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Chapter 12 - Individual licensing and consumer protection

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Chapter 12 Individual licensing models and consumer protection

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Abstract Copyright law is not primarily directed at consumers. Their interests are therefore only marginally accounted for, as the copyright rules exempt specific uses of works from the right holder's control. This Chapter examines the impact of digital technology on the position of consumers of licensed copyrighted content. While ownership of the physical embodiment of a work does not entail the ownership of the rights in the work, how does copyright law deal with 'disembodied' works? Whereas digital content is now commonly distributed on the basis of individual licensing schemes, what does it mean for consumers? Do they have a claim under consumer protection law against copyright owners for the impossibility to make a copy for private purposes, the lack of interoperability between devices, and the geo-blocking of their account?

Keywords Digital content, copyright, consumer protection, interoperability, private copying, geo-blocking

Table of contents

1. Introduction	3
2. 'Individual licensing' of digital content to consumers	5
3. The nature of the transaction	8
3.1 Physical purchase	8
3.2 Digital download	9
3.3 Streaming	11
4. The position of the consumer	11
4.1 Private copying.....	13
4.2 Interoperability of devices.....	15

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4.3 Geo-blocking	15
5. Conclusion.....	17
References	18

1. Introduction

The romantic idea of authors conveying their works to the enjoyment of individual members of the public has progressively evolved over the past century into a powerful creative industry geared to the demands of masses of eager consumers. That ‘digital content’, defined as any content protected by copyright and/or related rights which the consumer can access on-line or through any other channels as CDs and DVDs, are consumption goods is undeniable. Without consumers, mass entertainment products, like films, TV programs, songs, books and video games, would have no public. But the creative industry has gone through a rough transition period in recent years due to the constant development of digital technology: not only must the industry face the enduring threat of online piracy, but more importantly, it must counter this threat by offering innovative legal channels of digital content to the public. According to the 2015 edition of the International Federation of Phonogram Industry’s (IFPI) *Digital Music Report*¹, the music industry derived for the first time in 2014 the same proportion of revenues from digital channels (46%) as physical format sales (46%). In recent years, music subscription services like Spotify, iTunes, Tidal, and Pandora have gained tremendous ground worldwide. Of the revenues generated from digital channels, digital downloads still account for the bulk of the global digital revenues (52%). These figures show that in the coming years, a further switch from a world of music primarily characterized by tangible goods to one primarily characterized by digital forms of distribution should be expected to take place.² The same phenomenon is unfolding as we speak, with respect to films and other types of content, as Amazon Prime, Netflix and other services give consumers access to a wide catalogue of audiovisual works.³

Whatever the channel of distribution, however, the digital content that is legally offered to the public on a commercial basis is usually ‘packaged’ so as to discourage any act of piracy with respect to that content. Such ‘packaging’ commonly entails a combination of contractual licensing conditions, conditional access measures and anti-copying devices. Measures enabling the industry to monitor the use made of copyrighted content by individual members of the public are often also part of the bundle. This type of ‘packaging’ does affect the general public’s enjoyment of the content. Consumers complain about a lack of interoperability between devices, the impossibility to make a copy for time or format shifting purposes, the lack of access to or the presence of restrictions on the use of the content in different territories, the limited possibilities to restore damaged or lost content, and data protection issues arising in relation to the monitoring of their use of copyrighted content.⁴

The intersection between copyright law, contract law and consumer protection law is increasingly attracting attention among legal commentators⁵ and civil societies.⁶ Many of the consumers’ concerns when purchasing digital content, in fact, have their source in the way

¹ IFPI Digital Music Report - Charting the path to sustainable growth, www.ifpi.org/downloads/Digital-Music-Report-2015.pdf

² R.M. Hilty (2015).

³ N. Fried (2015).

⁴ N. Helberger / L. Guibault / M. Loos / C. Mak / L. Pessers / B. van der Sloot (2012).

⁵ S. Arnerstål (2015), 750-758; N. Helberger / L. Guibault (2012); N. Helberger et al. (2012); J. Schovsbo (2008), 393-408; T. Kreutzer (2011); G. Mazziotti, (2007).

⁶ J. Malcom (2015).

copyright law governs the exploitation and use of digital content. Some ‘disruptive’ features in the ‘packaging’ of content have been challenged before the courts in some countries.⁷ But as digital technology evolves, together with the business models used to bring copyrighted content to consumers, the point of intersection between the three fields of law moves as well. What does the disembodiment of copyrighted content mean for consumers? Are the consumers’ concerns the same if the film, song, book or game is distributed on a tangible medium or through a digital channel? Are the solutions different?

This Chapter examines the question of the impact of digital technology on the position of consumers of licensed digital content. The analysis starts from the basic tenet in copyright law, according to which the ownership of the physical embodiment of a work does not entail the ownership of the rights in the work. The existence and exercise of the copyright owner’s rights in an original work actually determine whether the lawful acquirer of a copy of this work has any rights in it. Qualifying the nature of the transaction between the copyright owner and the consumer constitutes a necessary step before enquiring whether the consumer has any claim against the copyright owner in respect of the lawfully acquired copy. Contract law plays a role in the copyright-consumer equation, inasmuch as copyrighted works are commonly accompanied by contractual terms of use. Do the contractual terms of use affixed to works qualify the transaction as a sale or a licence? What is the consequence of this qualification? Moreover, depending on the copyrights involved and their mode of exercise, consumers may or may not have a claim under consumer protection law against copyright owners for the lack of interoperability between devices, the impossibility to make a copy for private purposes, and the geo-blocking of their account.

