: is a user aware that the product he ordered is subject to a shrinkwrap license ? If so is he aware that by opening the product's packing he agrees to the license terms ?
- the user's familiarity with the contents of the license terms. The license terms have to be available.
- the moment upon which the user was informed about the terms.³³

2.3 **On-line licenses**

2.3.1 Definition and examples of on-line licenses

²⁹ Computerrecht 1997/2, pp. 63-65; See also Grosheide, l.c. (n. 26), pp. 153-154; Meijboom, A.P., *Ars Aequi* 1996, Katern no. 58, p. 2760.

³⁰ See Grosheide, l.c. (n. 26), p. 154; Meijboom, l.c. (n. 29), p. 2760.

³¹ See Grosheide, l.c. (n. 26), p. 154.

³² See opinion judge Easterbrook, in: ProCD v. Zeidenberg; Goodger, l.c. (n. 25), p. 638.

³³ See similarities in consumer protection laws in EU Member States, e.g., legislation relating to unfair terms in consumer contracts; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJEC 1993, L 95/29.

An on-line license sets the conditions for use of a product, protected under copyright law, to be delivered to a user on-line. This report focuses on end user licenses. So when we hereafter refer to an on-line license we mean an end user license presented and applied on-line, unless otherwise indicated.

By way of illustration we give two imaginary examples of how on-line licenses might be presented to end users.

Example I:

"Carefully read all of the terms and conditions of this license agreement before using this work. By pressing the "accept button", you indicate your acceptance of the following terms and conditions. ... "

[First the terms are presented, followed by the "accept button"]

Example II

"Warning: This work is protected by copyright law and international treaties. This copy was installed in accordance with a right to use license and can only be run under these terms.

If you agree to the terms of the license then you may use the work now. If you do not agree then you may not use the work. If you want to read the license agreement then click the button marked "Read License".

[buttons:] *agree* *disagree* *Read License*"

2.3.2 On-line licenses compared to shrink-wrap licenses

An on-line license is the on-line variant of a shrinkwrap license. There is however an important difference. In an on-line transaction between distributor and user it is technically possible to ensure:

- the user knows the transaction is subject to a license (by way of a notice);
- the user reads the license terms before he orders the licensed product and executes any download commands³⁴;
- takes affirmative steps to signify agreement, e.g., by hitting certain keys or clicking on certain icons, which could later be used as evidence of agreement, if recorded.³⁵

Case law on the enforceability of on-line licenses has not yet been reported.³⁶ Because of the technical advantages of on-line licenses commentators are however positive about the enforceability of on-line licenses.³⁷

A disadvantage of on-line licenses compared to shrinkwrap licenses is the difficulty to check the

³⁴ It is doubtful whether a consumer can be expected to really read the terms. See also Draft Reporter's Notes to Draft Section 2:208 UCC (will be discussed in para. 2.4..2-2.4.3). In order to ensure a user really reads the terms and not only "browses" them, license terms should be as short and as simple as possible. See also Farrell, l.c.

(n. 13); decision of Landgericht Freiburg 7 April 1992, at: <http://www.netlaw.de/urteile>

³⁵ Farrell (l.c. (n. 13)) sums up seven features any system implementing on-line licenses should at least include. Noteworthy are also the instructions for drafters of shrinkwrap licenses formulated by Raysman/Brown, l.c. (n. 13).

³⁶ Judge Easterbrook already referred to on-line licenses in his opinion on the enforceability of shrinkwrap licenses. See opinion Easterbrook in *ProCD v. Zeidenberg*, 1996 U.S. App. LEXIS 14951.

³⁷ See Kochinke/Günther, l.c. (n. 13), p. 137; Goodger, l.c. (n. 25), p. 639; Raysman/Brown, l.c. (n. 13); DAmico/Oliver, l.c. (n. 13), C.1.a; Farrell, l.c. (n. 13).

identity and the (legal) capacity of the user.³⁸ These are problems of on-line contracting in general. Technical solutions may also be found to tackle these problems e.g. digital signatures, icons to confirm legal capacity of user, etc. Another question to be solved is whether a consumer can be bound to the terms of a license when these are agreed upon by an "electronic agent".³⁹ An electronic agent is a computer program used by a person to initiate or respond on behalf of him to electronic messages or performances without review by an individual.⁴⁰

1. *From the point of view of consumer protection, in an on-line situation the best moment to inform an end user about the terms seems to be before ordering.*
2. *The "accept button" should always follow the text of the license, like in example I (paragraph 2.3.1). In the interests of both consumer and producer a "Read license" button, like in example II, is not to be preferred. A user should be inevitably confronted with the terms of a license instead of having the choice between reviewing and not reviewing them, like in example II.⁴¹*

2.4 On-line licenses under Draft article 2B UCC

2.4.1 Special regime for licenses in UCC

Draft Article 2B UCC deals with information transactions in general, and especially with transactions involving licensing of information. Several years ago committees of the National Conference of Commissioners on Uniform State Laws, the American Bar Association and other interest groups concluded that information transactions differ substantially from transactions involving the sale of goods and represent an important commercial interest in today's economy. Therefore it was decided to develop uniform law treatment of information transactions and to do this by drafting a special provision on licenses in the Uniform Commercial Code: Article 2B UCC.⁴²

2.4.2 Draft Section 2B-208 UCC: mass market licenses

Draft Article 2B UCC consists of about a hundred sections. In our discussion we will focus on Draft Section 2B-208 UCC which deals with mass market licenses.

We draw special attention to the fact that, since Article 2B UCC has not been adopted yet, we discuss here but Draft Sections of Article 2B UCC. This means that these texts may be changed again at a later stage in the drafting process.

A mass-market license is defined as "a standard form that is prepared for and used in a mass-market transaction" (Draft Section 2B-102 UCC).

According to the latest Draft (April 15, 1998) the text of Section 2B-208 reads as follows:

"a) A party adopts the terms of a mass-market license for purposes of Section 2B-207 only if the

³⁸ Griffiths, l.c. (n. 26), p. 4.

³⁹ See Levi/Sporn, l.c. (n. 13); Griffiths, l.c. (n. 26), p. 4.

⁴⁰ See Draft Sections 2B-204 and 2B-119 UCC.

⁴¹ See also n. 34.

⁴² See Preface, part 1, article 2B UCC, draft April 15, 1998 (<http://www.law.upenn.edu/library/ulc/ucc2/2b498.htm>).

party agrees to the license, by manifesting assent or otherwise, before or in connection with the initial performance or use of or access to the information or informational property rights. However, a term does not become part of the contract:

- (1) if it is unconscionable; or
- (2) subject to Section 2B-301 with regard to parole or extrinsic evidence, if it conflicts with negotiated terms to which the parties to the license expressly agreed.

b) If a party does not have an opportunity to review a mass-market license before becoming obligated to pay for the information and does not agree, by manifesting assent or otherwise, to the license after having that opportunity, on delivering all copies of the information dealt with by the license or destroying the copies pursuant to instructions, the party has a right to:

- (1) a refund;
- (2) reimbursement of any reasonable expenses of obtaining the refund and incurred in complying with any instructions of the licensor for return or destruction of the information or, in the absence of such instructions, reasonable expenses in connection with return of the information; and
- (3) compensation for any foreseeable loss caused by the installation, including any reasonable expenses incurred in restoring the particular information processing system to its condition before the required installation, if
 - (A) the information must be installed in an information processing system to enable review of the license; and
 - (B) the installation alters that information processing system or information contained in the system but does not return the system or information to its original condition when the installed information is removed."

2.4.3 UCC Draft Reporter's Notes

The following explanation is based upon the Draft "Reporter's Notes" to Draft Section 2B-208 UCC.

Draft Section 2B-208 UCC applies to all transactions in the retail market, including consumer transactions. It comprises shrinkwrap licenses but it is not limited to this category. The Reporter circumscribes shrinkwrap licenses as "contracts that are entered into after an initial transaction in a retail or other context". This type of licenses often involves creating a relationship between a remote information publisher and an end user who acquires a copy of information from a retailer.

On-line licenses are not explicitly mentioned as a category of licenses covered by Draft Section 2B-208 UCC. But it can be concluded from both the text of Draft Section 2B-208 UCC⁴³ and the Draft Reporter's Notes⁴⁴ that this Draft Section surely applies to on-line licenses.

What strikes is that the legal regime with respect to mass market licenses will be based upon a distinction between, what the Reporter calls, "pre-payment" and "post-payment" (or "post-retail") licenses. Pre-payment licenses are licenses whereby the license terms are presented to the user for review prior to payment of the license fee, whereas the terms of a post-payment license are presented to the user after he has payed the license fee, i.e. at or before the first use of the information. A shrinkwrap license is a typical post-payment license. On-line licenses can be either pre-payment or post-payment licenses (see below).

