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The Regulation of Digital Content Contracts in the Optional Instrument of Contract Law

MARCO LOOS, NATALI HELBERGER, LUCIE GUIBAULT & CHANTAL MAK*

Abstract: The past decade has shown a rapid development of the markets for digital content. The further development of these markets, however, may be hindered because of the lack of a functioning legal framework to deal with digital content contracts. In this article, it is argued that the future Optional Instrument should contain rules governing digital content contracts. Moreover, suggestions are made as to the content of such rules.

Résumé: La dernière décennie a connu un développement rapide des marchés des contenus numériques. La poursuite du développement de ces marchés peut cependant être entravée en raison de l'absence d'un cadre juridique qui fonctionne pour faire face à des contrats de contenu numérique. Dans ce papier, il est soutenu que le futur Instrument Optionnel devrait contenir des règles régissant les contrats de contenu numérique. Par ailleurs, des suggestions sont faites quant à la teneur de ces règles.

Zusammenfassung: Das letzte Jahrzehnt sah eine stürmische Entwicklung der Märkte für digitale Inhalte. Das Fehlen eines angemessenen rechtlichen Rahmens für Verträge über digitale Inhalte könnte allerdings den Fortschritt und die weitere Entwicklung dieser Märkte erheblich beeinträchtigen. Dieser Artikel argumentiert, dass das zukünftige Optionale Instrument auch Regeln für Verträge über digitale Inhalte beinhalten sollte, und machte konkrete Vorschläge, wie solche Regeln aussehen könnten.

1. Introduction

Over the last years, the consumption of digital content has become common for consumers of all ages, professions, and levels of experience in many European

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countries. Consumers download music and ringtones, subscribe to podcasts, watch a TV programme or movie online, game and gamble online, purchase e-books, and so on. In short, the consumption of digital content has become an integral part of the daily life of Europe's digital consumers. By demanding and consuming these products, digital consumers are the engine of the information economy. Growing consumer demand for all kinds of digital content stimulates the digital content sector to become one of the most dynamic, innovative, and prospering economies within and outside the European Union (EU).

The further development of the market for digital content, however, may be hindered because of the lack of a functioning legal framework to deal with digital content contracts. Active participation in digital markets requires trust and confidence, also on the side of consumers. Digital consumers will only embrace the digital economy if they can be confident that services are safe (e.g., that they are free from viruses, malware, and spyware) and meet their expectations and if they can trust that their legitimate interests and rights are respected, also online. The legal protection of consumers of digital content was a central theme during the preparation of the proposal for a Consumer Rights Directive (CRD). Whereas the 2008 proposal of the European Commission did not contain specific provisions on digital content,¹ the version adopted by the Council on 10 October 2011² – hereinafter referred to as the CRD – does contain some specific provisions on information obligations and the right of withdrawal. As the European Commission already announced in its 2010 Green Paper,³ for reasons of consistency, the Optional Instrument will have to integrate at least these provisions of the CRD in its text. Yet, the text produced by the Commission Expert Group on European Contract Law as a draft for a potential Optional Instrument of contract law – included as an annex to the Feasibility Study⁴ – does not provide for any specific provisions on digital content contracts. However, in the Feasibility Study, the

¹ Proposal for a Directive of the European Parliament and of the Council on Consumer Rights, COM (2008) 614 final (hereinafter the 'proposal for a Consumer Rights Directive of 8 Oct. 2008').

² See the press conference of Polish presidency of that day, <www.prezdyencja.uokik.gov.pl/en/new-directive>, 12 Oct. 2011. The text adopted by the Council, and previously by the European Parliament on 23 Jun. 2011, may be downloaded at <<http://register.consilium.europa.eu/pdf/en/11/pe00/pe00026.en11.pdf>>, 12 Oct. 2011. When finishing this contribution, it was expected that the Directive would be published in the Official Journal by the end of 2011 or the beginning of 2012.

³ European Commission, Green Paper from the Commission on Policy Options for Progress towards a European Contract Law for Consumers and Businesses, COM(2010)348 final, p. 11, fn. 30, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0348:FIN:EN:PDF>>, 12 Oct. 2011. This Green Paper will be referred to hereinafter as the 'Green Paper on Policy Options'.

⁴ European Commission, *A European Contract Law for Consumers and Businesses: Publication of the Results of the Feasibility Study Carried Out by the Expert Group on European Contract Law for Stakeholders' and Legal Practitioners' Feedback*, 2011. This study will be referred to hereinafter as the 'Feasibility Study'. It is available online at <http://ec.europa.eu/justice/contract/files/feasibility_study_final.pdf>, 12 Oct. 2011.

European Commission requests respondents whether the European Contract Law instrument should also cover the digital content itself, whether it is delivered on a durable medium or directly downloaded from the Internet.⁵ We will first argue that and why this question should be answered affirmatively. We will then indicate some of the problems consumers and traders face when concluding and performing digital content contracts. Finally, we will sketch the contours of a regulation of digital content contracts in the Optional Instruments.

2. Why Digital Content Contracts Should Be Regulated⁶

In its 2010 Digital Agenda, the European Commission indicated that digital markets are still very much national markets. As a consequence, European citizens

are prevented by solvable problems from enjoying the benefits of a digital single market. Commercial and cultural content and services need to flow across borders.⁷

Moreover, as the Commission signals:

consumers and businesses are still faced with considerable uncertainty about their rights and legal protection when doing business online.⁸

For this reason, the Commission announces that it will

investigate how to improve rights of consumers buying digital products. Cross-border transactions online can also be made easier by increasing the coherence of European contract law, based on a high level of consumer protection.⁹

In the 2010 Green Paper on Policy Options, the European Commission explicitly suggests that the Optional Instrument could focus on contracts concluded in the online environment or, more generally, at a distance, either cross-border or domestic. The Commission remarks that such contracts

⁵ Cf. Feasibility Study, p. 9.

⁶ This section is based on M.B.M. LOOS, 'Scope and Application of the Optional Instrument', in D. Voinot & J. S  n  chal (eds), *Vers un droit europ  en des contrats sp  ciaux (Towards a European Law of Specific Contracts)*, 2011 (forthcoming).

⁷ European Commission, A Digital Agenda for Europe. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2010) 245, p. 5, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0245:FIN:EN:PDF>>, 12 Oct. 2011. The Communication will be referred to hereinafter as the 'Digital Agenda'.

⁸ Digital Agenda, p. 7.

⁹ *Ibid.*, pp. 12-13.

constitute a significant proportion of cross-border transactions in the internal market and have the highest potential for growth.¹⁰

That there is a need for regulation of digital content contracts is crystal clear. In a comparative study we have conducted,¹¹ we indicate that there is substantial uncertainty in all Member States included in our study as to the classification of digital content contracts as contracts for the provision of goods or services.¹² This uncertainty causes problems in legal practice, as the classification of digital content as either a good or a service often determines the answer to questions such as whether information duties apply, and if so, which information must be disclosed; whether the provider of the digital content may be held liable for hidden defects or lack of conformity; which remedies are available for which type of deficiency; and whether the consumer may invoke a right of withdrawal, etc. A crucial matter in the regulation of digital content contracts is, therefore, to determine to what extent digital content falls, if at all, under the category of goods or services for the purpose of consumer contract law. While the distinction between goods and services can intuitively be made between a movie distributed on a DVD 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 offline distribution of digital content that are neither true good nor pure service. With the rise of cloud computing – where the digital content is not stored on the consumer’s own computer but rather on the trader’s server, and the consumer is merely provided access to her personalized digital content – it is likely that the classification of digital content as goods or services will be even more problematic in the future.

