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ORIGINAL PAPER

# Digital Content Contracts for Consumers

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**Abstract** The application of consumer law to digital content contracts encounters a number of obstacles. Some of these are rather typical for digital content markets, e.g., the legal consequences of the classification of digital content as "goods" or "services" and, more importantly, the absence of general benchmarks to evaluate the conformity of digital content. Other problems, such as the limited usefulness of consumer information and the position of underage consumers, are not as such reserved to digital consumers, but they are amplified in the digital content markets. Moreover, particular attention is paid to the complex relationship between copyright law and consumer law. This paper explores the extent to which consumer (contract) law is fit to address the problems faced by digital consumers wishing to enjoy the benefits of digital content and examines whether the on-going initiatives at national and European level are likely to provide relief. Finally, recommendations for improvement are put forward in cases where the analysis shows that the problems identified are not or are insufficiently solved by these initiatives.

**Keywords** Digital content · Consumer law · General contract law · Copyright law · Telecommunications law

Digital content has become an intrinsic and important element of the European and national economies, and is a target area of the digital regulatory agenda (European Commission 2010, pp. 11–13). Digital content is also, and increasingly, an established fact and factor of our daily lives. More and more of our needs for information, personal development, entertainment, communication, and social interaction are catered for by the suppliers of

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digital content. For the purpose of this paper, "digital content" is being defined as "all digital content which consumers can access either online or through any other channels such as CD or DVD, and any other services which the consumer can receive online" (Europe Economics 2011a, p. 9).

Unlike other areas of law, such as media and communications law, data protection law, copyright law, or e-commerce law, general consumer and contract law was late to respond to the changed situation and to the challenges from digital markets for the application of a legal regime that is firmly rooted in an analogue, tangible world. More recently, however, "digital consumer law" has experienced a surge of interest and, what is more, concrete actions. Already during the legislative process leading to the enactment of the Consumer Rights Directive (Directive 2011/83/EU, *OJ* 2011, L 304/64, hereinafter also CRD), the legal protection of the consumers of digital content was a central theme (European Parliament 2010). Parallel to that, a group of experts under the guidance of DG Justice elaborated provisions that would form the basis for the European Commission's proposal for a Regulation on a Common European Sales Law (proposal of 11 October 2011, COM (2011) 635 final, hereinafter also CESL). Both the CRD and the CESL address explicitly also contracts for the provision of digital content.

Suggesting an adequate regulatory framework for digital content requires a thorough understanding of the characteristics of digital content markets and products, the concrete concerns that consumers experience as well as the extent to which these concerns are already addressed by existing law, and the gaps in the present legal regime that may cause an imbalance to the disadvantage of digital consumers. While digital consumers share many of the general concerns and challenges that consumers in any other market experience, their situation is also special in a number of respects.

The goal of this contribution is to provide a concise and critical analysis of (a) the legal standing of digital consumers under the present legal regime, (b) the extent to which the new rules and initiatives suggested are able to address problems that still need to be dealt with, and (c) the issues that should be considered in future debates towards further adjusting consumer and contract law to digital markets. In doing so, the paper also summarizes some of the main findings of a study that the authors conducted for the European Commission (Loos et al. 2011a). Part of the analysis for this study was based on a concurrent comprehensive empirical study into the actual experiences and problems of digital consumers, and on a legal study, combining a comparative survey in nine Member States (Finland, France, Germany, Hungary, Italy, the Netherlands, Poland, Spain, the UK), and in Norway and the USA, with desk research and a critical analysis of the existing European and national rules and the options for further optimization. This is much ground to cover, and in order to do so the analysis in this paper necessarily needs to be concise. Where relevant, reference is made to the more elaborate discussion in the study. When making suggestions on how to improve the protection of digital consumers, the authors sought to achieve a balanced approach, which takes into account the interests of both consumers and the digital suppliers.

## Digital Content Markets for Consumers

A number of factors and parameters characterize the situation of consumers in digital content markets. Digital consumer law must take these factors into account as well as the resulting concerns of consumers and challenges for the application of existing consumer law.

## From Tangible to Intangible

Probably one of the most evident characteristics of digital content markets is the move from the supply of predominantly tangible goods towards intangible products. Instead of printing and selling a tangible book in a bookstore, it is now also possible to "print" the same book in electronic form and offer it for download. Music can be offered for sale in the form of (tangible) CDs but also in the form of MP3s, etc. Games are played increasingly online and ringtones purchased via the mobile phone. Other forms of digital content have a hybrid character and combine the characteristics of the sale of goods and the provision of services. For example, software sales may involve (1) the sale of a physical copy of the software, (2) an online (automated) update service, and (3) a real-time (remote) software support service (e.g., a help desk).

As was, for instance, pointed out during the consultation on the Commission's Green Paper on the Review of the Consumer Acquis and elsewhere, intangible digital content may have many things in common with tangible products (the content to begin with). Yet, digital content does not fit well into the traditional consumer law framework, where many rules are designed for a tangible economic environment, such as the rules in consumer sales law, the provisions about the right of withdrawal, or certain remedies, such as the right to demand repair or return a product (Loos 2008, pp. 38–39). In particular the fact that digital content is excluded from the application of consumer sales law was mentioned as one of the "major deficits" of the present legal situation (The European Consumer Centres' Network 2010, p. 21).

## Doing Business Online

Digitization has enabled the emergence of a plethora of new business models for the delivery of digital content. Consumers can choose between "on-demand" offerings, "near-on-demand" content, on-demand downloading, streaming, webcasting, IP-based TV, subscription to purchase e-books, e-journals, and e-newspapers, social broadcasting, cloud computing, apps, in-app purchases, and many, many more. Similarly varied are the forms of payment, ranging from monetary prices to services in kind, attention (in particular to advertising), or personal data. In addition, new ways of concluding contracts (in particular through the click-wrap, browse-wrap mechanisms) can be reported (Loos et al. 2011b, pp. 735–737). In a "click-wrap" licence, the standard contract terms are presented to the user electronically, and the user agrees to these terms by clicking on a button or ticking a box labelled "I agree" or by some other electronic action. For instance, depending how the click-wrap licence is technically set up, the consumer's consent may be required either at the download or at the installation of the software, or sometimes at both stages. The most recent way to present standard terms to the consumer is the "browse-wrap" licence, where the terms of the agreement are simply accessible via a hyperlink on the website of the trader. Contrary to the click-wrap method, the consumer does not get, by the browse-wrap licence, the possibility to "agree" to the terms by actively clicking on a button or ticking a box. Instead, the user is presumed to assent to the terms by merely using the website. Paradoxically, the website must be used in order to read the contract, or even become aware of its existence. Whether the presentation of licence terms through click-wrap or browse-wrap is sufficient to give rise to a legal act is a question that receives varying answers in the different jurisdictions examined (Loos et al. 2011a, pp. 65–66). While problems of contract formation in electronic environments are not specific to digital content contracts, these problems become more acute in relation to one-off experience goods, such as purchasing movies or music online.