⁴³ See e.g., Draft Subsection (b), 3, A.

⁴⁴ See Draft Reporter's Notes to Draft Section 2B-208 UCC, no. 5, b. Illustration 2 (numbering should be: no. 7, b.)

So the moment of presentation of the license in relation to the moment of payment (before or after payment) is decisive for the rules laid down in Draft Section 2B-208 UCC to be applied. Presentation to the end user means an end-user has to have an opportunity to review the record of terms. This requires that the record should be reasonably available. According to the Draft Reporter's Notes it is however not required that the party actually reads the record.⁴⁵

What are the rules laid down in Draft Section 2B-208 UCC?

Draft Subsection (a) (quoted above) sets out general rules for when the terms of a mass market license become the terms of the contract. These rules apply to records of terms irrespective of the moment upon which these are presented for review to the user (irrespective of whether these are presented prior to committing to the transaction with the retailer, or are presented at or before the first use of the information).

Briefly these rules are:

- a party adopts the terms of a mass-market license only if the party agrees to the license by manifesting assent or otherwise;
- a term does however not become part of the contract if it is unconscionable⁴⁶ or if it conflicts with agreed-to terms negotiated by the parties to the license.

The rules laid down in Draft Subsection (b) (quoted above) deal solely with “post-payment” licenses. It creates robust refund, reimbursement and compensation rights for the licensee. The objective of this provision is to ensure “that the licensee (end user) has a real opportunity to review or accept or reject the license with the remote publisher”. “What is created is a right to be in a situation equivalent to what could exist if the license were presented for adoption before the retail acquisition of the copy”. Thus the end user has a cost free right to say no to the proposed license.⁴⁷

In case of on-line presentation of licenses a licensor may not only be confronted with refund claims but also with a special claim for compensation. For Draft Subsection (b) creates a right to compensation for any loss caused by the installation of information in an information processing system, in case the information has to be installed to enable review of the license and the installation alters the processing system or information contained in the system, but does not return the system or information to its original condition when the installed information is removed.

From the text it is clear that this right to compensation applies only to on-line licenses and not to licenses presented on paper. The Reporter illustrates the non-applicability of the right to compensation to paperbased licenses (like shrinkwrap licenses) by the following case.

"An end user opens the package and finds a license on an envelope that contains a copy of the [ordered] information. The envelope clearly states that opening the envelope constitutes consent to the license. The user reads the license and rejects it, deciding not to open the envelope. Subsections (b) (i) and (ii) entitle him to return the information with return costs covered by the licensor. Subsection (b) (iii) does not apply; it was not necessary to install the license in order to read it."

It should be noted that for on-line licensing a special consequence of the differences in treatment of "pre-payment" and "post-payment" licenses under Draft Section 2B-208 UCC, is that an end user will not have any right to refund, reimbursement or compensation if an on-line license is presented

⁴⁵ See Draft Reporter's Notes to Draft Section 2B-208 UCC, no. 4, a.

⁴⁶ See Draft Section 2B-110 UCC and Section 2-302 UCC.

⁴⁷ See Draft Reporter's Notes to Draft Section 2B-208 UCC, no. 5, b (numbering should be: no. 6, b.)

before payment. Therefore remote publishers who want to prevent refund and compensation claims from end users should develop their on-line commerce system technically in such a way that terms of on-line licenses are always presented before payment.

The Draft Reporter's Notes contain the following illustration of the consequence of the regime of Draft Section 2B-208 UCC for an on-line "pre-payment" license:

"Two end users desire information under a mass market license. End user #1 goes to a web site and, after reviewing the license terms, provides his credit card number and downloads the information. Subsection (b) does not apply because opportunity to review the license contract existed before payment. End user #2 places a telephone order and provides his credit card, but the license is not available for review until the information arrives in the mail. Subsection (b) applies."

2.4.4 Conclusions

Our conclusions with respect to on-line licenses under Draft Section 2B-208 UCC are:

- On-line licenses are enforceable under Draft Section 2B-208 UCC;
- On-line license terms may be presented both before or after payment. In other words an on-line license can be either a pre-payment license or a post-payment license;
- The moment of presentation of the license by the rightsowner in relation to the moment of payment by the end user is decisive for the protection he can derive from Draft Section 2B-208 UCC. When an on-line license is first presented to an end user after payment, an end user has a right to refund, reimbursement and/or compensation under Draft Subsection (b). When an on-line license is presented before payment an end user has no such rights.

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3. THE UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE

3.1 Introduction

In June 1996 the United Nations Commission on International Trade Law (UNCITRAL) adopted the Model Law on Electronic Commerce.⁴⁸ In this chapter the character, purpose and principles of the Model Law will be discussed (§ 3.3-3.8). First we briefly describe the work of UNCITRAL (§ 3.2). The acceptance of the Model Law and its value for the IMPRIMATUR Business Model (transaction between media distributor and user) are examined (§ 3.9 and 3.10). We also refer to current UNCITRAL projects on electronic commerce which are related to the Model Law (§ 3.11).

3.2 UNCITRAL

The Model Law on Electronic Commerce (hereafter: the Model Law) was drafted under the auspices of UNCITRAL.⁴⁹ This is a specialized commission of the United Nations, established in 1966. The UNCITRAL mandate can be summarized as "the promotion of the progressive harmonization and unification of the law of international trade law".⁵⁰ The main tasks of UNCITRAL are: to co-ordinate the work of organisations active in the field of international trade law, to promote existing international trade law and also to prepare and promote new international trade law. Other fields of activity are the promotion of uniform interpretation of international trade law, and the collection and dissemination of information on national legislation in the field of international trade.

In UNCITRAL representatives of thirty-six UN member states (usually experts in the field of international trade law) are participating. Member states to UNCITRAL are nominated by the UN General Assembly for a period of six years. UNCITRAL has a permanent secretariat, directed by a Secretary-General, in Vienna. This Secretariat contributes substantially to all projects initiated by UNCITRAL (e.g., by preparing studies and drafting texts). The preparation of trade law projects usually take place in working groups, in which UNCITRAL members and staff-members of the secretariat participate. These working groups meet when necessary. A plenary session of UNCITRAL takes place every spring.

Though primarily established to fulfill a co-ordinating role UNCITRAL itself has made a substantial contribution to the creation of international trade law. The subjects dealt with are *inter alia* transport, sale of goods, arbitration, finances, construction, public procurement, countertrade, electronic commerce and insolvency. UNCITRAL has formulated five international conventions⁵¹, five model laws⁵² and various legal standards facilitating international trade.

⁴⁸ Publications on (draft) Model Law: see § 3.12 of this report.

⁴⁹ About UNCITRAL: Yearbooks UNCITRAL, volumes I (1968-1970) - XXVI (1995), United Nations (ed.); <http://www.un.or.at/uncitral>; Trompenaars, o.c. (§ 3.12).

⁵⁰ See UN General Assembly Resolution 2205 (XXI), UNCITRAL Yearbook Vol. I (1968-1970), pp. 65-66.

⁵¹ e.g., Convention on Carriage of Goods by Sea (1978); Convention on International Sale of Goods (1980).

⁵² Model laws on: International Commercial Arbitration (1985), International Credit Transfer (1992), Procurement of Goods, Construction and Services (1994), Electronic Commerce (1996) and Cross-Border Insolvency (1997). See status of enactments: <http://www.un.or.at/uncitral>

3.3 Model laws and their non-binding character

A model law itself is not legally binding. National legislators are free to decide whether or not they will issue legislation based upon a model law. Only through national legislation the principles laid down in a model law can become legally binding.

When a model law has not been enacted by a state, its principles can nevertheless be applied by private parties. For parties may decide to formulate their contracts in accordance with the principles derived from the model law.

A model law should be regarded as a balanced set of rules. For that reason it is recommendable to enact it as a single statute. However, depending on the situation in an enacting state, it can also be implemented in several pieces of legislation.

In enacting a model law national legislators may take into account particular national circumstances. They may supplement or limit the content of a model law. The Model Law on Electronic Commerce explicitly permits a degree of flexibility to national legislators to limit the model law provisions. For instance various articles of this Model Law end with the following *optional* clause (which an enacting state can make use of):

"The provisions of this article do not apply to the following: [specific subjects]".⁵³

It should be noted that the optional clause was included with a view to enhancing the acceptability of the Model Law. It is clear however that a frequent use of this clause will not further uniformity of law. It may raise new obstacles to modern means of communication instead.⁵⁴ It would be in the interest of an international uniform legal regime for electronic commerce that states who decide to enact the Model Law, implement it as a single statute and try to avoid national variations.