The absence of specific rules dealing with digital content contracts in the Expert Group’s draft is disappointing. However, it seems likely that the European Commission will repair this caveat in its upcoming official proposal – if only to ensure that the information obligations and the provisions on the right of withdrawal in the Optional Instrument will closely follow the final provisions of the CRD on these matters.¹³ This impression is confirmed by the speech of Commissioner Reding, responsible for European Contract Law, at a conference held recently in Leuven. In this speech, Commissioner Reding confirmed that she wants to take the

¹⁰ Green Paper on Policy Options, p. 12.

¹¹ See the star note.

¹² See also SCHMIDT-KESSEL *et al.*, ‘Should the Consumer Rights Directive Apply to Digital Content?’, 1. *Zeitschrift für Gemeinschaftsprivatrecht* 2011, p. 10.

¹³ Already in the Green Paper on Policy Options, the European Commission indicated that ‘[f]or reasons of consistency, the instrument of European Contract Law will have to complement the relevant consumer *acquis*, *by integrating its requirements*, including progress made on consumer protection in the internal market in the Consumer Rights Directive’ (emphasis added, MBML); see Green Paper on Policy Options, p. 11, fn. 30. *Cf.* also Feasibility Study, p. 6.

reality of our modern Information Society into account and that she therefore wants to ensure that the optional instrument takes such digital situations into account.¹⁴

3. Problems When Applying Existing Contract Law to Digital Content Contracts

If one wishes to take ‘digital situations’ into account, one may wonder what specific problems consumers and traders face with regard to digital content contracts. Are there, in fact, particular issues that require specific legislation? In this section, we will address the main areas that require attention: information obligations (section 3.1), formation of contract (section 3.2), rights of withdrawal (section 3.3), non-conformity and remedies (section 3.4), and finally the provision of gratuitous digital content (section 3.5). Within these subsections, we will first indicate what the current state of affairs is. As the rules of the CRD are to be integrated in the Optional Instrument, we will then indicate to what extent and how these matters are regulated under the CRD. Moreover, we will also indicate to what extent the subject is already regulated in the Expert Group’s draft for the Optional Instrument. As it does not seem likely that the Optional Instrument will provide rules regarding the validity of contracts concluded with minors, we will not touch upon this matter in this article.¹⁵

3.1 Information Obligations

3.1.1 Current State of Affairs

In a recent empirical study by Europe Economics, lack of information figured prominently at the second place (after access issues) among the most frequently mentioned problems that consumers experienced, whereas unclarity or complexity of information took third place.¹⁶ Even though information obligations are an important feature of distance selling legislation, it appears that these obligations are not very effective. The lack of effectiveness of information obligations may have to do with some particularities of digital content, for example, the high degree of technology involved and the lack of experience consumers have with digital content. 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 (experience good). While some information, for example, title or length of a film, might still be relatively easy to find, others, such as journalistic or artistic quality, are difficult to judge for most consumers, even after they have consumed a digital content product (credence good). Moreover, the manner and amount of use the consumer

¹⁴ REDING 2011, p. 8.

¹⁵ In LOOS, 2011 (forthcoming), it has been argued that the Optional Instrument should, in fact, contain specific rules on this matter.

¹⁶ Europe Economics, *Digital Content Services for Consumers: Assessment of Problems Experienced by Consumers (Lot 1), Report 4: Final Report*, London 2011, pp. 74-75.

may have of digital content may differ significantly from traditional products. Whereas a consumer may read and re-read a book at will, take it with him on vacation, or lend it to a friend without anyone noticing, this is different with e-books. In the case of e-books, right holders can and do specify the number of copies that a consumer is allowed to make, whether it can be printed or lent to others, on which devices it can be played, and how long a consumer can ‘possess’ the book. With the help of Digital Rights Management (DRM), monitoring, and other technologies, enforcement of these conditions is directly implemented in the file itself and becomes part of its functionality. Some contents, predominantly films, can be played only in certain regions, others only a certain number or period of time. The terms and conditions of usage can vary from publisher to publisher and even from item to item. These all are possible features of digital content that, due to the complexity of the underlying technology but also the licensing conditions, consumers are usually not able to find out easily themselves. These features, however, can influence the purchasing decisions of consumers, and their experience of digital content, once purchased. It does not seem strange that consumers – even if they would be properly informed – would feel confused by the differing conditions of use.

3.1.2 *Regulation under the CRD and the Expert Group’s Draft*

At present, the Distance Selling Directive¹⁷ does not contain any specific provisions on the information to be provided with regard to digital content contracts. Moreover, Member States have so far largely refrained from adopting specific obligations in their general consumer and contract law provisions about digital content products for consumers. However, this is soon to be changed when the CRD is implemented: The CRD requires traders to inform consumers of the functionality and the use of any applicable technical protection measures (including DRM), as well as the relevant interoperability of the digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of.¹⁸ A failure to do so may not only trigger the remedies for mistake under national law but also those for non-conformity.

Articles 5(1) and 6(1) of the CRD require the information to be provided ‘in a clear and comprehensible manner’ without specifying what this actually means in a given case. With regard to distance contracts – and most digital content contracts qualify as such – the Member States may only introduce or maintain linguistic requirements, ‘so as to ensure that such information is easily understood by consumers’.¹⁹ Articles 7(1) and 8(1) further require traders to provide such information in plain and intelligible language and that, when it is provided on paper or on a

¹⁷ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, *OJ* 1997, L 144/19.

¹⁸ *Cf.* Arts 5(1)(g) and (h) CRD for contracts concluded in shops and Arts 6(1)(q) and (r) CRD for contracts concluded at a distance or off premises.

¹⁹ *Cf.* Art. 6(7) CRD.

durable medium, it is legible. Moreover, when the distance contract is concluded by electronic means, the trader must make the consumer aware in a clear and prominent manner before the order is placed of the information on the main characteristics of the digital content, the total price for the purchase of the digital content, as well the duration of the contract, the conditions for termination, and the minimum duration of the consumer's obligations under the contract.²⁰ Moreover, where the consumer is required to pay for the digital content, the consumer must explicitly confirm that the order implies an obligation to pay either by an express statement or by clicking on a button that is labelled in an easily legible manner with an unambiguous statement to that effect.²¹ Further national provisions, for example, prescribing the order of information to be provided or in what size the information is to be provided (e.g., font 10 or more) are, however, not allowed for off-premises and distance contracts.²² This implies that, for instance, the obligation imposed by a French court on the manufacturer of a music CD to put a warning on the CD that it cannot be played on all players or car radios²³ may not be codified into a pre-contractual obligation applicable also to distance contracts.

3.2 Formation of Contract

3.2.1 Current State of Affairs

The vast majority of contracts concluded in relation to digital content are non-negotiated contracts, presented to the consumer at a distance on a 'take-it-or-leave-it' basis. Where the consumer would not accept the contract or the terms thereof, either no contract is concluded at all or the consumer is simply prevented from making use of the service even if the contract has been concluded.

According to Article 9(1) of the E-Commerce Directive,²⁴ Member States must ensure that their legal system allows contracts to be concluded by electronic means. In particular, Member States are required to ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.