The Chapter is further divided in three parts: the first part provides a brief description of what is to be generally understood throughout this part of the book by ‘individual licensing’. The second part examines the nature of the transaction between the copyright owner and the consumer of digital content, from a copyright and contract law perspective. To see how digital technology affects the consumers’ position in relation to online digital content, the act of licensing will be broken down in three separate instances: physical purchase, digital download and streaming. As will become apparent, the use of digital technology as a support for the distribution of digital content to the public does affect the way in which the rights are allocated and exercised by the rights holder, thereby affecting the position of the consumer. On the basis of the analysis of the nature of the transaction, the third part explores how consumer protection law responds, in each separate instance, to a number of recurring concerns expressed by consumers with respect to the digital copyrighted content that they have acquired. This part will show whether European consumer protection law treats the consumption of tangible goods differently from that of services.

⁷ Brussels Court of Appeal, 9 September 2005 (Test Achats v. EMI Recorded Music Belgium et al.); Cour de cassation, (1st chamber, civil section), 28 February 2006, (Studio Canal, Universal Pictures Video France and SEV / S. Perquin and UFC Que Choisir); Tribunal de Grande Instance de Nanterre, 6th chamber, Judgment of 24 June 2003, Association CLCV / EMI Muisic France; Tribunal de Grande Instance de Nanterre, 6th chamber, Judgment of 2 September 2003, Françoise M. / EMI Music France, Auchan France; Tribunal de Grand Instance de Paris, 3rd chamber, 2e section, Stéphane P., UFC Que Choisir/Société Films Alain Sarde et, Judgment of 30 April 2004.

For the purposes of this Chapter, the rules in force in the European Union on copyright, contract and consumer protection serve as the legal framework of reference. Although international copyright conventions, such as the Berne Convention and the WIPO Copyright Treaty, ensure a certain degree of harmonisation of the concepts of copyright law, national legislation still shows too many differences in terminology and scope of protection to allow a high level comparison between countries or regions of the world. Moreover, the rules on contract and consumer protection law are not harmonised internationally, as a result of which the level of protection vastly differs between countries. Identifying the legal framework within which the analysis of the present Chapter is conducted is all the more important knowing that the outcome would most probably differ if the analysis were conducted on the basis of the legal framework of any other jurisdiction. Be that as it may, the legal concepts discussed in this Chapter are presented, as much as possible, in a jurisdiction-agnostic manner.

The expectations of consumers, defined as ‘any natural person who is acting for purposes which are outside his trade, business, craft or profession’⁸, with respect to the purchase and use of digital content are taken as a given. Moreover we assume that these expectations are reasonable. As this Chapter focuses on copyright, contract and consumer protection law, data protection law remains outside the scope of the analysis. Finally, since the objective of the Chapter is to describe a situation with a potentially global application, current legislative developments at the European level regarding the establishment of the Digital Single Market and the cross-border portability of online content services are mentioned only as an example of how consumer concerns with regards to individual licensing practices for digital content can be addressed.

2. “Individual licensing” of digital content to consumers

The consumption of digital content forms an integral part of the daily life of consumers of all ages, professions and level of experience. More and more digital services are aimed at meeting consumer demand for information, education, entertainment and communication: music downloads, online gaming, online publishing and the purchase of e-books, subscription to podcasts, webcast and streaming services, et cetera. Business models enabling the exploitation of digital content come in an array of different arrangements, ranging from ‘on-demand’ offerings, ‘near-on-demand’ content, on-demand downloading, streaming, webcasting, and IP-based TV, to subscription for e-books, e-journals and newspapers, social broadcasting, cloud computing, and many more. Forms of payment are as diverse as the business models supporting them, including pay-per-download, pay-per-bundle, pay-per-use, pay-per-source (e.g. a specific title), pay-per-day, flat access fee, subscription, price, advertisement financed, or free of charge.

In comparison to more conventional means of exploitation of content protected by copyright and related rights, the online distribution of digital content involves the intervention of numerous intermediaries. While traditional rights owners, most notably publishers, (recording and film) producers, and collective rights management organisations (CRMOs) continue to

⁸ Directive 2011/83/EC of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, L 304/64, O.J.E.U. 22 November 2011, Article 2(1).

take an active part in the licensing of digital content, new players have secured themselves a place in the chain: among them, content aggregators (like Spotify, Netflix, Amazon Prime or Apple iTunes) and Internet service providers (ISPs) (like Youtube, DailyMotion etc.) play an increasingly important role in the supply of digital content. The complexity of the chain of exploitation and the identity and role of the different intermediaries vary between sectors of the creative industry.⁹ The very simplified licensing scheme for the exploitation of copyright content, shown in Figure 1 below, indicates, in a generic manner, how rights are transferred (red arrows between the author and the publisher/CRMO or between the publisher and the CRMO) and licensed (blue arrows between the publisher/CRMO and aggregators/online services) from the initial author all the way down to the consumer.