The Model Law also contains a special provision dealing with "variation by agreement" (article 4). This provision refers to the possibilities the Model Law offers to parties to vary by agreement the rules on communication of data messages laid down in chapter III of the Model Law (articles 11-15).⁵⁵

3.4 Purpose of the Model Law

The Model Law seeks to facilitate the use of modern techniques for recording and communicating information in various types of circumstances by providing principles and procedures.⁵⁶ It does not intend to cover every aspect of the use of electronic commerce. Its purpose is to offer national legislators a set of internationally acceptable rules in order to remove legal obstacles to the use of information presented in a form other than a traditional paper document. Many national laws contain requirements with respect to the form of specific

⁵³ Articles 6-8, 11, 12, 15, 17. See Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, nos. 9, 29, 51.

⁵⁴ Guide, nrs 1, 13, 52.

⁵⁵ See § 3.8; Guide, nrs 44-45; Draft rules on electronic signature: note by the Secretariat, A/CN.9/WG.IV/W-P.73, 12 december 1997, no. 14.

⁵⁶ Guide, nos. 2-6, 13.

legal acts, for example, a legal act has to be in writing or has to be signed by hand⁵⁷. If these form requirements are not fulfilled, the legal act will be invalid or void. The Model Law aims to remove these barriers to electronic commerce. The Model Law also deals with the uncertainty as to the legal effect or validity of information spread by or stored in electronic means. It seeks to achieve the same degree of legal certainty for both paper-based and electronic communications (see § 3.8).

3.5 The Guide to Enactment of the Model Law

The Model Law is accompanied by an explanatory guide. The "Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce" (hereafter: the Guide)⁵⁸ is meant to give guidance to states who want to enact the Model Law. It is also intended as a help for users of electronic means of communication who, in the absence of national legislation on electronic commerce, may want to formulate their contracts in accordance with the principles expressed in the Model Law. The Guide is also an important source for scholars.⁵⁹

Most of the text of the Guide is drawn from the discussions on the Model Law on Electronic Commerce held in the Working Group on Electronic Data Interchange (in June 1996 the Commission decided to rename it Working Group on Electronic Commerce⁶⁰) and during the annual sessions of UNCITRAL. A number of issues that were discussed have finally not been included into the Model Law itself, but have been addressed in the Guide though. These "extra" issues discussed in the Guide may inspire national legislators as well.

3.6 Structure of the Model Law

The Model Law consists of two parts. Part one is devoted to electronic commerce in general. Part two deals with specific areas of electronic commerce.⁶¹ This report focuses on part one.

Chapter I (of part one) contains a number of general provisions, i.e. provisions on the sphere of application (article 1), definitions (article 2), interpretation (article 3) and variation by agreement (article 4).

Chapters II and III (of part one) are the core of the Model Law. Chapter II deals with the application of form requirements to data messages, like those of "writing" and "signature". According to the Guide:

⁵⁷ For examples of these form requirements in national laws, see Hill/Walden, l.c. (§ 3.12), footnotes 5-10, 15, 18; Mitrakas, o.c. (§ 3.12), pp. 41-43, 111.

⁵⁸ See Guide to Enactment, A/CN.9/426, 24 April 1996, no. 1; UN-publication V.97-22269, Austria, May 1997; www.un.or.at/uncitral.

⁵⁹ See Guide, no. 1.

⁶⁰ See Report Working Group on Electronic Commerce, 31th session (February 1997), A/CN.9/437, 12 March 1997, no. 9.

⁶¹ So far only transport. In the future other specific areas may be added. See Guide, nr 108. It has been suggested to add special rules on electronic contracts to part two. See Report Working Group on Electronic Commerce, 31th Session (1997), A/CN.9/437, no. 6.

"[t]he provisions contained in chapter II may, to some extent, be regarded as a collection of exceptions to well-established rules regarding the form of legal transactions. Such well-established rules are normally of a mandatory nature since they generally reflect decisions of public policy. The provisions contained in chapter II should be regarded as stating the minimum acceptable form requirement and are, for that reason, of a mandatory nature, unless expressly stated otherwise in those provisions."⁶²

Chapter III deals with the legal effects of communication of data messages between originator and addressee. "Originator" of a data message means a person⁶³ by whom, or on whose behalf, the data message purports to have been sent or generated prior to storage, if any. "Addressee" means a person who is intended by the originator to receive the data message.⁶⁴

According to the Guide the rules contained in chapter III "may be used by parties as a basis for concluding agreements. They may also be used to supplement the terms of agreements in cases of gaps or omissions in contractual stipulations. In addition, they may be regarded as setting a basic standard for situations where data messages are exchanged without a previous agreement being entered into by the communicating parties, e.g., in the context of open-networks communications."⁶⁵

3.7 Sphere of application of the Model Law

3.7.1 Data message

The central notion of the Model Law is not "electronic commerce" but "data message"⁶⁶. It is defined as:

"information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy" (article 2, sub a)

The Model Law applies "to any kind of information in the form of a data message used in the context of commercial activities" (article 1).⁶⁷ This includes for instance information transmitted through the Internet.⁶⁸

3.7.2 National and international data messages

The Model Law applies to both national and international data messages. The drafters indicate that a national legislator may decide to limit the applicability to international data messages but

⁶² Guide, no. 21. See § 3.3 of this report.

⁶³ Natural person or corporate body or other legal entity; Guide, no. 35.

⁶⁴ Both originator and addressee do not include a person acting as an intermediary with respect to that data message. See article 2, sub c-e, Model Law.

⁶⁵ Guide, no. 20.

⁶⁶ In earlier drafts the notion "data record" was used. See the discussion about the final choice for "data message" in Report Working Group on EDI, 28th session (1994), A/CN.9/406, UNCITRAL Yearbook 1995, pp. 111-137, no. 133.

⁶⁷ As a matter of principle no communication technique (including future techniques) is excluded from its scope. The Model Law is "media-neutral". See Guide, nos. 6, 8.

⁶⁸ See Guide, nos. 7, 8.

make clear not to be in favour of such a restriction.⁶⁹

3.7.3 Commercial activities

The Model Law applies to data messages in the context of all relationships of a commercial nature, whether contractual or not. The drafters give a non-limitative list of such relationships. This list includes *inter alia*:

- licensing;
- transactions for the supply or exchange of goods or services;
- distribution agreements;
- commercial representation or agency.⁷⁰

States can extend the scope of the Model Law to uses of electronic commerce outside the commercial sphere, e.g., the use in a relationship between public authorities and users.⁷¹

It should be noted that the rules of the Model Law do not, in principle, apply to the substance of the information, i.e. the commercial transaction as such, but merely to the exchange and storing of data messages in the context of commercial activities and the rights and obligations that result therefrom.⁷²

3.7.4 Consumers

In principle, situations involving consumers are not excluded from the scope of the Model Law. But the Model Law does not override any rule of law in an enacting state intended for the protection of consumers. So national consumer protection law may prevail over the Model Law provisions.⁷³

3.8 **Principles expressed in the Model Law**

The Model Law contains the following principles:

* Legal recognition of data messages (article 5).

Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message. It should be noted that this rule *does not* establish the legal validity of any given data message or of any information contained therein. The rule *does* indicate that the form in which information is presented or retained cannot be used as the only reason to deny legal effectiveness, validity or enforceability of that information.⁷⁴

⁶⁹ See explanatory footnote * to article 1; Guide, nos. 28, 29. About the use of footnotes, see Guide, no. 25.

⁷⁰ See explanatory footnote **** to article 1; Guide, no. 25.

⁷¹ See Guide, no. 26.

⁷² See Heinrich 1995, l.c. (§ 3.12).

⁷³ See explanatory footnote ** to article 1; Guide, no. 27; Draft rules on electronic signature: note by the Secretariat, A/CN.9/WG.IV/WP.73, 12 december 1997, no. 13.

⁷⁴ See Guide, no. 46.

* Legal recognition of a functional equivalent of information in writing (article 6). Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference. National laws may specify exceptions.

* Legal recognition of a functional equivalent of a handwritten signature (article 7). Where the law requires a signature of a person, that requirement is met in relation to a data message if a reliable method is used to identify that person and to indicate that person's approval of the information contained in the data message; and that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement. National laws may specify exceptions.

According to the Guide "this rule does not imply that the mere signing of a data message by means of a functional equivalent of a handwritten signature is not intended, in and of itself, to confer legal validity on the data message. Whether a data message that fulfilled the requirement of a signature has legal validity, is to be settled under the law applicable outside the Model Law."⁷⁵

* Legal recognition of a data message as an original document (article 8). Where the law requires information to be presented or retained in its original form, that requirement is met by a data message if there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise, and that the information can be displayed if required. National laws may specify exceptions.