### More than "Just" Goods or Services

"Cultural goods and services should be fully recognized and treated as being not like other forms of merchandise" (UNESCO 1998). This statement, part of an Action Plan on Cultural Policies for Development, is representative for a broader sentiment that digital content is different from other consumer goods, such as cars, hair-dryers, or instant coffee. Digital content is often also a form of cultural expression and an important ingredient of personal development and self-expression, social and political participation, cultural adhesion, and the exercise of fundamental rights, such as the right to exercise one's freedom of expression. With this comes a responsibility for the legislator to create the conditions under which digital consumers can exercise their fundamental rights and fully benefit from the various forms of digital content. In other words, the distribution and consumption of digital content is subject to a range of prominent public interest objectives regarding the accessibility, safety, and availability of digital content. Many such public interests are articulated in sector-specific rules in, e.g., audio-visual law, copyright law, telecommunications law, data protection, and e-commerce law that also govern the production, distribution, and consumption of digital content. This situation raises questions regarding the interaction between general and sector-specific rules to protect the interests of consumers, as well as the role that public interest can play in the interpretation of general consumer law.

## Digital Consumer Concerns

### Access Problems

On the list of problems consumers experience with digital content, access problems hold the first place. About one third of the most recent problems experienced revolved around access (Europe Economics 2011b, pp. 58, 74–75). Access problems can span from technical access issues, such as the ability to play, listen, and watch digital content on different kinds of devices, to lock-in or lock-out situations that are the result of product bundling or interoperability issues, social exclusion, and geographical impediment because of region coding and restrictive licensing practices. The ability to access digital content has important implications for consumers' participation in cultural, political, social, and economic life (Helberger 2005, pp. 35, 57). Many of these access issues also have implications for the consumers' freedom of choice and their ability to benefit from a diverse offer of media contents and products.

### Information Problems

Access issues are closely followed by concerns about absent, incomplete, or incomprehensible information. The lack of information or the low quality of information provided and also the fact that key information is often obscured, for example, hidden away in lengthy terms of use, are all reasons why consumers feel incompletely informed (ECC-Net 2010, p. 24; Europe Economics 2011b, pp. 38–50). At the same time, when talking about consumer protection in digital content markets, the need for more transparency is probably the most frequently made suggestion of how to improve the situation for consumers (APIG 2006, par. 97–105; BEUC 2004). This further emphasizes the need for a thorough understanding of the potential, limits, and gaps in present information rules.

### Usage Restrictions

Another frequently mentioned problem consumers experience is usage restrictions, for example, as a result of the application of technological protection measures or Digital Rights Management (DRM), but also contractual restrictions on the ability to play, listen, copy, print, or share digital content (Europe Economics 2011b, p. 58; Helberger et al. 2004). It should be noted that this is not only a problem of copyright law but also of unfair terms, particularly with regard to digital games (for a critical account of the US situation on this, see Lastowska 2010).

### Unfair Terms

Less noticeable to consumers but no less serious are problems regarding unfair terms and conditions. Suspicious provisions include the following:

- The reservation to unilaterally change the terms and conditions of the contract. As a consequence, the provider of digital content reserving the possibility to do so can, for instance, change the number of copies of a song a consumer is allowed to make even after the consumer bought the song and downloaded it onto her computer.
- Wide-ranging disclaimers through which liability for several types of damage on consumer hardware or software is excluded.
- Provisions allowing the vendor to place restrictions on the possibility of criticizing the product publicly.
- Provisions enabling the vendor, through the sale of the product, to monitor usage behaviour.
- Provisions stating that the product only works with software and/or hardware provided by the same vendor or a supplier preferred by the vendor.
- Suppliers of software reserving the right to update software remotely and without warning.

Moreover, terms and conditions may affect users' privacy. While there is evidence that consumers are (very) concerned about their privacy *in abstracto*, in practice they will find it often difficult to identify privacy issues or concrete threats to their privacy. Still they mention the excessive or inappropriate request for information as well as the unnoticed processing and collection of personal data as commonly experienced concerns. More generally, in order to acknowledge problems with unfair terms in consumer contracts and possible conflicts with reasonable interests protected elsewhere (e.g., in copyright law, data protection law, or media law), a certain level of legal expertise is required that many if not most consumers lack.

### Security and Safety Problems

Finally, other important areas of concern are security, safety, and the sustainability of communications. Security and safety issues are a concern, also and particularly in the online environment, where viruses, malware, and other corruptive technology can spread easily and in no time. Security concerns mentioned by consumers include email scams, spam, identity theft, viruses, loss of information, and the security of online possessions and communication, for example, in the context of social networks or email (Europe Economics 2011b, pp. 59–60, 105). Security concerns can arise, for example, with respect to DRM systems that are in conflict with other software installed on a computer. Since most DRM systems and the relevant online

services need an Internet connection, they are relatively open for external attacks that can hardly be prevented by consumers. The security and safety of consumers' hardware and software is not only a concern of consumers; it is also in the interest of society as a whole: "For information technology to also function reliably in the future it is important to make people increasingly aware of the importance of IT security," as the Charter Consumer Sovereignty 2007 puts it.

## Digital Content Contracts and the Law

### Goods or Services: Does It Matter?

#### *Theory: Complex Situation*

European consumer law largely pivots around the key distinction between goods and services, a distinction that has been further reinforced by European primary and secondary law (Schmidt-Kessel 2011). The distinction between goods and services is certainly one of the main features of the Consumer Sales Directive (Directive 1999/44/EC, OJ 1999, L 171/12), for it only covers tangible movable items (Article 1(2)(b) Consumer Sales Directive). Even the now repealed Distance Selling Directive (Directive 97/7/EC, OJ 1997 L 144/19), although containing no definition of goods or services, did provide for different rules in relation to the trigger point for the exercise of the right of withdrawal and for the exemptions thereto. Both of these examples show that the protection enjoyed by consumers in relation to the digital content they purchase may depend on and vary according to its classification as a good or a service. The situation of consumers of digital content is rendered more difficult by the fact that, unlike the rules that apply to goods (e.g., the rules of the Consumer Sales Directive), the regulation of service contracts is generally a patchwork of rules that have been developed by legislators or courts on an ad hoc basis (Loos 2011, pp. 757–759). Also at the European level, the *acquis communautaire* in the area of service contracts is only of a rudimentary nature. Even the 2006 Directive on services in the internal market (Directive 2006/123/EC, OJ 2006, L 376/36, hereinafter the "Services Directive") does not apply to major types of services,[1] and in principle does not affect the contractual relations between the service provider and the client, as recital (90) of the preamble to the Directive indicates. As a consequence, the Services Directive hardly contains any substantive rules that bear an effect on the contract between a service provider and its client. The principal exceptions are the information requirements of Article 22 of the Services Directive.