At the bottom of the chain is the consumer. Content sold or communicated via conventional channels, e.g. the purchase of books, CDs, DVDs or the broadcast or transmission of songs or films, can generally be used without requiring consumers to abide by the specific contractual conditions (grey arrows). By contrast, digital content is commonly exploited through online channels along with licensing conditions that set restrictions on the possibility to use the content (blue arrow).

The model described above forms a complex web of individual licensing agreements for the exploitation of digital content, which can be either direct or indirect to consumers:

- Direct licensing from right holders to consumers, e.g. where a newspaper publisher offers an internet-based business models allowing for daily individual downloads by every single subscriber; or
- Indirect licensing through intermediaries, like Spotify, YouTube, or Amazon Prime, who provide services to consumers based on individualized licensing models; in this case, the intermediaries obtain a license from the right holder (publisher/producer or CRMO) to provide their service and to grant sub-licenses to consumers.

⁹ Europe Economics et al. (2015); C. Cooke (2015).

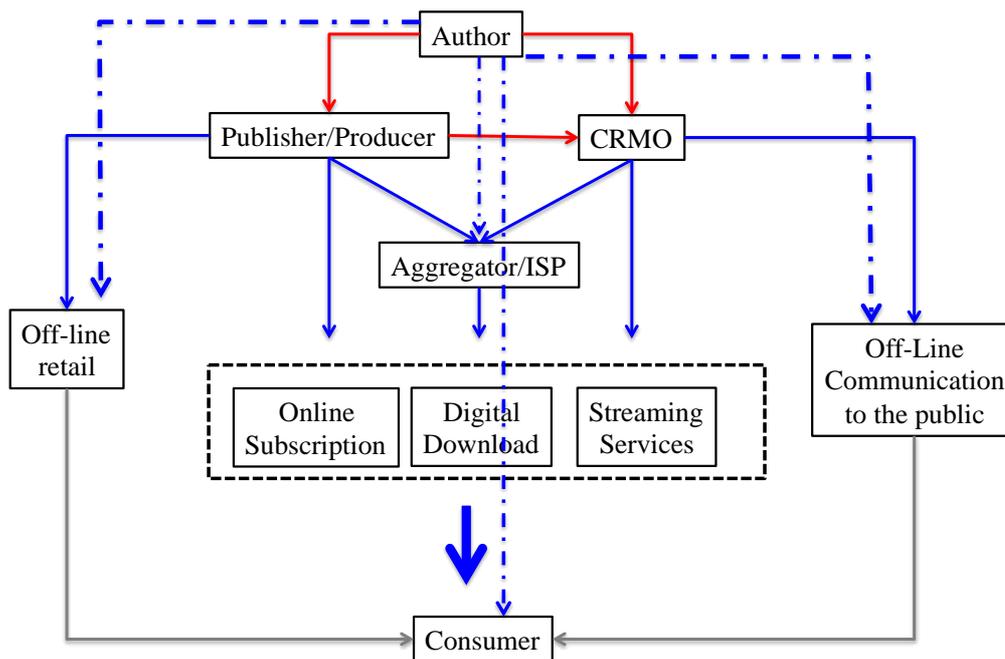


Figure 1 – Licensing scheme for the distribution of content

The form of payment associated with a particular individual licensing model does not affect the nature of the model: irrespective of the calculation of a licensing fee, a contract between individuals, which allows for the use of digital content, remains under all circumstances a licensing agreement.

Admittedly the more intricate licensing schemes in place for the exploitation of digital content could be qualified as hybrid, in that they involve both individual and collective licensing arrangements. The structure of a particular licensing scheme in support of a specific business model actually depends on several factors, including the category of work or other subject matter concerned, the initial ownership of rights on those works or other subject matter, and the (combination of) rights necessary to allow for a workable business model. Some rights are presumed by law to be transferred to a producer upon completion of the work, while other rights may be transferred voluntarily to a CRMO for more effective commercial exploitation. Taking cinematographic works as an example, film producers are known to administer their rights individually.¹⁰ They are therefore likely to license their right of reproduction and making available directly to intermediaries such as Netflix, who license the service to consumers via an Internet platform or a cable retransmission service. However, Netflix also needs to obtain a licence from the CRMOs representing the rights of music authors and performing artists to ensure that the musical works integrated in the cinematographic works can be properly reproduced and made available to the public. As the chain of distribution of digital content in this constellation almost always entails a licence of use for the consumer, we believe that the predominant characteristic of this form of licensing should logically be ‘individual’, knowing that CRMOs are not in the business of granting licences to consumers.

¹⁰ Europe Economics et al. (2015).

The conditions set by contract for the use of digital content, together with the technical protection measures (TPM) applied to the content, e.g. the ‘packaging’ of the digital content, may indeed have important repercussions for consumers and their ability to enjoy the content that they lawfully access or acquire.