* Legal recognition of admissibility and evidential weight of data messages (article 9). In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of a data message in evidence: on the sole ground that it is a data message, or, in case it is the best evidence obtained, on the grounds that it is not in its original form. Information in the form of a data message shall be given due evidential weight.

* Legal recognition of retention of data messages (article 10). Where the law requires that certain documents, records or information be retained that requirement is met by retaining data messages, provided that the prescribed conditions are satisfied.

* Formation and validity of electronic contracts (article 11, § 1). In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose. National laws may specify exceptions.⁷⁶

* Recognition by parties of data messages related to the performance of contractual obligations (article 12).⁷⁷

⁷⁵ See Guide, no. 61.

⁷⁶ The time and place of formation of contracts is not covered by the Model Law. Here the national law applicable to contract formation is decisive. See Guide, no. 78.

⁷⁷ Article 11 is limited to messages geared to the conclusion of a contract, whereas article 12 applies to

Between originator and addressee, a declaration of will or other statement shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message. National laws may specify exceptions.

* The attribution of data message (article 13).

Basic rule is: a data message is that of the originator if it was sent by the originator itself. Under specific circumstances prescribed by the Model Law, it may be assumed that the data message is that of the originator.

* Acknowledgement of receipt (article 14).

The Model Law provides rules for the situation in which, on or before sending a data message, or by means of that data message, the originator has requested or has agreed with the addressee that the receipt of that message be acknowledged.

* Time and place of dispatch and receipt of data messages (article 15).

The Model Law contains rules on when and where a data message has been or is deemed to be dispatched or received. National laws may specify exceptions.

3.9 Acceptance of the Model Law

The acceptance of the Model Law will depend on how close its provisions are to commercial reality.⁷⁸ According to Hill and Walden the approach adopted by the Model Law is pragmatic and corresponds well to both current practices and to the thinking of leading scholars.⁷⁹

The present significance of the Model Law could be judged by counting the number of states that have enacted the Model Law. However, according to the current status of UNCITRAL model laws⁸⁰ no state has yet adopted legislation based on the Model Law. At this stage it seems too early to judge the success of a model law adopted in June 1996. Many states are still in the stage of investigating the legal obstacles to electronic commerce in their national laws. The next step would be to think about possible remedies. Enacting the Model Law - which means the start of a time-consuming legislative process - may be such a remedy.

In his speech "A Framework for Global Electronic Commerce" on July 1, 1997 President Clinton advocated the adoption by all nations of principles in accordance with those expressed in the Model Law "as a start to defining an international set of uniform commercial principles for electronic commerce".⁸¹

Though it is premature to pass a final judgment on the success of the Model Law, there are various indications that national legislators do consider enacting the Model Law.⁸²

messages related to the performance of contractual obligations (e.g., offer to pay, notice of place of performance). Guide, no. 81.

⁷⁸ See Heinrich 1995, l.c. (§ 3.12).

⁷⁹ Hill/Walden, l.c. (§ 3.12), p. 22; see also Mitrakas, o.c. (§ 3.12), p. 162.

⁸⁰ Last update June 10, 1998 at: www.un.or.at/uncitral

⁸¹ See <http://www.iitf.nist.gov/elecomm/ecom.htm>; site, ch. II, nr 3.

⁸² Australian Report of Electronic Commerce Expert Group, Electronic commerce: building the legal framework (31.3.1998), ch. 2, II, <http://law.gov.au/ahome/advisory/eceg>; Report UNCITRAL Working Group on Electronic Commerce, 31th session (1997), A/CN.9/437, no. 18.

In the United States a Uniform Electronic Transactions Act is being prepared by the US National Conference of Commissioners on Uniform State Laws.⁸³ The UNCITRAL Model Law is one of its main sources.⁸⁴ In Australia the Electronic Commerce Expert Group has recommended to adopt legislation based on the Model Law.⁸⁵ Singapore intends to enact a commercial code based on the Model Law.⁸⁶

In Sweden the compatibility between the Model Law and Swedish law has been studied. The conclusion of that study, carried out upon request of the Ministry of Justice, was that current Swedish law is almost in line with the Model Law rules.⁸⁷ In The Netherlands the Ministry of Justice launched a memorandum "Legislation for the electronic highway" (February 1998). This memorandum concludes that under present civil law there are no substantial barriers to the performance of juristic acts (e.g., contracts) by electronic means. However legislation should give an extra impulse to the performance of juristic acts by electronic means. Therefore it is proposed to add special provisions to the Dutch Civil Code to encourage the performance of juristic acts by electronic means. The memorandum indicates the Model Law on Electronic Commerce could serve as a model for those provisions.⁸⁸

In order to create uniform law on electronic commerce in the Member States of the European Union, a solution would be to incorporate the provisions of the Model Law into a European directive.⁸⁹ On various occasions the Commission has expressed its willingness to build forth on the work already initiated by international organisations in the field of electronic commerce, for example the Model Law adopted by UNCITRAL.⁹⁰ The Commission has announced a directive dealing with on-line contracting (expected in 1998).⁹¹ It remains to be seen whether the Model Law principles will be incorporated into this directive.

The International Chamber of Commerce (ICC) has also contributed to the promotion of the Model Law. ICC adopted a new instrument to facilitate electronic commerce: GUIDEC, General Usage for International Digitally Ensured Commerce (November 1997). According to its drafters GUIDEC builds upon and extends the Model Law principle of recognition of electronic signatures.⁹²

3.10 The Model Law and the IMPRIMATUR Business Model

The non-binding character of a model law implies that the content of such a law will only acquire legal effect when it has been enacted by a state. This means for example that a on-line transaction between media distributor and user will only be affected by the Model Law on

⁸³ Latest draft March 23, 1998, <http://www.law.upenn.edu>

⁸⁴ See Beard, Memorandum to Drafting Committee d.d. April 10, 1997, <http://www.law.upenn.edu>

⁸⁵ Report ECEG, l.c. (n. 82).

⁸⁶ See Report ECEG, l.c. (n. 82), ch. 2, 2.0.12.

⁸⁷ It was found that only the subject of article 13 Model Law (i.e. attribution) is not explicitly regulated in Swedish law. Reported by C. Hultmark, University of Göteborg, 1997.

⁸⁸ Nota Wetgeving voor de elektronische snelweg, II, C, 1.2.4, <http://www.minjust.nl/sdu/toc.htm>; Tweede Kamer 1997-1998 - 24036, no. 84.

⁸⁹ Advocated by Mitrakas, o.c. (§ 3.12), pp. 162-163, 268-272.

⁹⁰ COM (97) 157, no. 60; COM (97) 503, IV, 1.2, iii. See about these communications: ch. 4, § 4.1., of this report.

⁹¹ COM (97) 157, no. 45.

⁹² <http://www.iccwbo.org/guidec2.htm>; see this site, § I.2, V.

Electronic Commerce if the national law applicable to this transaction⁹³ is based upon the Model Law. As already indicated, at this stage national legislation enacting the Model Law has not been adopted.

Model Law principles become relevant for the IMPRIMATUR Business Model if they are implemented into national legislation.⁹⁴ A transaction between a media distributor and a user concerning the purchase of a media work will fall under the scope of the Model Law, because it is a commercial relationship. If the user is not a professional but a consumer the Model Law may be applicable as well, unless a national legislator chooses to exclude transactions with consumers from the scope of the Model Law rules.⁹⁵

On the whole the Model Law is favourable to commercial transactions in electronic information. It lowers the barriers of conventional form requirements (like that of a written document, a handwritten signature and an original document) and it recognizes the formation and validity of electronic contracts. Both aspects are important for the IMPRIMATUR Business Model.

According to article 6, §1, of the Model Law on-line equivalents of information in writing should be recognized provided they are accessible for subsequent reference. An enacting state may exclude specific categories from this general rule. In some states licence agreements have to be in writing.⁹⁶ If such a state enacts article 6 of the Model Law a license agreement will not have to be in writing but may be presented on-line instead, unless the enacting state chooses to exclude licenses from this general rule. The IMPRIMATUR Business Model will profit when states adopt the principle expressed in article 6, § 1.

In many jurisdictions it is not yet obvious that contracts can be concluded by electronic means. National laws explicitly recognizing the formation and validity of on-line contracts are therefore necessary.⁹⁷ Article 11, §1, of the Model Law provides that a valid contract can be concluded by exchanging offer and acceptance in the form of electronic messages.⁹⁸ However an enacting state can make exceptions to this rule in certain instances to be specified in the legislation enacting the Model Law.