An analysis of the situation within the Member States demonstrates that the classification of digital content is subject to considerable legal uncertainty (Loos et al. 2011b, p. 732). This might partly be due to the relatively small amount of relevant case law available. But it may also lie partly on an unresolved controversy about how to classify digital content. In France, for example, the law does not envisage the classification of the purchase of a CD or DVD containing software, and case law as well as literature diverges on the matter. Some decisions and authors consider the contract to be a sales contract (e.g., *Cour de cassation*, LCE c/ Artware, Mai 22, 1991, no. 89-11390), while others see it as a variant of a contract for hiring (Hollande and Linant de Bellefonds 2002, no. 503), and yet others consider it to be

[1] Art. 2 of the Directive lists services such as financial services, electronic communications services and networks, transport services, services of temporary work agencies, healthcare services, audiovisual services, gambling, services of notaries, bailiffs and other official authorities, social services, and private security services.

a sui generis contract (Montéro 2005, p. 77). Many provisions of the Consumer Code apply to goods, without specifying whether or not the goods must be tangible or intangible. However, the "legal warranty of conformity" only applies to movable *tangible* goods, and it is thought not to apply to flaws in software. Where software is placed on a CD or DVD, French case law distinguishes between the sale of the CD or DVD itself and the sale of the software.[2] It is therefore likely that a judge would consider a flaw in software to be a flaw affecting an *intangible* good, thus excluding any recourse to the said warranty (Loos et al. 2010, pp. 42–43). To further complicate matters, Article L. 121-20-3 of the French Consumer code does provide for the professional's automatic liability towards the consumer for the correct execution of the contract, insofar as the good was purchased at a distance. In effect, this means that the seller of a CD or DVD on which software is placed is strictly liable for flaws in the software if it was purchased at a distance, but possibly not if the CD or DVD was purchased in a shop. This way, the remedies for non-conformity under Articles 1603 ff. of the French Civil Code or the warranty against hidden defects of Articles 1641 ff. of the French Civil Code would most likely be available to the French consumer (Loos et al. 2010, p. 41). The situation in France is representative of the controversy and uncertainty in many Member States.

*Practice: Pragmatic Approach*

Despite the lack of a clear theoretical classification of digital content, it is interesting to see that in practice the classification problem seems to be not that relevant. In particular in situations in which digital content (e.g., a piece of software) is contained on a tangible medium, a substantial number of Member States (such as France, Germany, Italy, the Netherlands, Spain, and the UK; the same is true for Norway) apply the rules of consumers sales law either directly or by analogy. For instance, § 453 of the German Civil Code states that the provisions on the "purchase of things apply with the necessary modification to the purchase of rights and other objects." Some legal systems, such as in Finland, expressly provide that where software is supplied on a tangible medium, it is considered a service, as is the online supply of software. The situation of digital content delivered online is more problematic, in particular in countries such as Norway, France, or Poland, where national law requires goods to be tangible. In other countries, the distinction between goods and services is less decisive. For example, in Italy, standard software, whether on a tangible medium or not, is qualified as a movable object intended for the consumer, whereas tailor-made software is not (Loos et al. 2010, p. 161). This implies that with regard to defects in standard software, the consumer may have recourse to consumer sales law. In the Netherlands and Norway, consumer sales law may apply by analogy (Loos et al. 2010, pp. 210 and 256). Somewhat different is the approach in Spain and Hungary, where it has been suggested to classify contracts for the (online) supply of digital content as license contracts (Loos et al. 2010, pp. 118 and 316). This would be in line with the classification of such contracts under copyright law. The legal consequences and rights of consumers would then depend on the licence terms as well as on the national law in question.

An interesting approach is to classify contracts for the supply of digital contents as sui generis contracts, to which consumer sales law is then declared applicable. This is an approach pursued, e.g., in the UK (Loos et al. 2010, pp. 356–357). This approach leaves the courts free to invoke the general principles of common law leading to a similar result as those that would be applicable under the Sale of Goods Act or Supply of Goods and Services

[2] *Cour de Cassation (Chambre commercial)* 9 November 1993, Bull. Civ. IV, no. 395.

Act. Classification of software as a sui generis right has also found support in the French literature (Hollande and Linant de Bellefonds 2002, no. 503). Arguments in favour of a sui generis approach were that it would leave more room to consider the relevant technological developments. Arguments against it could be that it also leads to the introduction of unfamiliar legal concepts and thus possibly to more legal uncertainty.

Under the Consumer Rights Directive, a special regime is provided for digital content contracts. Digital content is defined in Article 2 under (11) CRD as "data which are produced and supplied in digital form," whereas recital (19) of the preamble to the Directive enumerates examples which fall within the definition, however, leaving open which rules shall apply outside the areas harmonized by the Directive. More specifically, the recital further indicates that where digital content is supplied on a tangible medium (such as a CD or DVD), it should be considered as a good within the meaning of the Directive. To the contrary, the Directive does not decide about the classification of digital content that is supplied online. Instead, it provides specific rules with regard to information obligations and the right of withdrawal where the contract is concluded away from business premises or at a distance. The Directive thereby avoids the difficult question of classification, but takes away the relevance of that distinction by stating that both forms of digital content delivery (tangible or not) fall under the scope of the Directive. This approach comes closest to the approach in those Member States that do apply consumer sales law either directly or by analogy, with the necessary modifications. One such modification concerns the right of withdrawal. As Article 16 under (m) CRD determines, where digital content is not provided on a tangible medium, a consumer has a right of withdrawal unless she consented to the beginning of the performance of the contract during the withdrawal period and has acknowledged that she will consequently lose the right to withdraw from the contract. The Directive does not touch upon other questions where modifications might be necessary, such as the question regarding the time and place of performance and the delivery of digital content (Loos et al. 2011a, pp. 99–102), the extent to which ownership has or must be transferred,[3] or the question of the appropriate remedies.[4] These are issues that still would need to be tackled.