3. The nature of the transaction

In the context of ‘individual licensing’ schemes, two inter-connected elements influence the nature of the transaction between the copyright owner and the consumer with respect to a lawfully acquired copy of a work: first, whether the work qualifies as a good or a service; and second, whether the transaction qualifies as a purchase or a licence. The concepts of ‘goods’ and ‘services’ are not harmonized at the European level, especially as they relate to the requirement of ‘tangibility’. Similarly the Directive on Copyright in the Information Society¹¹ does not regulate the issue of end-user contracts as such. However, it does create a legal framework within the boundaries of which rights owners are able to license their rights to end-users and to enforce them.¹² This framework allows right holders to put restrictions on the access to and use of digital content. The double qualification is important, as in consumer protection law distinct legal consequences may be attached to different types of transactions.

It has been argued that the medium in which the digital content is embodied essentially determines the tangible or intangible nature of the content: a movie on a DVD would be tangible, whereas the same movie downloaded through the Internet would be intangible. While the distinction between goods and services can intuitively be made between a movie distributed on a CD and one made available through the Internet, it is quite a challenge to apply this distinction to a vast array of forms of online or off-line distribution of digital content that are neither true goods nor pure service. To see how the consumer’s position with respect to copyright protected works has evolved over time, along with the development of digital technology, we consider three separate instances of distribution of content to the public, going from analogue, to digital and cloud technology: physical purchase, digital download and streaming.¹³

3.1 Physical purchase

Copyright owners enjoy under copyright law the exclusive rights? of reproduction, distribution and communication to the public. The right of distribution concerns the control of the distribution of the work incorporated in a tangible article. This right is exhausted by the first sale, or other transfer of ownership, of the original of a work or copies thereof by the right holder or with his consent. In Europe, the distribution right is exhausted with respect to any sale within the territory of the European Union.¹⁴ The copyright holder has therefore the exclusive right to distribute his work on a CD, DVD or flash drive.¹⁵ Once the work is sold on

¹¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ 2001 L167/10.

¹² N. Helberger et al. (2012); M.M.M. van Eechoud et al. (2009).

¹³ R.M. Hilty (2015), 3.

¹⁴ Information Society Directive, Article 4(1) ; Case C-479/04, Judgment of the Court (Grand Chamber) of 12 September 2006, (Laserdisken v/ Kultuministeriet)

¹⁵ S. Dusollier (2010), 26.

such a tangible medium, the purchaser becomes the owner of the physical object. In other words, the consumer becomes the owner of the physical copy of the work and, in application of the exhaustion doctrine he/she may resell it, destroy it or give it away. As purchasers of tangible goods, consumers of works on CDs, DVDs or other tangible media entertain reasonable expectations in terms of workability and functionality.

Be that as it may, consumers of tangible media hardly ever obtain the transfer of rights in the digital content itself. Instead, consumers receive an implied or express license to use the content as part of the ‘wrapping’ of the product.¹⁶ Express licences can be either printed on or inside the box or they can be made to appear on a screen when opening or running the digital content on a device. It is not uncommon to see that, in an effort to curb piracy, TPMs are applied together with licence terms, so as to prohibit acts of reproduction or communication to the public that would otherwise be permitted under the law. Whether a term in a licence is deemed unfair or unreasonable towards consumers of copyrighted material largely depends on the country's approach to the copyright regime and to the principle of freedom of contract.¹⁷

3.2 Digital download

Leaving the realm of the tangible objects, online platforms now offer digital files for download by members of the public. Such digital downloads can be marketed on the basis of numerous business models: pay-per-download, pay-per-use, pay-per-source (e.g. a specific title), pay-per-day, flat access fee, or subscription. Downloadable digital files are also ‘packaged’ along with licence terms enforced through TPMs. The question is how to qualify the digital copy once downloaded onto one’s device: under which conditions could the consumer be considered to ‘own’ the copy of the copyright protected work? And what kind of expectations can he/she entertain with respect to the content?

When the work is not embodied in a tangible medium, the distribution right is not applicable. Rather the exclusive right involved is that of communication to the public, which includes the right to make it available to the public in such a way that members of the public may access them from a place and at a time individually chosen by them. The Directive on Copyright in Information Society specifies that the exclusive right is not exhausted by any act of communication to the public nor of making available to the public.¹⁸ According to Recital 29 of the Directive, ‘the question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject matter made by a user of such a service with the consent of the rightholder. Therefore, the same applies to rental and lending of the original and copies of works or other subject matter, which are services by nature. Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorization where the copyright or related right so provides.’

¹⁶ R.M. Hilty (2015), 4.

¹⁷ L. Guibault (2002), 299.

¹⁸ Copyright Directive, Article 3(3); cf. also, Case 62/79 Judgment of the Court of 18 March 1980, ECR 1980, p. 881 (Coditel v. Ciné Vog Films et al.).