It would seem that Article 9(1) of the E-Commerce Directive also answers the question on the validity of so-called click-wrap or browse-wrap agreements, which is a rather common way of concluding contracts for digital content. The term 'click-wrap' is derived from the 'shrink-wrap' license, which determines that a consumer,

²⁰ Cf. Art. 8(2)(first subparagraph) CRD.

²¹ Cf. Art. 8(2)(second subparagraph) CRD.

²² Cf. Arts 7(5) and 8(10) CRD.

²³ TGI Nanterre, 15e ch., 31 May 2007, No. 0331845026 (criminal case against Ministère Public/ SA EMI Music France).

²⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 Jun. 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), *OJ* 2000, L 178/1.

by opening the plastic wrapping around a certain product (such as software on a CD), accepts the contract terms related to the purchase of the product. In a ‘click-wrap’ license, the terms of the license 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. A refusal to agree implies that no order can be submitted to the trader; hence, no contract is concluded. In the case of a ‘browse-wrap’ license, the terms of the agreement are simply made accessible via a hyperlink on the website of the trader. Contrary to the ‘click-wrap’ method, the consumer does not get the possibility to explicitly ‘agree’ to the terms. Instead, the consumer is presumed to assent to the terms by ordering through the website. It would seem that in both cases the validity of the contract cannot be put into question since the consumer consents to the conclusion of a contract and the parties at least agree on the main obligations under the contract – the delivery of the digital content and the price (if any) the consumer is to pay for the digital content. Nevertheless, in many Member States, the validity of both the terms and the contract itself is under debate.²⁵

The uncertainty as to the validity of click-wrap and browse-wrap licenses and the terms included in such contracts clearly hinders the further developments of contracts concluded online, including digital content contracts.

3.2.2 Regulation under the CRD and the Expert Group’s Draft

Although the CRD extensively regulates the pre-contractual and the contracting stages, it does not contain any rules on the validity of contracts or deciding when contract terms are effectively included in a contract. Under Article 3(5) of the CRD, these matters are, therefore, left to national contract law. The Expert Group has provided extensive rules on the validity of contracts and the incorporation of standard terms. However, neither the CRD nor the Expert Group’s draft provide clear rules on the validity of click-wrap licenses or browse-wrap licenses and the terms included in such contracts.

Article 10(3) of the E-Commerce Directive does not indicate when the terms are to be provided but merely requires *that* they are provided. By contrast, Articles 22(1)(f) and (4) of the Services Directive²⁶ require the service provider to supply the contract terms ‘in good time before conclusion of the contract or, where there is no written contract, before the service is provided’. This implies that the contract terms are only to be provided before the conclusion of the contract if the contract is ‘in writing’. Neither the Services Directive nor the CRD determines whether this applies also to contracts concluded electronically.

²⁵ For details on this debate, we refer to the study indicated in the star note.

²⁶ Directive 2006/123/EC of the European Parliament and of the Council of 12 Dec. 2006 on services in the internal market, *OJ* 2006, L 376/36 (hereinafter referred to as the ‘Services Directive’).

Article 26 of the Expert Group's draft basically codifies Articles 10 and 11 of the E-Commerce Directive in 'contract law language'.²⁷ Under its paragraph (3)(e), the trader 'must provide information about' the terms used before an offer is made or accepted by the consumer, whereas the terms must be made available under paragraph (4) in a manner that allows the consumer to read or otherwise access the terms and to store and reproduce them in tangible form. Again, it is not indicated *when* the contract terms themselves are to be provided to the consumer – paragraph (4) merely requires that they are provided, whereas paragraph (3) requires that information *about* the terms must be provided before the contract is concluded. Fortunately, this problem is solved under Article 14(1)(d) of the draft, which provides that in the case of a distance contract or an off-premises contract, the contract terms are to be communicated to the consumer before the contract is concluded. This implies that the classification of digital content contracts as sales contracts or services contracts does not appear again through the back door with regard to the moment when the contract terms are to be provided for digital content contracts.

The provision of Article 14(1)(d) of the Expert Group's draft also prevents the incorporation of the terms of a click-wrap agreement, which only are presented when the digital content is downloaded or installed. It does, however, not settle the question of whether click-wrap and browse-wrap agreements themselves are to be considered valid and whether, if the requirements of Article 14(1)(d) are met, these terms are indeed incorporated in the contract. The answer to the first question seems to be affirmative given the fact that the consumer will have to provide her consent to the conclusion of the contract as such. However, in particular with regard to browse-wrap agreements, where the consumer does not expressly agree to the incorporation of the standard terms, it remains uncertain whether these terms are indeed incorporated.

3.3 Right of Withdrawal

3.3.1 Current State of Affairs

The common idea for a right of withdrawal is to obtain time to rethink the conclusion of the contract or obtain additional information.²⁸ When such a right is awarded to the consumer, she may go back on her decision to conclude a contract, sometimes even if that contract has already been performed by the parties. The counterpart to the contract, typically a trader (i.e., a professional seller or service provider), is not given such possibility.²⁹ When the consumer does exercise

²⁷ Articles 26(2) and (5) deal with the subject matter of Art. 11 E-Commerce Directive and Arts 26(3) and (4) with that of Art. 10 of the Directive.

²⁸ C. VON BAR *et al.* (eds), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (Full Edition)*, vol. 1, Sellier. European Law Publishers, Munich 2009, p. 354.

²⁹ Cf. M.B.M. LOOS, 'Rights of Withdrawal', in G. Howells & R. Schulze (eds), *Modernising and Harmonising Consumer Contract law*, Sellier. European Law Publishers, Munich 2009, p. 241.

her right of withdrawal, all contractual obligations are extinguished.³⁰ Typically, the consumer need not give any reason for her withdrawal. In particular, she need not show non-performance on the part of the trader. The exercise of the right of withdrawal is often enclosed in a determined period of time (the cooling-off period). The right of withdrawal is usually meant to protect a party who, in a particular context or a particular type of contract, is thought to require protection. Finally, it is often of a mandatory nature, inasmuch as parties may not agree to amend the rules on the right of withdrawal to the disadvantage of the party, which it benefits.³¹

Arguably, the maintenance of a cooling-off period could be justified especially in the online context. First, the Internet has greatly accelerated the contractual process. Contracts can be concluded almost anywhere and rather hastily. This may justify the need for a time of reflection. In addition, the readability of websites is not always optimal, and the consumer may not be fully aware of the new technological ways to manifest one's consent inasmuch as she may have entered a contract without knowing it. This could be dealt with through information obligations or formation of contract,³² but a right of withdrawal offers a quick and easy way to back out of the contractual relationship. Likewise, consumers may be faced online with a substantial amount of unfair commercial practices.³³ In some national systems, the consumer may not be allowed to directly invoke in court the provisions relating to unfair commercial practices.³⁴ A right of withdrawal would offer the possibility to back out of the contract, for example, without having to prove consent was flawed.

There are, however, some exemptions to the right of withdrawal, as enumerated in Article 6 of the Distance Selling Directive. In the context of digital content, a first exemption may be relevant where the contract is to be classified as a contract for the provision of services. Article 6(3), first incident of the Distance Selling Directive indicates that the consumer may not exercise the right of withdrawal with respect to a contract for the provision of services, if performance has begun with the consumer's agreement before the end of the cooling-off period. This implies, for instance, that when a contract for the live streaming of, for instance, football matches has commenced with the consumer's consent during the cooling-off period, the consumer loses her right of withdrawal.