## Consumer Law Versus Copyright Law

### *Copyright Approach*

Many if not most items of digital content are subject to intellectual property rights, in particular to copyright law. Copyright law lays down the rights of authors or other rightholders, e.g., publishers with respect to their "works." Works can include any form of creative output, including video, music, text, books, pictures, games, and software. Copyright law grants authors a set of economic exploitation rights (like the right to control the copying, and the physical and online distribution of their works) and moral rights (like attribution and adaptation). These rights are subject to exceptions and limitations as a means to balance the rights of authors with other individual and societal interests, such as private

[3] Typically, a trader in a consumer sales contract is obliged to transfer ownership of the good. This is difficult, however, in the case of digital content, particularly digital content delivered online, because it is subject to intellectual property rights of the rightholder.

[4] For example, in most EU legal systems, in case of termination of a contract the parties will have to return the benefits from the performance of an obligation that has already taken place. This might be difficult in case of digital content because of its very nature. The consumer could be requested to delete the files from her system, but it will hardly be possible to check whether she has actually done so.

use and privacy, the access to and wide dissemination of works, news reporting, education, religion, etc.

Digitization offers new and exciting opportunities for authors to disseminate and sell their works: on new carriers, such as DVDs and CDs, online per download or streaming, and across new platforms such as game consoles, MP3 players, tablets, mobile phones, and e-book readers. Along with digitization, however, new challenges have emerged for right-holders as a result of the improved possibilities to copy works and disseminate them at low cost. This again magnifies concerns about piracy and unauthorized use. Part of the response to the new perceived risks but also to the nature of digital content markets was a legal one: It resulted in the further expansion of exclusive rights (like the introduction of the making available right to cover online distribution) and discussions on how to reduce existing user privileges, such as the private copying exception. Other solutions were technological, leading to the development of new technologies to control the dissemination and consumption of digital content, such as technical protection measures (TPMs), Digital Rights Management solutions (DRMs), and electronic access control or conditional access systems (CAs), including watermarking and tracking technologies. Common to all these technologies is that their ultimate goal is to enable rightholders to exercise precise control over who may access and use which content on which devices and under which conditions (after payment of a fee or subscription, for limited or unlimited time, once, twice, reading but not copying or printing, sharing with a limited number of users and devices, etc.).

The resulting usage restrictions and the way rightholders control the consumption and distribution of their works are an important cause of some of the consumers' concerns regarding digital content mentioned earlier in "Digital Consumer Concerns section." DRM, TPMs, and CAs can be the reason why consumers are not able to use e-books in the same way as they use normal books, why they are excluded from access to video content that is sold or broadcast in different regions, or why they find that the content they purchase is incompatible with their equipment or cannot be transferred to new equipment. The licensing conditions of digital content, moreover, can be perceived as overly restrictive or unfair by consumers. Finally, the enforcement of rightholders' exploitation rights can go at the cost of other rights of consumers, such as the right to freedom of expression, personal property, or privacy.

*Consumer Law Approach*

When applying consumer and contract law to situations in which consumers complain about problems with digital content that are directly or indirectly related to copyright protection or the way it is being exercised, additional difficulties arise due to the difficult relationship between both fields of the law, in particular to their differing concepts of property. Consumer law, and consumer sales law in particular, is based on the idea that once a consumer purchases a good, a complete transfer of ownership occurs either because the supplier is obliged to transfer ownership or because such a transfer automatically follows from the conclusion of the contract (Von Bar et al. 2009, Notes 1–5 to Article IV.A.—1:202 DCFR, pp. 1235–1236, and Notes 1–2 to Article IV.A—2:101 DCFR, pp. 1254–1255). The consumer as the new owner receives the permanent right to deal with that good as she sees fit. In situations in which she cannot use the product in a way that corresponds to her reasonable expectations, this might give rise to complaints about non-conformity. The consumer's reasonable expectations as to the functionality of a good and her ability as the owner of the good to benefit from that functionality determine not only the extent to which suppliers are obliged to inform the consumer about the main characteristics of that good, but

also how the fairness of the contractual conditions and commercial practices related to the process of selling the good are assessed.

*Consequences of Conflicting Approaches*

Whereas consumer sales law starts from the idea of ownership of the purchased goods and the right to use these goods as the buyer sees fit, the basic tenet of copyright law is that ownership of a physical copy of a work does not grant any ownership in the copyright on the work embodied in the physical object. For example, a purchaser of a book or videotape becomes the owner of the physical copy of the work, but only a licensee of the copyright in the work. Consumer law and copyright law therefore start from opposing positions. This already complicated relationship for traditional goods is even more problematic in the case of digital content. First of all, a transfer of the digital content, in the strict sense, does not occur, as the supplier does not provide the consumer with the original data (which therefore remain under her control) but only a copy of the original data. Second, the supplier may be able to transfer the ownership over a physical carrier such as a CD or DVD. She will typically not transfer the ownership of the digital content itself, i.e., the intellectual property rights associated with the digital content. Instead, the consumer receives an implied or express license to use the digital content.

The fact that the consumer does not become the full owner of the digital content but only a licensee can also create difficulties when assessing the reasonable expectations consumers may hold with regard to that content. What expectations consumers may have regarding the functionality and usability of digital content remains largely for rightholders and traders to determine, in their communication to consumers as well as in the licensing terms. Whether the conditions stipulated there are fair and reasonable is again difficult to assess because, unlike for many traditional goods, no commonly accepted benchmark exists for digital content of what consumers should be reasonably expected to do with digital content. Partly, this is a result of the intangible nature of many items of digital content. Partly, this is caused by the novelty of digital content, the high level of product differentiation, and the rapid development of newer digital content, rendering developing benchmarks outdated by the time they emerge (Loos et al. 2011b, pp. 741–742). And partly, it is the result of copyright law which grants rightholders the power to determine the conditions of exploitation of their works. Due to the particular structure of copyright law, statutory exceptions and limitations on the owners' exclusive rights, such as the private copy exception, do not confer concrete rights to consumers. Instead, they have been described by judges as mere privileges, which depending on the national law, can be circumvented by contract or TPMs and DRMs.[5] The character of the private copying exception as a mere privilege has also caused considerable legal uncertainty regarding the scope of information obligations[6] and whether suppliers are obliged to inform users about usage restrictions, as well as the fairness of the contractual terms that stipulate usage restrictions in deviance from copyright law's exceptions (Guibault 2002).