In view of the seemingly unambiguous text of the Directive, national courts mostly followed a conservative approach to the issue of exhaustion in the online environment.¹⁹ German courts ruled for example that since the exhaustion doctrine does not apply to works that are made available on the Internet, a lawful purchaser cannot offer her software or music downloads for sale to other users, irrespective of the method of transfer (e.g. on eBay or per email or otherwise).²⁰ This approach has been criticized on the ground that such unequal treatment between the physical and non-physical copies of works is unjustified either for technological or trade-related reasons. While the prohibition on re-sale is believed to prevent piracy, it inhibits consumers of non-physical copies of works from realizing the resale value of their goods. The argument has been put forward that re-sale could be possible by using watermarking technology which allows authentication of non-physical copies.²¹

The Court of Justice of the EU opened the door to the application of the exhaustion doctrine to the re-sale of ‘used’ software licences in the *UsedSoft* case.²² On the basis of the provisions of the Computer Programs Directive, the Court ruled that ‘in the event of the resale of a user licence entailing the resale of a copy of a computer program downloaded from the copyright holder’s website, the licence having originally been granted by that rightholder to the first acquirer for an unlimited period in return for payment of a fee intended to enable the rightholder to obtain a remuneration corresponding to the economic value of that copy of his work, the second acquirer of the licence, as well as any subsequent acquirer of it, will be able to rely on the exhaustion of the distribution right under Article 4(2) of that [Computer Programs] directive, and hence be regarded as lawful acquirers of a copy of a computer program within the meaning of Article 5(1) of that directive and benefit from the right of reproduction provided for in that provision.’²³

The criterion retained by the Court is therefore whether the software was licenced ‘for an unlimited period in return for payment of a fee’, in which case the transaction could be assimilated to a sale. An additional factor used to assess the nature of the transaction is whether the digital download by the consumer onto his/her computer can lead to a permanently stored file. The more permanent is the storage, the closer the transaction resembles the sale of a tangible object, the use of which is subject of course, to the terms of a licence for the use of the copyrighted work.²⁴

The *UsedSoft* decision gave rise to numerous commentaries, mostly favorable to the Court’s position.²⁵ As the *UsedSoft* decision dealt exclusively with software, the question remains at this stage whether the criteria developed by the Court with respect to the exhaustion doctrine will be extended to other categories of works licensed in digital format. The Court of Justice will hopefully shed some light on the issue when it renders decision in the *Vereniging*

¹⁹ See the review of jurisprudence in E. Linklater (2014).

²⁰ Court of Appeal Dusseldorf, Decision of 29.06.2009 I-20 U 247/08; see also German Supreme Court, (OEM case), decision of 06.07.2000 I ZR 244/97; District Court Berlin, decision of 14.07.2009, 6 O 67/08.

²¹ T. Kreutzer (2011), 14-15.

²² Case C-128/11, Judgment of the Court (Grand Chamber) of 3 July 2012 (*UsedSoft GmbH v. Oracle International Corp.*).

²³ *Ibid*, para. 88.

²⁴ R.M. Hilty (2015), 9.

²⁵ B. Batchelor / L. Montani (2015), 591; P. Mezei (2015); M. Savič (2015); S. Karapapa (2014).

Openbare Bibliotheken case.²⁶ The last question put to the Court in this case is whether ‘Article 4(2) of Directive 2001/29 is to be construed as meaning that the initial sale or other transfer of ownership of material as referred to in that provision also means making available remotely by downloading, for use for an unlimited period, a digital copy of copyright-protected novels, collections of short stories, biographies, travelogues, children’s books and youth literature?’

3.1 Streaming

One step further in the ‘dematerialization’ of content is streaming, which can be defined as the transfer of data (as audio or video material) in a continuous stream especially for immediate processing or playback.²⁷ This form of exploitation entails no independent purchase, but depends on authorization from an online platform.²⁸ Streaming in principle does not enable the download of copies of works on the computer memory or portable media for any significant length of time. As Hilty correctly observes, ‘mere access [in the case of streaming] requires neither a distribution of works via tangible carriers nor a download by the user’.²⁹ In such circumstances, the exclusive right involved is the right to make the work available to the public, which is not exhausted by any act of making available to the public.³⁰ From the consumers’ perspective, when no analogy can be drawn with a sale, the dematerialization of content results in qualifying the transaction as a service. In this case, the licence is the product!³¹ In the absence of a download by the consumer, what kind of expectations can he/she entertain with respect to the content? Are consumers entitled to have reasonable expectations in respect of services? Are those expectations only those molded by the licensing terms?

In the end, the classification of digital content pursuant to consumer contract law may need to occur on a case-by-case basis. Not all digital content can be qualified as a good, whereas not all digital content falls under the definition of service. In short, the nature of the transaction changes as technology evolves and as copyright-protected content dematerialises.

4. The position of the consumer

The fact that digital content is only ‘licensed’ rather than ‘sold’ to consumers poses difficulties when assessing the reasonable expectations consumers may hold with regard to that content. Right holders and traders play an important role in shaping the expectations consumers have regarding the functionality and usability of digital content, through their communications with consumers and the application of licensing terms. Situations where consumers are unable to use the product in a way that corresponds to their reasonable expectations give rise to complaints about non-conformity. The consumer’s reasonable

²⁶ Case C-174/15, Request for preliminary ruling by the Court of Justice lodged on 17 April 2015 (Vereniging Openbare Bibliotheken v Stichting Leenrecht; interveners: Nederlands Uitgeversverbond and Others).