³⁰ Cf. ECJ 22 Apr. 1999, Case C-423/97, *Travel Vac SL/Anselm Sanchís* [1999] ECR I-2195, Nos 57-58.

³¹ Cf. VON BAR *et al.*, *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (Full Edition)*, vol. 1, pp. 346-347.

³² *Ibid.*, p. 389.

³³ R. TIGNER, 'Online Astroturfing and the European Union's Unfair Commercial Practices Directive', *Unité de Droit Economique (ULB)* 2010, <www.droit-eco-ulb.be/fileadmin/fichiers/Ronan_Tigner_-_Online_astroturfing.pdf>, 4 Aug. 2011.

³⁴ Chr. Twigg-Flesner *et al.*, *An Analysis of the Application and Scope of the Unfair Commercial Practices Directive, A Report for the Department of Trade And Industry, 18 May 2005*, <www.bis.gov.uk/files/file32095.pdf>, 4 Aug. 2011.

However, insofar as the contract is not classified as a contract for the provision of services, in particular the exception relating to the unsealing of certain types of goods that were sealed on delivery and unsealed by the consumer becomes relevant. According to the Distance Selling Directive, the right of withdrawal shall not apply for the supply of audio or video recordings or computer software that has been unsealed by the consumer.³⁵ Many national systems have transposed this exemption in a very pre-digital setting and have not modified it since. Indeed, in many legal systems, the process of unsealing refers to the action of taking a wrap off a physical good. Electronic seals are not encompassed in the definition.³⁶ Nevertheless, some countries have dealt with the issue of the downloading of digital content under the unsealing exemption.³⁷

3.3.2 Regulation under the CRD and the Expert Group's Draft

Whereas the applicability of the right of withdrawal for digital content contracts is rather uncertain under the current legislation, the CRD brings much more clarity. Article 9(1) of the CRD awards the consumer a 14-day period to withdraw from the contract. Paragraph (2) adds that insofar as the digital content is not stored on a tangible medium, the period starts to run as of the moment when the contract is concluded, whereas otherwise it starts when the consumer acquires physical possession of the tangible medium on which the digital content is stored. If the trader neglects to inform the consumer of the existence of the right of withdrawal or the modalities for invoking it, the cooling-off period is prolonged with one full year or, if the information is provided in the meantime, with the time that has passed until then.³⁸ According to Article 16(m) CRD, the consumer loses the possibility to invoke the right of withdrawal if the digital content is not provided on a tangible medium, and performance by the trader has begun with the consumer's prior express consent and her acknowledgment that by agreeing to performance she loses her right of withdrawal. The trader must, together with all other information, confirm this on a durable medium, for instance, by sending an e-mail, no later than

³⁵ Article 6(3), fourth incident, Distance Selling Directive.

³⁶ For example, the Notes to the DCFR indicate that the exemption in Latvia covers the situation where 'the consumer opened the packaging', in Poland 'the consumer has removed the original packaging', and in the Czech Republic 'the consumer damages the original packaging'. See VON BAR *et al.*, *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (Full Edition)*, vol. 1, Note 19 to Art. 5:201 (Contracts negotiated away from business premises), p. 402.

³⁷ See, for instance, Art. 102(c) of the Spanish Consumer Act and the French proposal to amend Art. L. 121-20-2 of the French Consumer code, *cf.* Assemblée Nationale, 16 Dec. 2009, *Rapport fait au nom de la commission des affaires économiques sur la proposition de loi de M. Jean-Pierre Nicolas, Mme Laure de la Raudière, Mm. Bernard Gerard et Jean-Michel Ferrand et plusieurs de leurs collègues, visant à renforcer la protection des consommateurs en matière de vente à distance*, <www.assemblee-nationale.fr/13/rapports/r2166.asp#P433_138626>, 5 Aug. 2011.

³⁸ *Cf.* Art. 10(1) CRD.

the moment when the digital content is delivered.³⁹ If the consumer has not expressed her consent to the performance during the cooling-off period and the ensuing loss of the right of withdrawal, she retains her right of withdrawal and need not pay for any performance rendered.⁴⁰

It is, however, not entirely clear what happens if the consumer has agreed to the loss of the possibility to invoke her right of withdrawal, but the trader has neglected to confirm this, in accordance with Article 8(7) CRD: Article 14(4) CRD seems to suggest that the consumer would not have to pay for the performance rendered even then, but according to Article 16(m) CRD the right of withdrawal would, nevertheless, seem to have elapsed. We expect that Article 14(4) CRD would be interpreted in such a manner that the consumer would be required to pay for the performance rendered since the aim of these provisions – no payment if not properly informed – has been achieved.

As indicated in section 1, the Expert Group's draft does not contain any specific rules on digital content contracts. The present rules on the right of withdrawal are, therefore, not apt to deal with digital content contracts. However, it would seem that by including the provisions of the CRD, this problem would be solved. There does not seem to be any need for additional specific provisions in this area.

3.4 Non-conformity and Remedies

3.4.1 Current State of Affairs

As indicated in section 2, Member States struggle with the classification of contracts – are they sales contracts, services contracts, or a sui generis type of contracts? Notwithstanding these difficulties, in practice, legal systems do not differ much in their approach as to how to determine whether or not the digital content is in accordance with the contract. In most legal systems, in practice, the conformity test is applied as it has developed under Article 2 of the Consumer Sales Directive⁴¹ with regard to 'ordinary' consumer goods.⁴² Generally, it should be noted that the

³⁹ Cf. Art. 8(7) CRD.

⁴⁰ See Art. 14(4)(b).

⁴¹ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, *OJ* 1999, L 171/12.

⁴² See also SCHMIDT-KESSEL *et al.*, p. 10, with references to Austrian, French, and German laws, and p. 13. See also, more generally, Th. WILHELMSSON, 'The Solution of the Consumer Sales Directive', in H. Collins (ed.), *The Forthcoming EC Directive on Unfair Commercial Practices. Contract, Consumer and Competition Law Implications*, Kluwer Law International, The Hague/London/New York 2004, p. 235, who argues that there is no obvious reason to treat the marketing of goods and services differently. Similarly, in the United States, Art. 2 UCC, developed for the sale of tangible goods, is applied to software contracts. Art. 2-314 UCC contains a provision on the implied warranty of merchantability, which is phrased in much the same manner as the conformity test of Art. 2 Consumer Sales Directive. Art. 403 of the Uniform Computer Information Transactions Act (UCITA) extends the test to cyberspace; cf. M.L. RUSTAD, *Software Licensing*, Oxford University Press, New York 2010, pp. 571 and 583.

conformity test appears to be flexible enough to take into account the differences between the different contracts pertaining to digital content – in much the same way as the conformity test is flexible enough to be applied to such differing goods as cars, furniture, toys, and foodstuffs.

3.4.1.1 Reasonable Expectations

The consumer is required to prove that the digital content does not conform to the contract, that is, does not meet her legitimate expectations. She normally is helped by the conformity test's sub-rule that the digital content must be fit for its ordinary (or normal) purpose. When the digital content is not fit for that purpose, it does not conform to the contract. This does, however, not mean that applying the conformity test is easy in the case of digital content contracts. Rather the opposite is true: Different from tangible goods, it is often uncertain *what* the consumer may reasonably expect from the digital content.⁴³ The sub-rule of the 'ordinary purpose' points to a standard against which the use this consumer wants to make of the object of the contract is measured. The problem for digital content contracts is that such a standard often does not (yet) exist. This is caused by a number of things. First, digital content contracts are a relatively new phenomenon. Second, there are very different types of digital content and there is a high level of product differentiation. Adding to the resulting diversity are the varying licensing practices of and licensing conditions offered by the different providers of digital content. Moreover, the market for digital content is largely set by its technical environment and the continuing rapid developments, which means that what is at one moment state of the art is outdated the next.