The question of the contractual fairness of restrictive conditions in consumer contracts is still far from being solved satisfactorily. Regarding the scope of the information obligations, however, the Consumer Rights Directive has taken a first step towards creating more clarity. According to Articles 5(1)(g) and (h), and (6)(1)(s) and (t) CRD traders are required to inform consumers about the functionality and interoperability of digital content (see also

[5] French *Cour de cassation (1re. Chambre civil*), 28 February 2006, and 19 June 2008; Belgian *Cour d'appel* Brussels, 9th Chambre 9 September 2005, RG 2004/AR/1649.
[6] French *Cour d'appel* Versailles, 15 April 2005, Françoise M., UFC-Que Choisir c/ SA EMI Music France.

"Information Needs and Obligations section" of this paper for a more elaborate discussion). One might even argue that by doing so, the Consumer Rights Directive took a first, albeit cautious, step towards developing a more consumer-oriented perspective on copyright law inside consumer law. For some time now, consumer representatives, policy makers, and academics have called for an obligation to inform consumers about usage restrictions imposed by TPMs and DRMs in copyright law, so far, however, largely without success (Guibault 2008, p. 409). It is noteworthy that the response to these calls has now come in European consumer law, instead of European copyright law. It will be interesting to see to what extent this development will be continued. In this respect, it may be observed that in the recently published text of the proposal for a Common European Sales Law, the information obligations on the functionality and interoperability of digital content of the CRD have been taken over (Articles 13(1)(h) and (l), and 20(1)(f) and (g) CESL). Where the information is provided properly, the consumer may in principle rely on it (Article 69 CESL), which implies that the digital content is not in conformity with the contract if it cannot be used in accordance with what the consumer could reasonably expect of the digital content on the basis of this information (Article 100(b), (f), and (g) CESL).

More generally, one may argue that consumer law has the potential to add another perspective to interpreting the scope and limitations of the exclusive rights of authors. While copyright law centres primarily on the position and the rights of copyrightholders, consumer law focuses on the position and rights of consumers. Arguably, the reasonable consumer expectations standard counterweighs the copyrightholder-centred norms on private copying that prevail in the copyright law analysis. For example, if there was evidence that a sufficiently large number of consumers expected to be able to make private copies, this could influence the interpretation of the conformity test to the advantage of consumers. Similarly, where judges are willing to not only adopt a functional perspective but also consider further-reaching cultural and societal interests when interpreting the conformity test, this could open the doors to a shift from a purely copyright (author-oriented) approach towards a more consumer-oriented approach to copyright-related matters, at least in consumer law. This would certainly fit into a trend that can be observed in some of the more recent decisions of the Court of Justice of the European Union, that do not see copyright law in isolation but in the larger normative and societal context.[7]

## Consumer Information Revisited

### *Information Needs and Obligations*

Digital consumers depend on accurate and truthful information about digital content when making informed decisions. This is more so since digital content is an experience good, meaning that for consumers it is often difficult if not impossible to anticipate the characteristics and value of a piece of music, a film, or a game before they have experienced it (Loos et al. 2011b, p. 742). And while some information, e.g., the title or length of a film, might still be relatively easy to find, other characteristics, such as journalistic or artistic quality, are difficult to judge for most consumers, even after they have consumed a digital content product (credence good). The need for pre-contractual information about digital content is

[7] See European Court of Justice, Scarlet Extended SA v Société Belge des Auteurs, Compositeurs et Editeurs SCRL (SABAM) (C-70/10), [2012] *E.C.D.R.* 4; Productores de Musica de España (Promusicae) v Telefonica de España SAU (C-275/06), [2008] 2 *C.M.L.R.* 17, Premier League (C-403/08 and C-429/08), 4 October 2011.

further re-enforced by two of their essential features: the complexity of the technology and the fact that most pieces of digital content are subject to specific licensing conditions that determine the functionality and usability of the digital content. Accordingly, purchasers of digital content have specific information needs. In addition to the more commonly acknowledged facts that consumers must be informed about (such as price, terms of delivery, etc.), they require information on matters such as access and interoperability, the functionality of digital content, the existence of usage restrictions, the licensing conditions, and the privacy-related implications of, e.g., the use of tracing and monitoring technologies, as well as information about the quality of the digital content in question, including the applicability of professional codes of conduct and guidelines (e.g., journalistic codes).

Much of these information needs are already being addressed by existing consumer law, though it should be mentioned that because of the mosaic of sector-specific rules, some forms of digital content are (unnecessarily so, one may add) excluded from the application of some of the relevant Directives (Helberger 2011a). For example, recital 18 of the E-Commerce Directive (Directive 2000/31/EC, OJ 2000, L 178/1) indicates that consumers of audiovisual media services cannot invoke the protection of the E-Commerce Directive and its information requirements. Instead, they are referred to the information obligation in the Audiovisual Media Service Directive, which is less comprehensive (Helberger 2011b). Similarly, recital (24) and Article 2(2)(c) and (g) of the Services Directive make clear that the application of the provisions of this Directive—with its extensive information obligations—is excluded for audiovisual services as well as for electronic communication services, such as email, internet access, and VoIP services. In this respect it is to be welcomed that the Consumer Rights Directive does not follow the tradition of excluding certain types of digital content by specifying explicitly that its provisions are applicable to almost all digital content products.[8] The Consumer Rights Directive, moreover, supplements the existing information obligations in two important aspects: It requires information about the functionality and the interoperability of digital content (see "Consequences of Conflicting Approaches section" of this paper). The question of whether traders are obliged to inform digital consumers about the presence of DRM, TPM, or other technologies that restrict access to and use of digital content remained highly controversial until the adoption of the CRD (Helberger and Hugenholtz 2007, pp. 1090–1093).

According to Articles 5(g) and (h), and 6(r) and (s) CRD, consumers of digital content products need to be informed about "the functionality, including applicable technical protection measures, of digital content" and "any relevant interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of." As the Directive further explains in recital (19), "the notion of relevant interoperability is meant to describe the information regarding the standard hardware and software environment with which the digital content is compatible, for instance the operating system, the necessary version and certain hardware features."

This definition of "interoperability" is dynamic in that it acknowledges that software and hardware are regularly updated, a process that raises questions regarding the compatibility of digital content over time.[9] The recital further indicates that "functionality" refers to "the way

[8] The exclusions in Article 3(3) CRD pertain, among others, to financial services, healthcare services, and gambling, but no specific exclusion for digital content contracts is added to this. This is different in the proposal for a Common European Sales Law, where also legal or financial advice provided in electronic form and, more importantly, electronic communications services and networks, and associated facilities and services are excluded from its scope, see art. 2(j) CESL.