²⁷ Merriam-Webster Dictionary, available at: www.merriam-webster.com/dictionary/streaming

²⁸ S. Karapapa (2014).

²⁹ R.M. Hilty (2015), 3.

³⁰ A.-É Credeville et al. (2012), 11.

³¹ Referring to a seminal quote from R. Gomulkiewicz (1998).

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.³² But what is the consumers' position in cases where there is no tangible good sold or licensed?

European consumer protection law hinges on the distinction between goods and services.³³ Conscious of the emerging paradox in the online environment, the Consumer Rights Directive³⁴ creates a special regime for digital content contracts. Digital content is defined in Article 2 under (11) as “data which are produced and supplied in digital form”, whereas Recital 19 of the Directive lists examples that fall within the definition, leaving open which rules shall apply outside the areas harmonised 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. By contrast, the Directive keeps silent about the classification of digital content that is supplied online. Instead, it provides specific rules with regard to information obligations where the contract is concluded at a distance. The Directive thereby avoids the difficult question of classification, but takes away the unintended consequences of such a distinction by stating that both forms of digital content delivery (tangible or not) fall under the scope of the Directive.³⁵

Consumer protection law grants consumers certain rights against suppliers of products that deviate from consumer's legitimate expectations, or who fail to take account of their lawful interests. In a highly competitive market such as the market for digital content, the sales price is rarely an issue for consumers. Were it an issue, consumer protection law would offer little help anyway since, according to the *iustum pretium* doctrine, clauses relating to price or other main characteristics of the contract are not open for judicial review.³⁶ Under consumer sales law, consumers can complain about unfair contract terms or about products that do not conform to the level of functionality that should normally be expected from similar products. With respect to digital content, research shows that the consumers' main concerns relate to: 1) restrictions on the making of private copies; 2) the lack of interoperability between devices; and 3) the lack of access/restrictions on use from different territories, otherwise known as geo-blocking.³⁷ All three concerns have their root in the way copyright is exercised through individual licensing schemes, more particularly through the combined application of restrictive licence terms and TPMs. In the following pages, we briefly discuss the role of copyright law as a support for the current licensing practice and consider how the law can provide a response to each consumer concern.

³² N. Helberger / L. Guibault (2012).

³³ See M. Schmidt-Kessel (2011).

³⁴ Directive 2011/83 on Consumer Rights, OJ L304/64–88 (2011).

³⁵ Loos/Helberger/Guibault/Mak et al. (2011), 99-102.

³⁶ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29-34, art. 4(2): “2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language”.

³⁷ *Ibid*, 35.

4.1 Private copying

In absence of explicit permission from the rights holder, reproductions of copyright protected works for private purposes are only lawful if authorized by law. Article 5(2)(b) of Directive on Copyright in the Information Society does this by allowing Member States to adopt an exception ‘in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right holders receive fair compensation which takes account of the application or non-application of technological measures to the work or subject-matter concerned’. The requirement that reproductions be made ‘by a natural person for private use and for ends that are neither directly nor indirectly commercial’ clearly excludes any form of commercial copying, be it for legitimate business-related purposes or ordinary ‘piracy’. Moreover, Article 5(2)(b) does not permit Member States to adopt exemptions allowing ‘private’ copying by or within business enterprises or other *legal* persons, even if such copying has no commercial purpose. Consequently, the scope of any exemption permitted by Article 5(2)(b) is fairly limited, as must be any system of private copying levies directly associated with it. It is settled case law of the Court of Justice that levies, as a form of ‘fair compensation’ prescribed by Article 5(2)(b), cannot serve to compensate right holders for losses incurred by acts not exempted pursuant to this provision, such as intra-company uses, or acts of piracy.³⁸

The last sentence of Article 5(2)(b) refers to the application of TPMs designed to prevent or restrict acts in respect of works, which are not authorized by the right holder. TPMs can also be used to control the number of reproductions. In practice, the application of a TPM on a work pursuant to the Directive is likely to result in preventing or at least limiting the consumer from exercising the exception of private copy recognized in that same Directive. This happens, for example, each time a work is protected by means of an anti-copy mechanism. In this case, the anti-copy technique prevails over the private copying exception. Whenever rights holders design their TPM in such a way that private copies are possible, then Member States are not allowed to intervene at all, on the basis of Article 6(4).³⁹

Technical restrictions are often reinforced by licence terms. The Directive on Copyright in Information Society contains very few provisions pertaining to the use of contractual licences as a means to determine the conditions of use of copyright protected works. Nor does the Directive actively regulate the intersection between copyright exceptions and contracts. With respect to the limitations on copyright, Recital 45 declares that ‘the exceptions and limitations referred to in Article 5(2), (3) and (4) should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law.’ What the precise meaning of Recital 45 is remains unclear. It could be referring, for example, to the conclusion of extended collective licensing agreements for acts of private copying and other uses, following the Scandinavian model. In the *Copydan*

³⁸ Case C-463/12, Judgment of the Court (Fourth Chamber) of 5 March 2015, (*Copydan Båndkopi v. Nokia Danmark A/S.*)

³⁹ See Information Society Directive, Article 6(4) para. (2): “A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions”.

case, the Court of Justice did rule, however, that individual licensing systems have no bearing on the obligation to pay the fair compensation owed by virtue of Article 5(2)(b) of the Information Society Directive.⁴⁰ In other words, the compensation owed for private copying activities will keep being collected even if the works are also licensed as part of an individual licensing scheme. This leads in practice to double payment on the part of the consumer: first by paying a license fee for the use of TPM-controlled content, second by paying a levy on media or equipment. Or consumers may end up paying a levy on blank media for works that cannot be copied.