An important factor in practice is the fact that the legitimate expectations of the consumer are, to a large extent, influenced by statements from the side of the industry. Statements by the industry – whether driven by restrictions of a technical nature or by business interests – indicating that a particular use of the digital content is not or only to a limited extent possible may, therefore, become a self-fulfilling prophecy. In this sense, the conformity test is somewhat subject to manipulation by the trader.⁴⁴

Nevertheless, it is clear that the potentially self-fulfilling prophecy of statements made by the industry as to the use the consumer may make of the digital content points to a problematic situation, both from the point of an individual consumer and from the perspective of the effectiveness of consumer protection in the area of digital content. Given the fact that there often is no standard (yet) to indicate what constitutes 'normal use' or 'ordinary use' of the digital content, this criterion often is of little use. This implies that whether or not a consumer can

⁴³ Cf. P. ROTT, 'Download of Copyright-Protected Internet Content and the Role of (Consumer) Contract Law', 4. *Journal of Consumer Policy* 2008, p. 450.

⁴⁴ SCHMIDT-KESSEL *et al.*, p. 13, rightly observes that this as such is not a phenomenon specific for digital content contracts but rather a general problem with the conformity test.

benefit from the rules on non-conformity, to a large extent, depends on the fact whether she has been properly informed.⁴⁵

On the other hand, the consumer's expectations will also be based on similar experiences she may have had from using traditional, tangible goods, which may resemble the digital content now purchased. Examples include the ability to play a CD on different devices, for example, a CD player, a car audio system, or a computer (for consumptive use) or to make private copies.⁴⁶ They are normally used to be able to use a CD or DVD in different players and therefore expect to be able to use downloaded digital content on different players as well. DRM and the contractual conditions it enforces restrict these forms of usage. Second, consumers have gotten used to the possibility to forward digital content to others, to use it on different devices, etc.⁴⁷ These experiences also shape consumers' expectations of digital content. As a result, consumers expect certain customary features of digital products, even if they have to pay extra for them.⁴⁸

3.4.1.2 Types of Problems

In practice, three different types of conformity problems may be identified: (1) accessibility, functionality, and compatibility issues, (2) bad or substandard quality, and (3) flaws, bugs, and other security and safety matters.⁴⁹ In the recent empirical study mentioned earlier, access problems ranked first among the most frequently mentioned problems, whereas quality and security problems ranked fourth and fifth.⁵⁰ In line with the fact that digital content to a large extent is an experience good, it will become immediately clear that most conformity problems in fact pertain to hidden defects, that is, defects that the consumer cannot discover before the digital content is, in fact, used. The trader is required to communicate these defects before the conclusion of the contract. It is undisputable that when the

⁴⁵ Cf. N. HELBERGER & P.B. HUGENHOLTZ, 'No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law', 3. *Berkeley Technology Law Journal* 2007, pp. 1093-1094.

⁴⁶ N. DUFFT *et al.*, 'INDICARE, Digital Music Usage and DRM, Results from a European Consumer Survey 26-28 (2005)', <www.indicare.org/tiki-download_file.php?fileId=110>, 5 Aug. 2011, pp. 16 and 23.

⁴⁷ DUFFT *et al.*, 2005, p. 16, shows that in 2005, 73% of the users of digital music had shared music files with family and friends over the previous six months and 60% with other people.

⁴⁸ DUFFT *et al.*, 2005, p. 29; N. DUFFT *et al.*, 'INDICARE, Digital Video Usage and DRM, Results from a European Consumer Survey 26-28 (2006)', <www.indicare.org/tiki-download_file.php?fileId=170>, 8 Aug. 2011, pp. 25-26.

⁴⁹ It should be noted that the division of conformity problems into categories does not have any legal consequences, so the precise demarcation of the borderline between the categories is of no practical importance. In fact, some conformity problems can be classified as belonging to two or even more of these categories. One may think of the situation where software contains a defect or bug, with security risks as a result. Such a problem can be classified as a security matter but also as a quality problem.

⁵⁰ Europe Economics, pp. 74-76.

trader knows or should recognize a hidden defect, and does not disclose this before the contract is concluded, the trader is liable for non-conformity.⁵¹

3.4.1.3 Ad 1. Accessibility, Functionality, and Compatibility Issues

When the consumer cannot access the digital content or transfer it to another device, and make use thereof in accordance with its ordinary or specifically agreed purpose, the question arises whether this constitutes non-conformity. The inability to access the digital content may be the result of the use of technical protection measures. Where this prevents the consumer from using the digital content in accordance with its normal purpose, this constitutes non-conformity – unless of course the consumer was no longer entitled to use the digital content, as may be the case where she has (rightfully) withdrawn from the contract.⁵² Access problems may also be the result of an incompatibility of formats and standards used. An example would be the case where a protected music CD cannot be played in an old CD player.⁵³

The limited functionality of the digital content may also relate to the question of whether the consumer can make use of the digital content wherever and whenever she wants. Consumers may be faced with user restrictions by the use of region codes embedded in DVDs and Blu-ray discs and players. Region codes are a technical protection measure developed by providers of movies that divide the world into six (DVD) or three (Blu-ray) regions, restricting the area of the world where the DVDs or Blu-ray discs can be played. As a consequence, a DVD or Blu-ray disc bought in the United States cannot be played in Europe if the DVD or Blu-ray player enforces the region codes. When the consumer is not properly informed of such user restrictions, the consumer may legitimately expect to be able to use the digital content also in other regions than the one in where they are purchased.

One of the battlegrounds with regard to digital content is whether or not consumers are allowed to make one or more copies of the digital content for private use. Empirical research shows that consumers generally tend to expect to be able to make such private copies.⁵⁴ However, this general expectation does not rest on legally solid ground.⁵⁵ Article 5(2)(b) of the 2001 Information Society Directive⁵⁶

⁵¹ Cf. RUSTAD, pp. 626-627.

⁵² Cf. also SCHMIDT-KESSEL *et al.*, p. 12. In such a case, a technical protection measure preventing further use would, of course, be perfectly legitimate as the consumer no longer has the right to use the digital content.

⁵³ Cf. ROTT, p. 445; cf. also L. GUIBAULT *et al.*, *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society*, 2007, pp. 111-112, with reference to several French cases. This report is available online at <www.ivir.nl/publications/guibault/Infosoc_report_2007.pdf>, 8 Aug. 2011.

⁵⁴ Cf. DUFFT *et al.*, 2005; DUFFT *et al.*, 2006.

⁵⁵ HELBERGER & HUGENHOLTZ, p. 1062.