3.11 Current UNCITRAL projects on electronic commerce

3.11.1 Incorporation by reference: draft article 5bis Model Law on Electronic Commerce

In conventional contracting so called "incorporation by reference" is acceptable under the law

⁹³ Rules of "private international law" which national law is applicable. See e.g., Eiselen, S., Implications of Private International Law for EDI, EDI Law Review 1995, pp. 9-27; Boele-Woelki, K., De functie van het IPR bij Internet-geschillen, Nederlands Juristenblad 1998, pp. 1028-1031.

⁹⁴ Model Law principles may also affect a transaction between media distributor and user if they are not implemented into the national law that governs the transaction, i.e. if these parties include these Model Law principles into their contract (provided they are not contrary to the applicable national law).

⁹⁵ See § 3.7.4 of this report.

⁹⁶ For example in Belgium and France.

⁹⁷ Report Working Group on EDI, 28th session (1994), A/CN.9/406, UNCITRAL Yearbook 1995, pp. 111-137, no. 37.

⁹⁸ Article 11 also covers situations in which only the offer or only the acceptance is communicated electronically. See Guide, no. 78.

of many states. This means that standard terms and conditions can be merely referred to in a contract but they are considered to be part of the contract as if the terms were fully set out therein. Using this technique prevents setting out lengthy standard terms and conditions while one negotiates or concludes contracts.

In January 1998 the UNCITRAL Working Group on Electronic Commerce adopted the text of a draft provision on incorporation by reference by electronic means.⁹⁹ The Working Group has presented the text to UNCITRAL for review and possible insertion as a new article 5bis of the Model Law on Electronic Commerce. The Secretariat already prepared an explanatory note to be added to the Guide to Enactment of the Model Law.¹⁰⁰ It is expected that UNCITRAL will decide upon this issue in June 1998 at its annual session.¹⁰¹

Draft article 5bis provides:

"Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is incorporated by reference in a data message."¹⁰²

This provision is intended to confirm that incorporation by reference by electronic means is equally effective as by any conventional means. Another aim of the provision, although not expressed in its text, is to recognize that consumer protection law or other law of a mandatory nature should not be interfered with. For example, in a number of jurisdictions, existing rules of mandatory law only validate incorporation by reference if the following three conditions are met:

- (1) the reference clause should be inserted in the data message;
- (2) the document being referred to, e.g., general terms and conditions, should actually be known to the party against whom the reference document might be relied upon;
- (3) the reference document should be accepted, in addition to being known, by that party.¹⁰³

The recognition of incorporation by reference by electronic means is important for the IMPRIMATUR Business Model, for it enables media distributors to incorporate license terms into their on-line offers to potential users without having to set out the whole text of the terms (see chapter 2).

⁹⁹ See Possible addition to the UNCITRAL Model Law on Electronic Commerce: draft provision on incorporation by reference, note by the Secretariat, A/CN.9/450, 6 April 1998; Report Working Group on Electronic Commerce, 32nd session, 11 February 1998, A/CN.9/446, nos. 14-24; Incorporation by reference, Proposal by the United Kingdom of Great Britain and Northern Ireland, Note by the Secretariat, A/CN.9/WG.IV/WP.74, 31 December 1997; Report Working Group on Electronic Commerce, 31st session (1997), A/CN.9/437, nos. 151-155; Planning of future work on electronic commerce: note by the Secretariat, A/CN.9/WG.IV/WP.71, 31 December 1996; Report Working Group on EDI, 28th session (1994), A/CN.9/406, UNCITRAL Yearbook 1995, pp. 111-137, nos. 90, 178.

¹⁰⁰ Possible addition to the UNCITRAL Model Law on Electronic Commerce: draft provision on incorporation by reference, note by the Secretariat, A/CN.9/450, 6 April 1998, annex II.

¹⁰¹ Provisional agenda, annotations thereto and scheduling of meetings of the thirty-first session of UNCITRAL, A/CN.9/443, 27 March 1998.

¹⁰² See earlier drafts: Planning of future work on electronic commerce: note by the Secretariat, A/CN.9/WG.IV/WP.71, 31 December 1996, nos. 91-93.

¹⁰³ Possible addition to the UNCITRAL Model Law on Electronic Commerce: draft provision on incorporation by reference, note by the Secretariat, A/CN.9/450, 6 April 1998, Annex II; Planning of future work on electronic commerce: note by the Secretariat, A/CN.9/WG.IV/WP.71, 31 December 1996, no. 79.

3.11.2 Electronic signatures

UNCITRAL is now preparing rules on digital signatures and certification authorities.¹⁰⁴ These rules should be consistent with the principles expressed in article 7 of the Model Law on Electronic Commerce (recognition of functional equivalents of a handwritten signature).¹⁰⁵

In February 1997 the Working Group on Electronic Commerce discussed a first draft of provisions on digital signatures.¹⁰⁶ The Working Group discussed a revised Draft Uniform Rules on Electronic Signatures in January 1998.¹⁰⁷ The draft rules primarily focus on issues of digital signatures (i.e. techniques involving the use of public-key cryptography). However issues dealing with other electronic signatures are also dealt with.¹⁰⁸ The draft rules also contain provisions on certification authorities, certificates, liabilities and recognition of foreign electronic signatures.

One may question what this project of UNCITRAL will add to the legislative work that has already been done or is currently being done with respect to electronic signatures in various countries. Of course UNCITRAL is aware of these developments. Therefore it points at the special objective of the UNCITRAL rules. This is to prevent a disharmony in national laws applicable to electronic commerce.¹⁰⁹

The UNCITRAL rules on electronic signatures may be too late for those European states that have already adopted (Germany and Italy)¹¹⁰ or are about to adopt legislation on digital signatures (Denmark).¹¹¹ These states will not be too eager to adapt their recently adopted laws to the UNCITRAL rules on electronic signatures. However European states preparing rules on digital signatures may take the UNCITRAL (draft) rules into consideration. Member States of the European Union should bear in mind the Commission's recent proposal for a Directive on digital signatures.¹¹² It remains to be seen whether the proposed directive will be influenced by the UNCITRAL draft rules. If so, the UNCITRAL rules will indirectly affect legislation of the Member States, including those which already have adopted national legisla-

¹⁰⁴ Alternatives to public-key cryptography, functions performed by third-party service providers, electronic contracting, jurisdiction, applicable law and dispute settlement on the Internet are mentioned as other issues for future UNCITRAL work. See Draft uniform rules on electronic signatures: note by the Secretariat, A/CN.9/WG.IV/WP.73, nos. 2, 5.

¹⁰⁵ So called "media-neutral approach". A decision about the precise relationship between draft rules and the Model Law is postponed. See Report Working Group on Electronic Commerce, 31st session (1997), A/CN.9/437, nos. 22, 26.

¹⁰⁶ See Report of the Working Group on Electronic Commerce, 31st session (1997), A/CN.9/437, nrs 25-150; Planning of future work on electronic commerce: digital signatures, certification authorities and related legal issues: note by the Secretariat, A/CN.9/WG.IV/WP.71, 31 December 1996, <http://www.un.or.at/uncitral/sessions/wg.ec/wp.71.htm#top>.

¹⁰⁷ Report of the Working Group on Electronic Commerce on the work of its thirty-second session, A/CN.9/44-6, 11 February 1998.

¹⁰⁸ Draft uniform rules on electronic signatures: note by the Secretariat, A/CN.9/WG.IV/WP.73, 12 December 1997, nr 4; Report Working Group on Electronic Commerce on the work of its thirty-first session (1997), A/CN.9/437, nos. 20, 22.

¹⁰⁹ Draft uniform rules on electronic signatures: note by the Secretariat, A/CN.9/WG.IV/WP.73, 12 December 1997, no. 9.

¹¹⁰ See article 3 German Information and Communication Act (www.iid.de/rahmen); Schema di Regolamento "Atti e documenti in forma elettronica" (www.aipa.it/notaria/ridotto.htm).

¹¹¹ See overview of national legislation on digital signatures at: <http://www.law.kuleuven.ac.be/icri>

¹¹² Proposal for a Directive establishing a legal framework for the use of electronic signatures, Brussels, 13 May 1998; (www.ispo.cec.be/eif).

tion on digital signatures.

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4. EUROPEAN DIRECTIVE ON DISTANCE CONTRACTS

4.1 Towards a Community legal framework for electronic commerce

In April 1997 the European Commission announced its intention to create a Community legal framework for electronic commerce.¹¹³ This should be realised by the year 2000. In this legal framework both the needs of business and consumers are to be met.