The ‘tangible’ or ‘intangible’ character of a copy of a work has, in principle, no bearing on the consumer’s ability to make a reproduction for private purposes: a private copy is lawful only if the conditions set by Article 5(2)(b) of the Directive are met. In the specific case of cloud computing and digital private recorders, the application of Article 5(2)(b) can be problematic insofar as the provision has been repeatedly interpreted as forbidding anyone from making a copy on behalf of someone else. Since the exempted copy must be for the natural person’s own private use, this excludes any system based on the storage of copies on a cloud computing’s server. This leads to a rather paradoxical situation, where a TV catch-up service offering consumers the possibility to store their favorite television programs in the cloud doesn’t fall under the private copying exception, whenever the storage space is under the control of the service provider instead of the consumer herself.⁴¹ In this sense, the authors of the French report entitled ‘*Informatique dans les nuages*’ suggest that the legal requirement of unity between the person making the copy and the one using this copy – as established in France through case law – should be reassessed in the light of cloud services. According to the authors, this standpoint is contrary to the notion of net neutrality.⁴²

So, when downloading or streaming digital content, do consumers have a reasonable expectation to be able to make a reproduction of that content for private purposes? This is a question to which the law can hardly provide an answer. Arguably the consumers’ expectations are primarily shaped on the basis of the law, their past experience with similar products and the communications made by content providers: if consumers have been able to make a private copy of their CDs and digital downloads for years, it could be argued that the sudden impossibility to do so renders that product unfit for purpose. Considering the above, it is unlikely that the same would hold true with respect to a streaming service: the absence of a possibility to make a private copy in this case may not be seen as affecting the functionality of the service. Consumer protection law in this case only requires that the provider give sufficient prior information about the functionality of the digital content service or allow consumers to withdraw from the transaction within a certain period of time. On the other hand, the problem of double payment is a point that should definitely be addressed by the legislator. Whether consumer protection law is the right vehicle to do so is doubtful, especially since the problem arises from two co-existing but conflicting rules of copyright law, e.g. allowing for the payment of fair compensation to rights owners for private copying

⁴⁰ Case C-463/12, Judgment of the Court (Fourth Chamber) of 5 March 2015, (Copydan Båndkopi v. Nokia Danmark A/S.)

⁴¹ BGH 22.4.2009 (Videorecorder); Court of Appeal of Paris, 1st ch. 14 December 2011 (Wizzgo/Metropole Television and others).

⁴² A.-É. Crédeville et al. (2012), 15.

activities while at the same time allowing the individual licensing of works protected by contracts and TPMs.

4.2 Interoperability of devices

Besides the restrictions on the making of private copies, the issue of interoperability between playing devices was listed at a certain point in time as one of the main concerns of consumers of digital content.⁴³ Lack of interoperability or limited degree of compatibility between different devices and services is often caused by the use of TPMs aimed at preventing acts of piracy and by the use of different standards and formats for the distribution of online content. As a result, consumers are locked into the choices they once made with regard to the particular devices and digital content, because the investments made are lost when the consumer purchases new and incompatible hardware. More than a decade ago, French and Belgian courts ruled that the impossibility to play music CDs on different players constituted an instance of non-conformity.⁴⁴ A comparative analysis conducted in 2011 demonstrated that even though an explicit legal obligation to inform the consumer about a lack of interoperability was normally missing, in most Member States, interoperability was considered an essential characteristic of the digital content, or an element of normal functioning of the digital content.⁴⁵ Evidence also suggested, however, that the limitations imposed by licensing rules and TPMs would likely exacerbate these problems related to access to digital content. It has therefore become a reasonable consumer expectation to be able to access or use digital content on different devices.

As no technical standard has imposed itself on the market for digital content, and as providers can put forward reasonable justification in keeping using their own standard or format, interoperability between hardware, products and services may still be far off. A lack of interoperability remains problematic, in particular when the consumer is not made aware of it before the conclusion of the contract. This is relevant with regard to the purchase both of the digital content itself and of the hardware on which it is intended to be used. This is the reason why the European legislature introduced Article 5 (1) sub- (g), (h), (s) and (t) in the Consumer Rights Directive, requiring traders to inform consumers up front about the functionality and interoperability of digital content. One might argue that by doing so, the Consumer Rights Directive took a first, albeit cautious, step in developing a more consumer-oriented perspective on copyright law in consumer protection law.

4.3 Geo-blocking

Individual as well as public interest objectives are also at stake in realizing the availability of access to services from other Member States and with regard to cross-border contracts. Consumers are consistently faced with geographical (technical) restrictions, making it

⁴³ Europe Economics (2011), 57.