⁵⁶ Directive 2001/29/EC of the European Parliament and of the Council of 8 Jun. 2001 on the harmonization of certain aspects of copyright and related rights in the information society, *OJ* 2001, L 167/10.

provides that Member States *may* include in their legislation a ‘private copy’ exception or limitation, enabling consumers to make a copy or copies for private use, provided that the right holders receive fair compensation. Under Article 6(1) of the Information Society Directive, technical protection measures are accepted, but Member States *may* take appropriate measures to ensure that consumers are enabled to make use of the private copy exception or limitation. However, in any case, right holders are allowed to adopt adequate measures regarding the number of reproductions the consumer may make.⁵⁷ This implies that under copyright law, an unrestricted right of private copying does not exist in any legal system in the EU. Moreover, it follows that Member States have complete discretion whether or not to adopt any rules allowing private copying. As a consequence, the majority of rules on private copying have not been harmonized in the EU.⁵⁸ In any case, it is clear that a generally recognized *right* to make private copies does not (yet) exist under European copyright law. Moreover, the private copy exception or limitation cannot be enforced insofar as the protected works are offered on demand under contractual terms to which the consumer has agreed.⁵⁹ It is uncertain, however, whether acceptance by the consumer of a non-negotiable standard term in a shrink-wrap, click-wrap, or browse-wrap license suffices.⁶⁰ Furthermore, the Information Society Directive provides that where the copyright holder voluntarily designs a technical protection measure that allows some private copying, the consumer’s right to private copying is exhausted with that voluntary scheme, thus preventing the Member States to further protect consumers against technical protection measures.⁶¹ The consumer’s right to make a private copy, insofar as such a right exists at all under national copyright law, can, therefore, easily be undermined by the copyright holder.⁶²

A problem related to, but going beyond the use of technical protection measures, relates to matters of interoperability and system requirements.⁶³ A particular trait of digital content is that it cannot be used without making use of a technical device and, in most cases, without making use of (other) software. For instance, a DVD cannot be played without a DVD player or a computer, and a film that is downloaded or streamed can only be watched when the consumer has the necessary software on her computer. This means that the digital content must interact with the consumer’s software and hardware. Obviously, where the trader

⁵⁷ Cf. Art. 6(4), second subparagraph of the Information Society Directive.

⁵⁸ Cf. HELBERGER & HUGENHOLTZ, p. 1064; GUIBAULT *et al.*, p. 125.

⁵⁹ Cf. Art. 6(4), fourth subparagraph Information Society Directive.

⁶⁰ Cf. GUIBAULT, 2002, pp. 252 and *et seq.*; HELBERGER & HUGENHOLTZ, p. 1077; GUIBAULT *et al.*, p. 112. See also s. 3.2.1 above.

⁶¹ Cf. Art. 6(4), third subparagraph Information Society Directive.

⁶² Cf. also GUIBAULT, p. 260; HELBERGER & HUGENHOLTZ, p. 1077.

⁶³ BEUC, *Digital Products, How to Include Them in the Proposal for a Consumer Rights Directive, Position Paper*, Brussels, 2010, p. 7, <<http://docshare.beuc.org/docs/1/PKKPBOHDHCKCCIMIDFFHPBJDPDWD9DBNBN9DW3571KM/BEUC/docs/DLS/2010-00606-01-E.pdf>>, 8 Aug. 2011.

(whether or not performing an obligation to that extent) has indicated in advance in a clear and intelligible manner that the digital content can only be played on or accessed through that device or operating system and the consumer (nevertheless) concludes the contract, the digital content is in conformity with the contract if it indeed only can be played on or accessed through that device or operating system.⁶⁴ Although such practical restrictions to interoperability may seem problematic from the perspective of competition law,⁶⁵ from the perspective of consumer contract law it is not, as long as it is communicated properly before the conclusion of the contract. In this sense, advertising statements indicating that this music file is intended to be used on an iPod or with Windows Media Player, etc., in particular when this information is repeated on the website on which the consumer places her order or in the retail shop, will bring about that the consumer may not and will not expect to be able to use the digital content on another device.

Another access problem is the situation where a consumer cannot access and use the purchased digital content without also purchasing and installing other digital content. Whether or not this constitutes non-conformity depends on the information provided to the consumer before the conclusion of the first contract. If the consumer was properly informed, she could not reasonably believe that she could make use of the digital content without purchasing also the other digital content. In that case, the fact that the digital content requires the availability of other digital content is (just) another system requirement.⁶⁶

3.4.1.4 Ad 2. Bad or Substandard Quality

A different type of problems consists of 'substandard products'. As indicated earlier, it is often difficult to determine whether the provided digital content is of the quality the consumer could reasonably expect, as quality standards often do not (yet) exist. Nevertheless, in many cases, notwithstanding the absence of a generally applicable objective standard as to quality, it will be clear that the quality of the digital content is not in conformity with the contract. Quality problems mostly arise where the digital content is of poor visual or sound quality due to technical defects or when the digital content is corrupted. Examples of this first type of defects are defects in a music file, causing a bad quality of that music file; an example of the second is data that cause a computer system to crash.⁶⁷ In both these cases, there clearly is a conformity problem.

An important element causing the absence of generally accepted quality standards is the rapid development of new types of digital content and of devices on which they have to operate. The mere fact that newer digital content of a higher

⁶⁴ Cf. also *ibid.*, p. 9.

⁶⁵ Cf. ROTT, p. 443.

⁶⁶ It should be noted, however, that requiring the consumer to make a second purchase may constitute an unfair commercial practice or an unfair term.

⁶⁷ BEUC, p. 6.

quality – for example, because of the use of a higher resolution – has appeared on the market does not imply that digital content that was put on the market is, henceforward, to be considered as substandard because of that mere fact. In this sense, an analogy may be made with traditional tangible goods, where Article 6(2) of the Product Liability Directive⁶⁸ explicitly provides that a ‘product shall not be considered defective for the sole reason that a better product is subsequently put into circulation’. However, it may well be that the newer version of the same digital content, for example, standard software, remedies existing problems in older versions of that digital content. In that case, the older digital content may very well be considered to be substandard if that older digital content is sold to the consumer when the new digital content has been put on the market and at that time the trader does not mention that these known defects have been remedied in the newer version of the digital content.

The parties may very well have accepted that the digital content to be provided is of substandard quality, that is, does not meet the expectations the consumer could otherwise reasonably expect. This is unproblematic, in particular, in case the consumer has clearly opted for such substandard quality. In this sense, the absence of, for instance, the possibility to make a private copy may have been accepted in order to obtain the digital content against a lower price.⁶⁹

More problematic is the answer to the question of whether a digital content may be considered non-conforming in case the product was fit for use at the moment of delivery but is soon outdated due to technological developments. The starting point must be that the digital content can be used with an operating system and software that can be considered normal at the time the contract is concluded. What the consumer may reasonably expect in this respect, of course, differs from time to time. For instance, the consumer may nowadays no longer expect that the software can be used on a computer that makes use of MS-DOS as its operating system, but she may also not expect to be able to use the software on a computer, which makes use of an operating system that is not yet commonly available on the market. However, the mere fact that the trader informs the consumer prior to the conclusion of the contract that the digital content has not been fully tested for its compatibility with existing hardware does not free the trader from liability. Any other view would effectively get the trader off scot-free even in cases where the consumer could reasonably expect that the digital content would function properly, for example, in the case where the digital content does not function properly on the hardware for which it is intended to be used on.⁷⁰ In fact, if such a statement would be given effect, this would create an incentive for traders not to investigate the proper functioning of the digital content.

⁶⁸ Council Directive 85/374/EEC, *OJ* 1985, L 210/29.

⁶⁹ HELBERGER & HUGENHOLTZ, p. 1094.