The Community legal framework will consist of i.a. rules on digital signatures¹¹⁴, rules on electronic payments and on financial services contracts concluded at a distance.¹¹⁵ The Commission also plans to take concrete measures to remove legal barriers to the enforceability of on-line contracts, like form requirements and evidence rules¹¹⁶. "Incorporation by reference"¹¹⁷ by electronic means is also considered a legal problem to be solved. The technical possibility of referring in an electronic document to standard contractual conditions which are part of another electronic document may not meet the legal requirements existing for paper documents. According to the Commission special rules will be necessary to enable the use of incorporation by reference in electronic means.¹¹⁸ The Commission has announced a communication on consumers and the information society (to appear in 1998). In that communication measures will be proposed to attain legal recognition of on-line contracts in all Member States.¹¹⁹ We expect the issue of incorporation by reference to be further discussed in that communication. It will be interesting to see whether any proposal from the Commission will be influenced by the UNCITRAL discussion on "incorporation by reference" (see chapter 3, § 3.11.1, of this report).

In this chapter "Directive 97/7/EC on the protection of consumers in respect of distance contracts" will be examined (hereafter: Directive on Distance Contracts or Directive).¹²⁰ This Directive can be considered a forerunner of the Community legal framework on electronic commerce, especially the contractual aspects thereof. We especially want to find out whether this Directive applies to contracts negotiated and concluded over the Internet (or any other network) between consumers and suppliers (e.g., media distributors).

4.2 Directive on Distance Contracts: adoption, entering into force and implementation

The Directive on Distance Contracts was adopted on May 20, 1997. It entered into force on June 4, 1997, the day of its publication in the Official Journal of the European Communities. It has to be implemented into national legislation of all Member States ultimately on June 4, 2000.¹²¹

It is not yet certain how Member States will implement the Directive. It is suggested that in Germany the Directive could be implemented in the 1986 "Gesetz über den Widerruf von

¹¹³ Communication "A European initiative in the field of electronic commerce", COM (97) 157 def., 16.4.1997.

¹¹⁴ See n. 112; see recent proposal for a Directive, com (98)297/2; www.ispo.cec.be/eif.

¹¹⁵ See communication, l.c. (n. 113), pp. 29-31.

¹¹⁶ See l.c. (n. 113), no. 45; l.c. (n. 114), ch. II, § 3.3.

¹¹⁷ See also chapter 3, § 3.11.1, of this Report.

¹¹⁸ COM (97) 503, l.c. (n. 114), ch. II, § 3.3. (iii).

¹¹⁹ COM (97) 157, l.c. (n. 113), no. 45.

¹²⁰ OJEC 4.6.1997, L 144/19.

¹²¹ Articles 15(1) and 18 of the Directive.

Haustürgeschäften und ähnlichen Geschäften" (Colportage Act). In The Netherlands the Directive will most probably be implemented in the Civil Code.¹²²

4.3 Objective of Directive on Distance Contracts

The Directive on Distance Contracts aims to harmonise the Member States' law on the protection of consumers in respect of distance contracts. This will enable consumers to profit from the free movement of goods and services in the internal market.

The Commission already launched its first proposal for a Directive on Distance Contracts in May 1992.¹²³ With this initiative the Commission reacted to the growing use of new technologies both to offer products or services and to obtain the consumer's order. The new interactive technologies applied to distance selling were at that time: telephone, teletext, home computers (e.g., Minitel in France, Bildschirmtext in Germany, Videotel in The Netherlands) and audiotext.

A Member State by Member State analysis made in 1992 shows that until 1987 there were hardly any laws on the protection of consumers in respect of distance selling. In 1987 Denmark, France and Portugal adopted specific legislation on distance selling. Other Member States (except the Netherlands, Ireland and UK) followed in the years thereafter.¹²⁴ The legislation on distance selling turned out to differ from Member State to Member State, having "a detrimental effect on competition between businesses in the internal market"¹²⁵ according to the Commission. It therefore concluded it was necessary to introduce "a minimum set of common rules"¹²⁶ on the protection of consumers in respect of distance contracts at Community level.

4.4 Scope of Directive on Distance Contracts

The Directive on Distance Contracts is applicable to distance contracts between consumers and suppliers. A "distance contract" is defined as:

"any contract concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded".¹²⁷

In this Directive a "consumer" means any natural person who is acting for purposes which are outside his trade, business or profession; a "supplier"¹²⁸ means any natural or legal person who is acting in his commercial or professional capacity.

¹²² Sander, C.J., De consument op de elektronische snelweg: een inleiding naar Nederlands en Duits recht, Tijdschrift voor Consumentenrecht 1997, pp. 191-198, 195-197; Sander, C.J., Beschermd kopen op afstand: binnen handbereik ? Nederlands Tijdschrift voor Europees Recht 1997, pp. 261-264.

¹²³ See COM(92) 11 final, 20.5.1992, Proposal for a Council Directive on the protection of consumers in respect of contracts negotiated at a distance (distance selling).

¹²⁴ See COM(92) 11 final, pp. 10-11 (pp. 7-9 and Annex 2 contain the results of this state-by-state analysis).

¹²⁵ Recital 4 of the Directive.

¹²⁶ Recital 4 of the Directive.

¹²⁷ Art. 2 (1). Certain types of contracts are excluded from the scope of the directive, i.a. contracts relating to financial services, concluded by means of automatic vending machines or automated commercial premises, or concluded for the construction and sale of immovable property: art. 3 (1).

¹²⁸ Article 2 (2) and (3).

"Means of distance communication" is any means which without the simultaneous physical presence of the supplier and the consumer, may be used for the conclusion of a contract between those parties. Annex I to the Directive provides an indicative list of such means of distance communication. The list contains *inter alia* the following means: printed matter, catalogue, telephone, radio, videotex, electronic mail, fax and television.

Electronic mail is on the list of means of distance communication, annexed to the Directive, however the Internet (or any other open network) is not. Though the list is non-exhaustive it is remarkable that the Internet is not explicitly mentioned. The Internet is more embracing than electronic mail. In the context of electronic commerce especially the Internet will be a crucial medium. A supplier will give information about his products or services on his website. After consultation of such a site, an interested consumer can place orders for these products and/or services for example by e-mail.¹²⁹ The ninth recital of the Directive runs:

"whereas the constant development of means of distance communication does not allow an exhaustive list to be compiled but does require principles to be defined which are valid even for those which are not as yet in widespread use."¹³⁰

It should be concluded that the Directive is also applicable to communication through the Internet (or any other open network).¹³¹

The subject of a distance contract can be goods or services. The notions "goods" and "services" are not defined in the Directive. Under the Directive the same regime applies to goods and services, with one exception (the right of withdrawal, see § 4.5).

According to the definition of the Directive a distance contract is a contract concluded between a supplier and a consumer under "an organized distance sales or service-provision scheme" (see definition in article 2 (1)). The Directive does not indicate what is meant by "an organized scheme". Does it mean that only regular delivery of goods or services by a supplier will fall under the regime of the Directive, and that an occasional sale by a supplier by means of a distance contract is excluded from the scope of the Directive? In our opinion, regular on-line transactions under the IMPRIMATUR Business Model should be qualified as "an organized scheme".

4.5 Rights of the consumer, obligations of the supplier

The following rights are ensured to a consumer negotiating and concluding a contract at a distance with a supplier of goods or services:

* *the right to receive information*

In good time before concluding a distance contract the consumer has to receive from the supplier certain specific information about the supplier and the content of the contract. This information is summed up in article 4, § 1, of the Directive (i.a. identity of the supplier; main characteristics and price of goods or services; arrangements for payment, delivery or performance; period for which

¹²⁹ See also Sprey, J., Internet; een transactie ontleed, *Advocatenblad* 1997, pp. 1049-1052, 1049.

¹³⁰ See also earlier drafts of the Directive: i.a., COM (96) 36 final, 7.2.1996, II; COM (92) 11 final, p. 10.

¹³¹ See also Sander, *TvC* 1997, l.c. (n. 122), p. 193.

the offer or the price remains valid). The commercial purpose of the information must be made clear.

The information has to be provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used, with due regard in particular to the principles of good faith in commercial transactions and the principles governing the protection of those who are unable to give their consent (such as minors).¹³² The Directive leaves the matter of languages used for distance contracts to the Member States.¹³³

** The right to receive the information confirmed in a durable medium available and accessible to the consumer*

The information¹³⁴ has to be confirmed to the consumer in writing or "in another durable medium that is available and accessible to him".

The preamble of the Directive declares:

"(13) Whereas information disseminated by certain electronic technologies is often ephemeral in nature insofar as it is not received on a permanent medium; whereas the consumer must therefore receive written notice in good time of the information necessary for proper performance of the contract."