⁴⁴ Brussels Court of Appeal, 9 September 2005 (*Test Achats v. EMI Recorded Music Belgium et al.*); Cour de cassation, (1st chamber, civil section), 28 February 2006, (*Studio Canal, Universal Pictures Video France and SEV / S. Perquin and UFC Que Choisir*); Tribunal de Grande Instance de Nanterre, 6th chamber, Judgment of 24 June 2003, *Association CLCV / EMI Music France*; Tribunal de Grande Instance de Nanterre, 6th chamber, Judgment of 2 September 2003, *Francoise M. / EMI Music France, Auchan France*; Tribunal de Grand Instance de Paris, 3rd chamber, 2e section, Stéphane P., *UFC Que Choisir/Société Films Alain Sarde et*, Judgment of 30 April 2004.

⁴⁵ CSECL, IViR and ACLE (2011), 51.

impossible for users from one country to access digital content services in another European country, as well as discrimination on basis of geographical location.⁴⁶ Most often, these restrictions are the result of the way in which copyrights are licensed, e.g. on a territorial basis. This constitutes another problem consumers frequently mention, and one that can seriously hamper the functioning of an Internal Market for digital content services.⁴⁷

One of the basic tenets of copyright law is the territorial nature of the protection granted, which derives from the Berne Convention. The existence and scope of the copyright protection are determined by the law in force in the territory where protection is claimed. Works are, accordingly, protected in Europe by a bundle of twenty-eight parallel (sets of) exclusive rights. Of course, in the days where digital content was sold primarily on physical carriers, the exhaustion doctrine applied and consumers were free to do as they pleased with their lawfully purchased copies. As the doctrine of exhaustion does not apply to services, however, the problem of cross-border access to and use of digital content is very tangible, at least within the European Union.

The principle of territoriality has come under strain over the last decade. Hugenholtz calls it the Achilles' heel of the European copyright acquis.⁴⁸ While decades of case law of the European Court of Justice confirmed the principle of territoriality,⁴⁹ the attitude of the Court towards territorial licensing seems to have changed. In its *Premier League* decision the Court explicitly stated that territorial exclusivity is “irreconcilable with the fundamental aim of the Treaty, which is completion of the internal market.”⁵⁰ This decision came at a time when the principle of territoriality in copyright law started to come under high political pressure, because it contradicts the European single market policy and consumers' right to choice and non-discrimination.⁵¹ Despite this new line of jurisprudence, individual licensing schemes for digital content are still offered across Europe on a territorial basis: service providers would have too much to lose if they changed this.

In response to this specific consumer concern, the European Commission recently published a proposal for a Regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market.⁵² Explaining the reasons for and objectives of the proposal, the European Commission emphasises that the Internet has become a key content distribution channel and that Europeans today expect to use online content services from wherever they are in the Union. The Commission has therefore made the issue of cross-border access to digital content one of the main points of its copyright

⁴⁶ N. Helberger (2007), 472.

⁴⁷ Case C-403/08 en C-429/08, decision of European Court of Justice of 4 October 2011 (*Premier League*),

⁴⁸ M.M.M. van Eechoud et al. (2009), 309.

⁴⁹ Case 62/79, decision of European Court of Justice of 18 March 1980 (*Coditel I*), EC.R. 1980, 881, para. 15, 16. See also: Case C-192/04, decision of the European Court of Justice of 14 July 2005, (*Lagardère Active Broadcast*), E.C.R. 2005, 7199.

⁵⁰ Case C-403/08 en C-429/08, decision of European Court of Justice of 4 October 2011 (*Football Association Premier League*), para. 115.

⁵¹ See: European Commission, *Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the regions, Second report on the implementation of Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access*, Brussels, 30 September 2008, COM(2008) 593 final.

⁵² Brussels, 9 December 2015, COM(2015) 627 final.

reform endeavours for the coming years. In its current version, the gist of the proposal is contained in Article 3, which establishes the obligation for the provider to enable a subscriber to use the online content service while the subscriber is temporarily present in a Member State other than the Member State of residence. The choice of a regulation as legislative instrument to address this issue is somewhat striking, as it would have immediate application to all existing and future contracts and acquired rights relating to online content services. Only time will tell whether this new proposal in its current state will survive the adoption process.

5. Conclusion

In conclusion, the development of digital technology has had a significant impact on the position of consumers of licensed copyrighted content. Consumers were in a much better position to access and use digital content distributed in a tangible format. First, they could benefit from the application of the exhaustion doctrine, according to which they could dispose of any lawfully acquired tangible embodiment of a work as they wished. Second, they could in certain circumstances invoke the protection of consumer protection law if the products they had bought were not displaying the expected functionality. The disembodiment of the content and the practice of individual licensing have meant so far that consumers are at the mercy of the service providers: consumers' actions are limited by the terms of use and the restrictions enforced through TPMs without useful recourse to consumer protection law.

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. Digital reality has changed the public's perception of copyright protected works for good: since digital content can be accessed and used by everyone in the comfort of her own home, it has become a consumer product. Based on their experience with analogue goods, consumers have developed specific expectations towards digital content that they want to see met.

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