⁷⁰ In this sense also, ROTT, p. 446.

A related question is how long the digital content must be ‘fit for use’. In practice, often consumers will be enabled to frequently update the digital content in order to cope with such developments, ensuring that the consumer may continue to make use of the purchased digital content. Where the parties have actually agreed upon such updates⁷¹ - either for free or against remuneration - and the updates are not or no longer provided, it seems obvious that this constitutes a breach of contract. This may be different in the case where the parties have not made an explicit agreement to this extent. Even then, however, it could be argued that the consumer would have to be able to make use of the digital content for a reasonable period of time. Where the normal purpose of the digital content is for it to be used for a certain period of time, and due to technological development such use is no longer possible during that period of time, this may be classified as non-conformity as well.⁷²

On the other hand, the consumer may not reasonably expect that such updates will be available for an unlimited amount of time, even against remuneration, as at a certain point it may be commercially unviable to provide such updates if the product itself has become obsolete. The reasonable expectations of the consumer would then have to decide when her right to be able to continue to use the digital content subsides. In many cases, however, it is not so much the technological developments of the hardware or of other software but external factors that cause the digital content to become outdated. Clear examples include road map software and anti-virus programs: If these are not regularly updated, they become useless after a while. Normally, the purchase of such products includes the purchase of regular updates without further charge for a certain period of time. If such further updates are not provided, this, of course, causes a breach of contract. Statutory obligations to provide updates or after sales services are missing altogether.

3.4.1.5 Ad 3. Flaws, Bugs, and Other Security and Safety Matters

Security problems such as flaws, bugs, and defects leaving the consumer’s hardware or software open to viruses and Trojan horses may also constitute non-conformity of the digital content. 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. The argument that complex software should be allowed to be slightly flawed was met with some scepticism by the German Supreme Court as early as 1987.⁷³ In practice, automatic services updates are also used to address and remedy newly discovered

⁷¹ Such contracts may be concluded either for a fixed period or for an undetermined period. In the latter case, both parties may terminate the contract for the future by notice, *cf.* Art. III.-1:109(2) DCFR (Variation or termination by notice), and VON BAR *et al.*, *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (Full Edition)*, vol. 1, Comment to Art. III.-1:109 DCFR (Variation or termination by notice), pp. 705-706.

⁷² *Cf.* ROTT, p. 446.

⁷³ BGH 4 Nov. 1987, VIII ZR 314/86, *BGHZ* 102, 135, *NJW* 1987, 406.

flaws as quickly and as efficiently as possible.⁷⁴ 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. If it is established that these expectations are not met, the digital content is non-conforming, irrespective of whether the deviation is major or minor.⁷⁵ The key problem, however, is how to establish what the consumer may reasonably expect from the digital content. Clearly, the consumer may reasonably expect that the digital content does not cause physical injury⁷⁶ or material damage to *other* hardware or software. Where such damage occurs as a result of a flaw, bug, or defect in the digital content, the trader is without doubt liable for non-conformity, as the consumer may *at any rate* expect that the digital content is safe in its use.⁷⁷

The digital content itself, of course, has to be free from viruses. In this respect, it is of no relevance whether the virus was not yet known and therefore undetected at the time of delivery. Moreover, the consumer may also expect that the digital content does not contain such bugs that viruses may enter the operating system through the bugs in the digital content. Where such a bug, nevertheless, exists and as a result the consumer's computer is infected, this constitutes non-conformity. On the other hand, where a virus or Trojan horse has made use of defects or bugs in other digital content and subsequently affects the purchased digital content, the trader will not be liable, as the digital content was in conformity with the contract at the moment of delivery or performance.⁷⁸

3.4.1.6 Remedies

In the absence of tailored legal remedies, in case of non-performance of a digital content contract, the consumer will have to seek recourse to the remedies that are available under consumer contract law or general contract law. Here, the classification under national law as a sales or a service contract (or as a contract *sui generis*) becomes relevant again, as only in the former case the remedies of the Consumer Sales Directive (as implemented in national law) apply, whereas in the latter case the consumer will generally have to rely on the remedies available in general contract law. Yet, in fact, the remedies are quite similar. The main difference

⁷⁴ Cf. Europe Economics, Report 3, p. 184. See also R. BRADGATE, *Consumer Rights in Digital Products*, No. 23, 2010, p. 15, <www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/10-1125-consumer-rights-in-digital-products>, 8 Aug. 2011.

⁷⁵ In this sense also, BEUC, p. 7.

⁷⁶ BRADGATE, p. 16, Nos 26-27, rightly remarks that personal injury or even death are unlikely to occur in the case of digital content purchased by consumers. This may be different where the purchaser is acting in the course of its business, e.g., a hospital purchasing software programs to be used in operating rooms or IC units.

⁷⁷ Cf. RUSTAD, pp. 626-627.

⁷⁸ Cf. SCHMIDT-KESSEL *et al.*, p. 14.

between the two types of contracts seems to be the restriction of the consumer's choice of remedies in consumer sales law. Under Article 3(3) of the Consumer Sales Directive, due to the hierarchy of remedies, repair and replacement (i.e., specific performance) are the primary remedies, whereas the consumer is generally free to choose among the available remedies in general contract law.⁷⁹ As the right to damages is not regulated under the Consumer Sales Directive, this matter is always regulated under the applicable national law. It should be pointed out that damages in practice are not limited to compensation in money. Although financial compensation is a common type of compensation for damage, the digital environment offers traders other means to redress for damage, such as free downloads, free extensions of contracts, and discounts on future purchases. Even though these may not be 'legal remedies', they may actually resolve the problems consumers face even more aptly than the available legal remedies could.⁸⁰

Where the consumer would terminate the digital content contract for non-conformity, a problem arises. As a consequence of the termination, in most legal systems, the parties to the contract would have to return the benefits from the performance of an obligation that has already taken place.⁸¹ Such restitution, although in theory possible, poses problems in the case of digital content: Whereas the consumer could be requested to delete the files from her system, it will hardly be possible to check whether she has actually done so.

3.4.2 Regulation under the CRD and the Expert Group's Draft

In its final version, the CRD does not deal with non-performance or non-conformity or with the remedies for such non-performance or non-conformity. This implies that the existing legislation - in particular, the Consumer Sales Directive - remains applicable. This Directive, however, is applicable only to the sale of tangible movable goods.⁸² This means that the Consumer Sales Directive applies to digital content contracts only insofar as the digital content is stored on a tangible medium. The same is true for the Expert Group's draft.⁸³ Therefore, insofar as consumer sales law is applied to digital content contracts where the digital content is not provided on a tangible medium, this follows not from EU law but only from the applicable national law. Insofar as digital content contracts would be classified as

⁷⁹ Although most national systems of general contract law do not apply a strict hierarchy of remedies, there are some national rules that have a somewhat similar effect. This applies in particular where under national contract law termination is possible only after a notice of default (*mise-en-demeure*) has been sent to the debtor in which an additional period for cure is awarded to him.

⁸⁰ As remarked above, many problems are prevented from manifesting through online automatic services updates. In such cases, the non-conformity is repaired even before it is discovered and without the consumer even noticing it.

⁸¹ H. BEALE *et al.*, *Cases, Materials and Text on Contract Law*, Hart Publishing, Oxford 2010, pp. 980-990.

⁸² *Cf.* Art. 1(2)(b) Consumer Sales Directive. On this, see SCHMIDT-KESSEL *et al.*, p. 9.