[9] For the same reason, art. 103 CESL explicitly indicates that the mere fact that updated digital content has become available after the conclusion of the contract does not mean that the digital content delivered is not in conformity with the contract.

in which digital content can be used, for instance, for the tracking of consumer behaviour; it should also refer to the absence or presence of any technical restrictions such as protection of Digital Rights Management or region coding." This comprehensive definition goes beyond the existing obligations in some national copyright laws (like in France and Germany) to inform about the presence of technical protection measures. Remarkably, the wording can principally also include the use of tracking software such as cookies, watermarks, or personal identifiers, as well as the use of restrictive technologies that are used for other purposes than protecting copyrights. Examples could be the use of region coding, of access controls, and of Digital Rights Management to ensure remuneration and compliance with the general terms and conditions, or to foreclose access to events that are not protected by IP rights, such as sport events and content in the public domain. What remains unclear is whether suppliers are only required to inform about technical restrictions or also about contractual restrictions, e.g., to the extent that these deviate from the catalogue of exceptions and limitations as provided for under copyright law. More clarity in this respect is desirable.

*More Attention for Presentation of Information Needed*

An aspect that the information obligations in the Consumer Rights Directive and other directives fail to address satisfactorily, however, is the way in which information must be communicated in order to be of true help to consumers. Digital markets, maybe even more than other markets, are characterized by the availability of a stunning plethora of different products from different suppliers in different countries, each handling their own terms of use and ways of informing consumers. In other words, the amount of information that digital consumers need to process is overwhelming, and evidence is amassing that consumers are neither able nor willing to understand and process much of the information that is being supplied (Rehberg 2007, p. 36). Insights from behavioural economics further demonstrate the importance of presentational aspects, as does research into digital consumer concerns. A recent study shows that between 16% and 44%—depending on the access channel but also on age and level of education—of digital consumers surveyed indicated that they did not understand the information provided to them. The most frequently cited reasons for not understanding the information were the complexity of the language, the technicality of the language, the layout, the small font as well as the length of the information provided (Europe Economics 2011b, pp. 45 and 48). These are essentially the same reasons why an even greater proportion of users do not even seem to try to read consumer information (Bakos et al. 2009; Europe Economics 2011b, pp. 45 and 54).

One obvious conclusion from this is that if the information approach to consumer protection (as opposed to, e.g., bans, defaults, or mandated standardization) is supposed to work, paying attention to the presentational aspect, and effective communication of consumer information must be a prime objective. This is, however, not yet the reality of the existing legal framework. General requirements such as that information should be "easily, directly, and permanently accessible" (Article 5(1) of the E-Commerce Directive), or "made available or communicated in a clear and unambiguous manner, and in good time before conclusion of the contract" (Article 22(2) and (4) of the Services Directive) are not only vague, but they also ignore that effective consumer information must be presented to consumers in a way that they have an incentive to actually use it. "Framing" is important in this context (Better Regulation Executive and National Consumer Council 2007, p. 9). If information is not framed properly, consumers are likely not to read the information, or not to understand it, and in either case not to act upon the information. This implies that the information is to be presented in such a way that consumers can actually relate it to their

personal situation. For example, instead of informing consumers that "copy protection is in place" or simply showing a label indicating that this content is copy protected, the information that "this e-book cannot be copied, printed, and transferred to other devices" (which could eventually also be conveyed in form of labels) is perhaps less favourable to sales but clearly more instructive. Unfortunately, the Consumer Rights Directive seems to steer in the wrong direction here, as Articles 7(5) and 8(10) CRD forbid Member States to introduce or maintain formal requirements as to the presentation of information that is to be provided before the conclusion of a contract concluded at a distance or off-premises.

Then, there is the aspect of the correct timing and contextualization of information (Better Regulation Executive and National Consumer Council 2007, p. 9; Rehberg 2007, p. 43; Vebraucherzentrale Bundesverband 2011, p. 36). Ideally, consumers are presented with the information (and only the information) that they need at the moment when it is relevant. To give some examples, information on the reporting of problems, cancellation policies, and dispute settlement could be organized as a separate button ("report a problem") at the bottom of the first page of the trader's website, and also only provided once the user clicks that button. Information about the price, usage restrictions, and software requirements would be displayed prominently at the first visit of a product description. Information about the trader and contact details could be part of the "About" section, etc. Digital technologies, moreover, make other non-textual ways of presenting information increasingly feasible and attractive, e.g., in form of instruction videos, pictures, banners, call-outs, interactive buttons, etc. Moreover, accessibility and comprehension of particularly longer texts can be improved, e.g., in form of headings, highlighted key words, summaries, table of contents, FAQs, order, prominent presentation, etc. To require this information already before or at the time the contract is concluded, as the Consumer Rights Directive does, is thus not only premature and ineffective as consumers have no interest in much of the information provided to them at that moment, but also brings about the risk that when consumers actually need the information it is no longer available to them (and the trader is not required to provide it again).

Finally, the ultimate goal of consumer information is to enable consumers to make informed choices. To do so, consumer information regarding the different goods and services must be comparable. This again requires a certain level of standardization not only of the content but also the form in which consumer information is supplied. Beyond that, comparable consumer information should be made available not only to consumers, but to the growing array of comparison sites and tools that can help consumers process, compare, and decide upon consumer information. Accordingly it is submitted here that it is not enough to stipulate that consumer information is clear and unambiguous. In addition, consumer information needs to be communicated effectively and provided in a form and manner that encourages and facilitates comparison not only by consumers but also by third parties.

### Lack of a Benchmark of Reasonable Consumer Expectations

Another, more fundamental, question is whether the information approach still deserves its popularity as a regulatory tool in consumer law and policy. In the light of factors such as information overload and broad failure of consumers to understand or even read consumer information, a decision will have to be made whether certain interests of digital consumers are not better protected through alternative means. Such means can span from voluntary standards and default settings to mandatory quality and safety requirements or even bans.