We believe the notion of "another durable medium that is available and accessible" to the consumer has to be interpreted in the light of the objective of the Directive, which is the protection of consumers who want to profit from the free movement of goods and services in the internal market. The information necessary for the proper performance of the contract should be "available and accessible" to the consumer. In our opinion, if a distributor makes the prescribed information available and accessible to a consumer on-line via a hyperlink this should be considered an acceptable method of confirmation under the Directive.¹³⁵

The confirmation has to be done during the performance of the contract, and at the latest at the time of delivery where goods not for delivery to third parties are concerned.¹³⁶ The sanction for not sending the prescribed information in a durable medium in time is that the consumer is free to withdraw from the contract within a three month-period without a penalty and without giving any reason.¹³⁷

** The right of withdrawal*

A consumer has the right to withdraw from the contract without any penalty and without giving a

¹³² Article 4, § 2.

¹³³ Recital 8 of the Directive. The May 1992 proposal of the Directive stipulated that the information should be in the language used in the contract solicitation; see COM (92) 11 final, article 10 (1) and commentary to this article.

¹³⁴ This is the information referred to in article 4, § 1, (a) to (f), and the information referred to in article 5, § 1, second sentence.

¹³⁵ Another opinion: Sander, NTER 1997, l.c. (n. 122), p. 262.

¹³⁶ See article 5, § 1.: confirmation should be received in good time during the performance of the contract, unless the information has already been confirmed prior to the conclusion of the contract.

¹³⁷ Article 6 (1).

reason. If a consumer exercises this right, no charge may be made to the consumer except for the direct costs of returning the goods. The supplier has to reimburse the sums paid by the consumer free of charge ("money back guarantee"). The period for exercising this right shall be at least seven working days. In case the supplier has not fulfilled his obligation to confirm the prescribed information in a durable medium this period shall be three months. The start of the right to withdraw-period depends on whether the contract involves goods or services. In the case of goods, it starts from the day of receipt by the consumer. In the case of services, it starts from the day of conclusion of the contract. In the case of services, a consumer may not exercise the right of withdrawal if performance has begun, with his consent, within seven days from the moment of conclusion of the contract.¹³⁸

Grounds for this distinction between goods and services are not explained in the Directive or in earlier drafts.¹³⁹ This distinction seems more favourable to consumers ordering goods than to consumers ordering services. If a consumer receives a good the right to withdraw-period just begins. At the moment the performance of a service is taking place the right of withdrawal may already be expired for it may take more than seven working days (after the conclusion of a service contract) before the service is performed.¹⁴⁰ This distinction may lead to a situation in which a consumer who orders a CD on-line and receives it by post, receives a longer lasting protection than a consumer who downloads a CD (provided that the latter transaction is considered a service¹⁴¹).

The right of withdrawal may not be exercised with respect to a few categories of contracts summed up in article 6 (3) of the Directive, unless the parties have agreed otherwise. One of these categories may be relevant for the IMPRIMATUR Business Model, i.e. "contracts for the supply of audio or video recordings or computer software which were unsealed by the consumer". This exception is said to relate to shrinkwrap licenses.¹⁴² It is not certain but courts might judge that the exception also applies to clickwrap licenses. This would mean that once a consumer agrees to on-line license terms by clicking on a "OK"-icon, he can no longer exercise the right of withdrawal.

The right of withdrawal shall be without prejudice to the consumer's rights under national laws (e.g., in case of damaged products or in case of products or services not corresponding to the description in the offer). It is for the Member States to determine "the other conditions and arrangements following exercise of the right of withdrawal".¹⁴³

* *The right to performance*

Unless the parties have agreed otherwise, the supplier must execute the order within 30 days from the day following the day the consumer ordered with him. If a supplier can not perform because the goods or services are unavailable, the consumer should be informed about this situation and should obtain a refund of any sum paid.¹⁴⁴

4.6 Minimum standard of consumer protection

¹³⁸ See article 6 (1) and (3).

¹³⁹ The May 1992 proposal of the Directive already made this distinction, COM (92) 11 final, article 11 (1).

¹⁴⁰ The right of withdrawal may not be exercised if performance has begun, with the consumer's agreement, before the seven working days period: article 6 (3).

¹⁴¹ Sander, NTER 1997, l.c. (n. 122), p. 262.

¹⁴² Griffiths, D., Contracting on the Internet, [1997] 13 EIPR, pp. 4-7, 7.

¹⁴³ Recital 14 of the Directive.

¹⁴⁴ Article 7.

The level of consumer protection prescribed by the Directive is but a minimum standard. The Directive explicitly allows Member States to introduce or maintain more stringent provisions ensuring a higher level of consumer protection. This includes, where appropriate, a prohibition, in the general interest, of the marketing of certain goods or products within the territory of a Member State.¹⁴⁵

It should be noted that if some Member States decide to introduce more stringent provisions whereas other Member States stick to the minimum standard of the Directive, this will lead again to disharmony of national laws and distortion of competition in the internal market.

4.7 National measures to ensure compliance with the Directive

Member States must take measures to ensure compliance with the Directive. They may stipulate in their national laws that the burden of proof concerning the existence of prior information, written confirmation, compliance with time-limits or consumer consent can be placed on the supplier.

Member States may also provide for voluntary supervision by self-regulatory bodies of compliance with the Directive.¹⁴⁶

In a 1992 recommendation the Commission has already anticipated upon the forthcoming Directive on Distance Contracts. Organisations of suppliers are recommended to supplement the basic rules laid down in the Directive with a code of conduct for their specific branches.¹⁴⁷

4.8 The Directive and the IMPRIMATUR Business Model

If a *consumer* orders a media work on-line from a media distributor the Directive on Distance Contracts is applicable. This means that the media distributor is obliged to provide the consumer the information summed up in the Directive before the contract is concluded. The information also has to be confirmed in a durable medium available and accessible to the consumer. In our opinion, if a distributor makes the prescribed information available and accessible to a consumer on-line via a hyperlink this should be considered an acceptable method of confirmation under the Directive.

The Directive distinguishes between distance contracts dealing with "goods" or "services". However it does not define these notions. An on-line transaction between a media distributor and a consumer may be qualified as a service contract rather than a contract dealing with goods.¹⁴⁸

If so, this qualification has a legal consequence under the Directive, i.e. it is decisive for the commencement of the period in which a consumer has the right to withdraw from a distance contract. In the case of services, this period starts on the day of the conclusion of the contract, whereas in the case of goods it runs from the day of receipt of the goods by the consumer.

In the case of services, a consumer may not exercise the right of withdrawal if performance has begun, with his consent, within seven days from the moment of conclusion of the contract. We

¹⁴⁵ Article 14. The Directive explicitly mentions medicinal products as a category of goods which Member States may decide not to be supplied in their territory by means of distance contracts.

¹⁴⁶ Article 11 (1), (3a) and (4).

¹⁴⁷ Recommendation 92/295/EEC of April 7, 1992, OJEC 1992, L 156/21.

¹⁴⁸ See chapter 1, § 1.4, of this report; Sander, NTER 1997, l.c. (n. 122), p. 262.

presume the latter situation will frequently occur under the IMPRIMATUR Business Model (provided that the on-line transaction between media distributor and consumer is regarded a service contract).

There is also no right of withdrawal with respect to contracts "for the supply of audio or video recordings or computer software which were unsealed by the consumer". This exception is said to cover shrinkwrap licenses. It is not certain but it may also be applicable to on-line licenses for media works. So this exception may be relevant for the IMPRIMATUR Business Model. It remains to be seen how courts will interpret this exception.

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SUMMARY

1. Relationship between media distributor and purchaser

The IMPRIMATUR WP4 Business Model identifies the relationship between media distributor and purchaser as one of the key relationships in the ECMS trading environment. What will this relationship look like?

A media distributor will store digital works which he acquires from a creation provider in databases. He will advertise these digital works in a catalogue on the Internet. Net users, consumers or professionals may browse the catalogue and purchase digital works on-line. Purchasers will be subject to a license holding the terms and conditions under which the purchased digital works are to be used. In electronic trade the license terms will be presented to the purchaser on-line most probably before electronic payment takes place and before the digital work can be downloaded.

In this report an "on-line contract" is defined as a contract between two parties concluded by exchanging messages relating to the offer, acceptance and terms of the contract via public networks such as the Internet. Two international legal instruments dealing with the formation and validity of on-line contracts are discussed, i.e. the UNCITRAL Model Law on Electronic Commerce (1996) and the EC Directive on the protection of consumers in respect of distance contracts (1997). The report also deals with the enforceability of on-line licenses under current national laws; the proposed Article 2B of the Uniform Commercial Code (Section 2B-208 UCC) of the United States is also discussed.