An important argument in favour of legally defining a certain minimum standard of usability, safety, and consumer friendliness of digital content (instead of leaving the matter entirely at the discretion of suppliers and relying on consumer information) lies in the

complex interaction between consumer information and the reasonable expectations of consumers. Consumer information can shape the reasonable expectations of consumers, and thereby also the level of protection consumers can reasonably expect. In this respect, the level of protection consumers can expect, e.g., according to the rules of non-conformity but also fairness of commercial practice or contract terms, depends to a considerable extent on the extent to which consumers have been informed about possible restrictions or side-effects of digital content. In this respect, consumer information may indirectly also serve as an (unfair) exclusion clause. This is more so since, and as already mentioned, unlike in the case of many tangible goods, no clear benchmark exists of what consumers can reasonably expect from digital products. Digital content markets are highly innovative, fast evolving sectors. Due to the intangible nature of most digital content products, the main characteristics are basically a matter of technical configuration and terms of licensing—factors that can vary from supplier to supplier and from product to product. Because of the lack of an objective benchmark, once a consumer has been informed about a usage restriction, she can no longer claim that the use of restrictive DRM technology constitutes a case of non-conformity. This way, consumer information can result in a creeping degradation of traditional user freedoms. Traders can gradually reduce the general standard of what consumers ought to be able to expect from digital content, without much counterweight from the consumer because of her limited negotiation position and the lack of any obvious set of "main characteristics" that digital content products possess (Ben-Shahar and Schneider 2010, p. 59; Helberger and Hugenholtz 2007, p. 1094; Loos et al. 2011b, p. 741). To protect fundamental user freedoms and a minimum set of reasonable expectations that users should be entitled to harbour with respect to digital content (e.g., for social, democratic, or cultural reasons), a certain level of standardization seems essential.

Such a process of standardization could take different forms: It could be industry-driven (as the DVB video standard or the GSM standard for mobile telephony) or be the result of a formal legal process (such as the introduction of specific rights in copyright law, similar to the already existing unwaivable right to make back-up copies of computer programmes in the Software Directive, Directive 2009/24/EC, OJ 2009, L 111/16) (for an extensive discussion see Helberger 2011c). For this reason, in our opinion the inclusion of terms that conflict with legitimate user interests under, e.g., copyright law or privacy law should be put into the black and grey lists of (presumably) unfair contract terms (Guibault 2008, p. 409; Loos et al. 2011a, pp. 200–202). Finally, standards could also be the result of the operation of an independent regulatory authority. For example, under Article 22(1) and (2) of the Citizen Rights Directive (Directive 2009/136/EC, *OJ* 2009 L 337/11), national regulatory authorities are entitled to define baselines of minimum expectations that consumers of communications services should be entitled to harbour. Similarly, though far more restricted in scope, (the controversial) Article L. 331-31 of the French Intellectual Property Code authorizes *Hadopi* to further define the content of the private copying exception, and how many copies users should be entitled to make (Winn and Jondet 2009). In conclusion, consumer information is an important tool, but it can also backfire and negatively influence the position of digital consumers. Insofar, it is necessary to define a minimum set of more concrete benchmarks of reasonable consumer expectations in one way or the other.

### Privacy and Other Fundamental Rights Considerations and Their Place in General Consumer and Contract Law

It was mentioned that digital content is more than "just goods and services" and that the consumption of digital content can touch upon a range of political and cultural objectives (such as the dissemination of ideas and culture, social participation, democratic opinion

forming, personal self-development, etc.), as well as fundamental rights, such as the right to freedom of expression and privacy. An important aspect in the context of digital consumer law is to what extent traditional consumer law is fit to also take into account such more abstract and often even political considerations. Regarding this first question, as the comparative review demonstrated, the functional approach to determining, e.g., conformity is still prevalent within the Member States. Only for Italy and Spain, the national experts reported that considerations such as freedom of information and expression, public order, and fundamental rights (e.g., privacy, identity, and honour) are relevant when determining whether or not the digital content contract is performed correctly (Loos et al. 2010, pp. 184 and 344). This suggests that consumer law may take account of such abstract considerations, but in practice often does not.

A second question concerns the interaction between consumer law and those sector-specific laws whose goal is to protect these more abstract interests, such as media law, copyright law, or data protection law. In particular in the country reports from Italy and Spain, and also in the US report, it was emphasized that when copyright or data protection law is not respected, the digital content may not conform to the contract (Loos et al. 2010, pp. 182–184, 331 and 347, and 412). On the other hand, the Polish correspondent also reported that standards developed in data protection law do not influence the conformity test (Loos et al. 2010, p. 293–294). This would mean, for example, that when digital content installed software to collect and process personal usage data without the consent of the consumer (i.e., in conflict with data protection law), the digital content could still be considered in conformity with the contract.

For the time being, there is still little experience with (or case law about) the interaction between general and sector-specific rules that protect the interests of consumers (Loos et al. 2011a, p. 59). Often, sector-specific laws are considered *leges speciales*, with the effect that they prevail over the application of general consumer and contract law. On the other hand, where a national order is considered consistent in itself, like in Germany, the Netherlands, and Norway, standards formulated outside general consumer law can, in principle, inform the interpretation of consumer law (Loos et al. 2010, pp. 99, 228, and 264). Moreover, the level of possible interaction appears to depend also on the legal field in question. For example, some country reports explicitly confirmed that contractual terms are considered unfair if they are in breach with privacy standards. Any contractual term restricting these rights will either be null and void or voidable in Hungary (Article 75(3) Hungarian Civil Code), Italy (Articles 121–134 Italian Consumer code), and Spain (Article 86 Spanish Consumer Act); case law in Poland[10] and France[11] is to the same extent. However, the question is far less clear in situations where contract terms conflict with copyright law (Loos et al. 2011a, pp. 86–93).

### Protecting Consumers' Reasonable Expectations of Safety and Security

The recent study by Europe Economics indicates that 9% of digital consumers had experienced security problems over the 12 months previous to the interviews (in practice the

[10] Polish Supreme Court (*SN*) 6 October 2004 (I CK 162/04); Regional Administrative Court in Warsaw (*WSA*) of 31 March 2006 (II SA/Wa 2395/04); Polish Supreme Administrative Court in Warsaw (*NSA*) 30 March 2006 (I OSK 628/05).

[11] For example, the Court of First Instance of Paris knocked down a clause of the general terms of an Internet Access Provider (IAP) which read that "with the exception of communications concerning the subscription and services the use of collected information for commercial purposes is only performed with the express acceptance of the subscriber," because the exception it established in favour of the IAP was not provided by any legal texts and was thus illicit, *TGI Paris (1re Chambre social)*, 5 April 2005, 1 ch. sociale, 04/02911.

figures might be higher because many security issues may not come to the attention of consumers, either because they have been fixed before consumers could notice them or because of the complexity of the technology). Most reported problems were related to spam, both in the form of email and text messages (SMS) and to digital content which either directly corrupted the device on which they were installed or left them open to viruses etc. (Europe Economics 2011b, pp. 76, 78).

There is little reason to doubt that digital content that may potentially cause serious detriment to the consumer is not in conformity with the contract and thus can be remedied under consumer law. Moreover, sending spam—i.e., unsolicited communications for the purposes of direct marketing—to consumers is illegal under Article 13(1) and (3) of the Directive on Privacy and Electronic Communications. Obviously, such conduct constitutes an unfair commercial practice. However, where the consumer had given her electronic contact details for electronic mail to the trader in the context of an earlier contract, spamming is not illegal insofar and as long as the consumer does not object to receiving the unsolicited commercial communications. It could be argued that where the consumer had given her contact details upon the conclusion of an earlier contract, but has later on objected to receiving such messages, continuing to send such messages constitutes a non-performance of that earlier contract. Still, there does not seem much need for such interpretation, as the law on unfair commercial practices would be applicable anyway.

More difficult to answer is the question whether flawed digital content that does not itself cause detriment but that leaves the consumer's hardware or software open to viruses and Trojan horses is also considered not to be in conformity with the contract. From the side of the industry, it is argued that it is normal that complex software has some flaws, defects, or bugs when it is first put on the market. In fact, automatic services updates are also used to address and remedy newly discovered flaws as quickly and as efficiently as possible. The question then arises whether the fact that such flaws, bugs, and defects are rather common implies that the digital content is nevertheless in conformity with the contract when such defect, flaw, or bug manifests itself. Decisive is whether the digital content meets the reasonable expectations the consumer may have of the product. Factors to consider in this context could be the time that the product has already been on the market, whether it is a beta-version or not, and whether or not the product is free of charge.[12] However, if it is established that the consumer's reasonable expectations are not met, the digital content is non-conforming, irrespective of whether the deviation is major or minor (BEUC 2010).

A relevant and yet unresolved question in that context is to what extent consumers must cooperate, e.g., through installing the requested updates, in order to "qualify" for protection. It would seem justified that suppliers of digital content can reasonably expect the consumer to keep her software programmes updated and to allow for repairs of discovered defects, flaws, and bugs through automated services update. Even though consumers may not be under a legal duty to do so, the failure to enable the supplier of the digital content to remedy such defects through updates and to keep antivirus programmes updated may have detrimental consequences for consumers under the rules of *mora creditoris* or contributory negligence. Unclear so far is for how long, and whether and to what extent consumers are also required to do so when the updates are not free-of-charge.

[12] On the latter point, Article 100(g) of the proposed CESL provides that "(…) when determining what the consumer may expect of the digital content regard is to be had to whether or not the digital content was supplied in exchange for the payment of a price."

### The Underage Digital Consumer

Digital content is an important part of the life of a group of consumers that is often overlooked when talking about digital consumers: the underage consumers.[13] Surveys show that their participation in the commercial process typically starts at a fairly young age and can also be quite intense in nature. An active consumer, however, is not necessarily a knowledgeable consumer. Credulity, susceptibility to certain advertising strategies, and a lack of experience with managing personal finances (to name a few aspects) all contribute to the vulnerability of the underage consumer. When we add to this the relative ease of digital purchasing and the difficulty of reliable age verification, a (potentially) problematic image appears. But that is only half the story. Minors are not solely associated with vulnerabilities, but also with the opposite characteristics like digital savviness and a choosy attitude. In the online environment, young consumers may sometimes be more skilled in transacting, trading, or gathering information than adults. Due to these contradictory features and the heterogeneity of the group, it is hard to draw a clear profile and subsequently to strike the right balance between protection and "emancipation."

Within the law of the Member States, it is commonly held that minors should not enjoy full legal capacities, but that they should also not be deprived of any capacity to conclude contracts (Loos et al. 2011a, p. 239). This raises the question as to where a line should be drawn and which actions should fall within the scope of a minor's limited legal capacities, and which should not. For the time being, the different approaches within the Member States differ considerably, more so since the topic has not been subject to any EU harmonization. It should be emphasized that a uniform answer to this question is important not only for the minors concerned and their parents, but also for businesses, as they need to be able to ascertain the risk of the digital content contract not being valid. The difficulty for businesses to establish the age of their counterpart and the resulting uncertainty as to the validity of cross border B2C-contracts for the supply of digital content may hamper the development of the internal market for digital content not only with regard to minors, but also with regard to adults (Loos 2012, pp. 14–16). It is therefore suggested that the EU take harmonization matters regarding these issues—and it would stand to reason that such action would not be restricted to digital content contracts but would also extend to other contracts concluded over the Internet.

## Conclusions

In this paper we have analysed the legal position of digital consumers under the present legal regime and to what extent developments in consumer (contract) law address problems digital consumers face when they wish to enjoy the benefits of digital markets. The analysis should be seen in the context of the on-going initiatives at national and European level to formulate new strategies for future consumer policy. Insofar, the recommendations made in this paper can also be seen as input for this debate.

[13] The matter of legal capacity is again left out of consideration in the proposal for a Common European Sales Law, as it is "neither very important for national laws or less relevant for cross-border contracts," see European Commission, *A common European sales law to facilitate cross-border transactions in the single market*, Communication of 11 October 2011 from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, COM(2011) 636 final, p. 8.

Some of the problems that digital consumers encounter are rather typical for digital content markets, e.g., the absence of general benchmarks as regards the question whether digital content is in conformity with the contract and the resulting possibility for suppliers of digital content to undermine consumers' expectations by providing (true or misleading) information on the performance capabilities of the digital content offered. Insofar, the analysis has identified gaps in the protection of digital consumers and made concrete suggestions, targeted specifically to their situation. Other problems, such as the classification of digital content as goods or services, are complex but tend to become less relevant as newly developed legal instruments such as the Consumer Rights Directive and the proposal for a Common European Sales Law tend to overcome the distinction by introducing tailor-made rules for digital content. And yet other problems we identified are as such not reserved to digital consumers, such as the sense and nonsense of consumer information obligations and the problem of underage consumers. These problems are, however, intensified in the light of digital content markets. Addressing these problems in the broader legal context (e.g., in the context of rules that are not specifically restricted to digital content contracts) would benefit the situation of digital consumers as well as of consumers of other consumer goods and services more generally. Finally, we have indicated that particular attention is needed with regard to the complicated relationship between copyright law and consumer law. We have shown that where copyright law focuses primarily on the protection of (the position of) rightholders, consumer law rather focusses on the need for protection of consumers. Ultimately, consumer protection law in the area of digital content may very well become the crowbar needed for the long-awaited improvement of the legal standing of consumers of copyrighted content, contributing to a better balance between the rights of consumers and the rights of copyrightholders.



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