2. Enforceability of on-line licenses

In the software industry a producer usually sells his software products to an end user through a retailer. Since software producers want to set terms and conditions to the use of their products by consumers, a special type of end user license has been developed. It is known under the name of "shrinkwrap license". This license is based on the assumption that an end user will be bound by the terms and conditions set by the rights owner from the moment the end user opens the shrinkwrap in which the software is packed. A common type of shrinkwrap license refers to the terms and conditions of the license on the outside of the package of the software, the full text of which can be found in the user guide inside the box. This means that the shrinkwrap has to be removed first. Generally a written notice to the user is displayed on the outside of the package to read the license carefully before using the software and to return the software promptly to the vendor for a refund in case the user does not agree to the terms of the license.

It is important to know whether shrinkwrap licenses are enforceable since in electronic commerce a new type of license is developing which is often compared to a shrinkwrap license: the "on-line license". This type of license is based on the assumption that a consumer will be bound by the license terms and conditions from the moment he has clicked the button on his PC-screen indicating "I agree to" or "I accept" (the license terms set by the rights owner).

Enforceability of shrinkwrap licenses in national law

From national case law it can be concluded that so far in none of the countries discussed (USA, UK, The Netherlands) the enforceability of shrinkwrap licenses is self-evident. Courts do, however, seem to recognise the interests of the software industry in the efficient management of transactions, and for that reason they are willing to give effect to the terms of a shrinkwrap license whenever possible.

The enforceability of shrinkwrap licenses will be determined by:

- the awareness of the user about the shrinkwrap license;
- the user's familiarity with the contents of the license terms and the moment upon which the user was informed about it.

On-line licenses compared to shrinkwrap licenses

An on-line license can be regarded as the on-line variant of a shrinkwrap license. There is however an important difference.

In an on-line transaction between a distributor and a user it is technically possible to ensure that:

- the user knows that the transaction is subject to a license;
- the user reads the license terms before he orders the licensed product and executes any download commands;
- the user takes affirmative steps to signify agreement, e.g. by hitting certain keys or clicking on certain icons, which could later be used as evidence of agreement, if recorded.

Case law on the enforceability of on-line licenses has not yet been reported. Because of the technical advantages of on-line licenses commentators are, however, positive as to the enforceability of on-line licenses.

On-line licenses under Draft Section 2B-208 UCC

The proposed Section 2B-208 of the U.S. Uniform Commercial Code (draft of April 15, 1998) deals with mass-market licenses. These are defined as standard forms prepared for and used in mass-market transactions. Section 2B-208 UCC applies to all transactions in the retail market, thus including consumer transactions. It comprises shrinkwrap licenses but it is not limited to this category. On-line licenses are not explicitly mentioned as a category of licenses covered by Draft Section 2B-208 UCC. But it can be concluded from both the text of Draft Section 2B-208 UCC and the UCC-Reporter's Notes that this Section does apply to on-line licenses.

The legislative regime with respect to mass market licenses will be based upon a distinction between, as described by the UCC Reporter, "pre-payment" and "post-payment" licenses. Pre-payment licenses are licenses whereby the license terms are presented to the user for review prior to payment of the license fee, whereas the terms of a post-payment license are presented to the user after he has paid the license fee, i.e. at or before the first use of the information. A shrinkwrap license is a typical post-payment license. On-line licenses can be either pre-payment or post-payment licenses.

So the moment of presentation of the license in relation to the moment of payment (before or after payment) is decisive for the applicability of the rules laid down in Draft Section 2B-208

UCC. Presentation to the end user means an end user must have an opportunity to review the record of terms. This requires that the record must be reasonably available. According to the Draft UCC Reporter's Notes it is, however, not required that the party actually reads the record.

The following conclusions with respect to on-line licenses and Draft Section 2B-208 UCC can be drawn:

- on-line licenses are enforceable under Draft Section 2B-208 UCC;
- on-line license terms may be presented before or after payment. In other words an on-line license can be either a pre-payment license or a post-payment license;

the moment of presentation of the license by the rights owner in relation to the moment of payment by the consumer is decisive for the protection he can derive from Draft Section 2B-208 UCC. When an on-line license is first presented to an end user after payment, an end user has a right to refund, reimbursement and/or compensation described in subsection (b) of Draft Section 2B-208 UCC. When an on-line license is presented before payment an end user has no such rights.

3. UNCITRAL Model Law on Electronic Commerce

In June 1996 the United Nations Commission on International Trade Law (UNCITRAL) adopted a Model Law on Electronic Commerce. The purpose of this Model Law is to offer national legislators a set of internationally acceptable rules in order to remove legal obstacles to electronic commerce. It particularly deals with legal obstacles to the use of information presented in a form other than a traditional paper document. It also recognizes the formation and validity of on-line contracts. The Model Law seeks to provide that electronic communications achieve the same degree of legal certainty as paper-based communications.

The Model Law is but a framework law. It does not set forth all rules necessary for the use of electronic commerce. A state enacting the Model Law may choose to issue regulations supplementing Model Law provisions or taking into account particular national circumstances. Such national rules should, however, not compromise the objectives of the Model Law.

The Model Law applies to any kind of information in the form of a national or international data message used in the context of commercial activities, whether contractual or not. The drafters made up a non-exhaustive list of such activities. The list includes licensing. Situations involving consumers are not excluded from the scope of the Model Law. However the Model Law states that it does not override any national consumer protection law.

Principles expressed in the Model Law on Electronic Commerce are *inter alia*:

- legal recognition of data messages: information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message;
- legal recognition of a functional equivalent of information in writing;
- legal recognition of a data message as an original document;
- formation and validity of electronic contracts: where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose. National laws may however specify exceptions to this rule;
- recognition by parties of data messages related to the performance of contractual obligations.

Significance of the Model Law on Electronic Commerce

A model law is a non-binding legal instrument. National legislators are free to decide whether or not to enact legislation based upon a model law. According to the status of UNCITRAL conventions and model laws of June 1998, no State has yet adopted legislation based on the Model Law on Electronic Commerce. It seems however too early to pass a judgement on the success of the Model Law. In various states (e.g. USA, Australia, Sweden and The Netherlands) the question whether to enact the Model Law has now become a serious subject of discussion.

Relevance of the Model Law for the Imprimatur Business Model

Information sent on demand from a media distributor to a user may fall under the scope of the Model Law, since it concerns a relationship of a commercial nature. If the user is not a professional but a consumer, the Model Law may be applicable, unless a national legislator chooses to exclude transactions with consumers from the scope of the Model Law rules.

For the Imprimatur Business Model, the rules on the formation and validity of electronic contracts are of special importance. In various national jurisdictions it is still not obvious that contracts can be concluded by electronic means. National laws explicitly recognizing the formation and validity of electronic contracts are therefore necessary. According to the Model Law a valid contract can be concluded by exchanging offer and acceptance in the form of electronic messages. National laws may however specify exceptions to this rule.

4. EC Directive on the protection of consumers in respect of distance contracts

The EC Directive on Distance Contracts was adopted on May 20, 1997. It has to be implemented into the national legislation of all Member States by June 4, 2000. The aim of the Directive is to harmonise the Member States' law on the protection of consumers in respect of distance contracts. The Directive is applicable to distance contracts between consumers and suppliers. A "distance contract" is defined as: "any contract concerning goods or services concluded between a supplier and a consumer under an organised distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded". From the text of the Directive it can be concluded that it is applicable to communications through the Internet.

The Directive ensures the following rights to a consumer who negotiates and concludes a contract at a distance with a supplier of goods or services: the right to receive clear information before concluding a distance contract, the right to receive the information confirmed in a durable medium, the right to withdraw from the contract without any penalty and without giving any reason and the right to performance by the supplier.

Relevance of Directive on Distance Contracts for the Imprimatur Business Model

If the user ordering a media work from a media distributor is a consumer, the Directive on Distance Contracts is applicable. This means that the media distributor is obliged to provide the consumer the information prescribed by the Directive before concluding the contract. The information has to be confirmed in a durable medium. It can be argued that information downloaded by means of a hyperlink will be an acceptable method of confirmation under the Directive. If a distributor fails to confirm the information, the consumer has the right to withdraw from the contract within a period of three months.

The Directive does not define the notions of goods and services. Qualifying the contractual relationship between a media distributor and a consumer as either a service contract or a contract dealing with goods is important. It is decisive for the moment of commencement of the period during which a consumer has the right to withdraw from a contract concluded at a distance. In the case of services this period commences on the day of the conclusion of the contract, whereas in the case of goods it starts from the day of receipt of the goods by the consumer.

There are a few exceptions to the right of withdrawal, inter alia with respect to contracts "for the supply of audio or video recordings or computer software which were unsealed by the consumer". This exception to the basic right of withdrawal may be relevant for the Imprimatur Business Model. For instance, if CD's and video's sent digitally to a consumer would have to be "unsealed" by clicking an OK-button, one could argue that this exception applies.