⁸³ *Cf.* Feasibility Study, p. 9.

service contracts, the Services Directive would apply. This Directive, however, does not contain any substantive rules on the quality of services and of the rights of consumers when quality standards have not been made. This implies that at the European level no body of legislation exists that is apt to deal with digital content contracts insofar as the digital content is not provided on a tangible medium.

3.5 *Gratuitous Digital Content Contracts*

3.5.1 *Current State of Affairs*

Whereas sales contracts by definition are contracts by which the consumer is required to pay a price in money, this is not the case for digital content contracts. In fact, many, if not most, Internet services are advertised as gratuitous. While this is true in monetary terms, it is agreed by most specialists that the new currency on the Internet is personal data.⁸⁴ In return for the provision of digital content services, companies gather, either explicitly through registration forms or secretly via cookies, personal data of their consumers. Through the use of personal data, they offer personal advertisements with which they make profit. The digital content provided through such ‘gratuitous’ contracts therefore in fact represents a monetary value, and payment just takes place in a different type of currency. Moreover, in many business models, both gratuitous and, at a slight price, add-free versions of the same digital content are offered.

3.5.2 *Regulation under the CRD and the Expert Group’s Draft*

At this moment, neither the CRD nor the Expert Group’s draft provide for any rules dealing with ‘gratuitous contracts’. The Expert Group’s draft only applies to sales contracts and to specific service contracts. Under this draft, a contract can be classified as a sales contract only if the buyer (the consumer) undertakes to pay the price.⁸⁵ In the definition of a service contract, such requirement is missing,⁸⁶ but the provisions on service contracts apply only insofar as the service contract is, to some extent, related to a sales contract between the same parties.⁸⁷ This limitation does not exist in the CRD. However, in Articles 2(5) and (6) CRD, both the definition of a sales contract and that of a service contract indicate that the contract is classified as such only if the consumer pays or undertakes to pay the price for the goods or the service. Moreover, Article 5(1)(c) for on-premises contracts and Article 6(1)(e) for distance and off-premises contracts require the trader to inform the consumer before the conclusion of the contract of the total price for his

⁸⁴ As acknowledged by (then Commissioner on Consumer Protection) M. KUNEVA, Keynote Speech at the Roundtable on Online Data Collection, Targeting and Profiling, Brussels, 31 Mar. 2009, Speech/09/156, p. 2, <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/156>>, 10 Aug. 2011.

⁸⁵ Cf. Art. 2(15) of the Expert Group’s draft.

⁸⁶ Cf. Art. 2(16) of the Expert Group’s draft; see also Art. 150(3) of that draft.

⁸⁷ See Art. 150(1) of the Expert Group’s draft.

performance. It seems clear that the European legislator did not intend to also cover gratuitous contracts.

4. What Is Needed under the Optional Instrument for Digital Content Contracts?

In this section, we will address the question of which changes need to be made to the CRD or the Expert Group's draft if the Optional Instrument is to be applicable to digital content contracts as well. What is missing under the existing texts and what should be amended? We will answer these questions in the same order as in which we have discussed the main problems that consumers and traders face with regard to the regulation of digital content contracts. However, first, one remark regarding terminology should be made. Currently, both the CRD and the Expert Group's draft refer to 'goods' and the physical control thereover. In order to enable the application of these provisions to digital content, it should be made clear that these provisions apply to digital content accordingly and that instead of physical control over the goods the consumer should obtain the possibility to access the digital content - whether after having stored the digital content on his own computer, mobile phone, or other device or by accessing the digital content on a for the consumer directly accessible part of the trader's server (which would be the normal course of business in the case of cloud computing, which is becoming more and more important in the near future). Delivering the consumer the possibility to access the digital content could, of course, still be considered as delivery of the control over the digital content.

4.1 Information Obligations

As indicated, the CRD requires traders to inform consumers of the functionality and the use of any applicable technical protection measures, as well as the relevant interoperability of the digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of.⁸⁸ The CRD goes some way in ensuring the effectiveness of the information obligations by requiring in the case of distance contracts that the information need not only be provided 'in a clear and comprehensible manner'⁸⁹ and adding to that in the case a distance contract is concluded by electronic means that the trader must inform the consumer of the main characteristics of the digital content, the total price for the purchase of the digital content, as well the duration of the contract, the conditions for termination, and the minimum duration of the consumer's obligations under the contract.⁹⁰ These provisions may not fully ensure the effectiveness of the information

⁸⁸ Cf. Arts 5(1)(g) and (h) CRD for contracts concluded in shops and Arts 6(1)(q) and (r) CRD for contracts concluded at a distance or off premises.

⁸⁹ Cf. Art. 5(1) CRD for on-premises contracts and Art. 6(1) CRD for distance contracts and off-premises contracts.

⁹⁰ Cf. Art. 8(2)(first subparagraph) CRD.

obligations but seem to go much further than any applicable rules at this moment. It seems that at least for now no additional rules are needed.

4.2 *Formation of Contract*

In section 3.2, it was argued that the uncertainty as to the validity of click-wrap and browse-wrap licenses and the terms included in such contracts hinders the further developments of the market for contracts concluded online, including digital content contracts. As mentioned earlier, in the case of a click-wrap agreement, the consumer has to click on the ‘I agree’ button, thus ‘accepting’ the trader’s standard terms, before being able to continue with the conclusion of the contract. Typically, these terms may also be read or accessed at the time when the consumer is given the possibility to accept the terms. In the case of a browse-wrap agreement, the terms are made accessible via a hyperlink, but the consumer need not express her acceptance to them separately.

This matter was left out of consideration in the CRD. Under the Expert Group’s draft, it appears that click-wrap and browse-wrap agreements in themselves may be valid, provided that the consumer indeed consented to the conclusion of the contract. It may be doubted whether this is the case when the consumer concludes a digital content contract and only upon downloading or accessing the digital content the click-wrap license requires the consumer to ‘agree’ to the terms included in the click-wrap license. Apart from this particular situation, it need not be doubted that a valid contract has been concluded. A different matter is whether also the standard terms used by the trader are incorporated in that contract. The answer is affirmative in the case of a click-wrap agreement as the consumer has expressly accepted the terms. This is different in the case of a browse-wrap agreement, where acceptance of these terms could only be tacit. Given the existing uncertainty in the Member States, it would be good for legal practice if this matter were either expressly accepted or rejected in the Optional Instrument.

4.3 *Rights of Withdrawal*

The CRD solves most problems with regard to the application of the right of withdrawal to digital content contracts. A slight uncertainty remains regarding the interplay between several provisions that apply when the consumer has agreed to the loss of the possibility to invoke her right of withdrawal, but the trader has neglected to confirm this in accordance with Article 8(7) CRD. It is suggested that this matter may be clarified when redrafting the provisions of the CRD for incorporation in the Optional Instrument. It seems that no additional provisions are needed here either.

4.4 *Non-conformity and Remedies*

Rules are needed the most in the area of non-conformity of the digital content. As was stated above, neither the CRD nor the Expert Group’s draft provides for

specific rules applicable to digital content contracts, whereas the Consumer Sales Directive explicitly limits the scope of its provisions to tangible goods. The question, therefore, arises whether for the purposes of the Optional Instrument the scope of the provisions of the Consumer Sales Directive and the Expert Group's draft could be extended and whether these provisions need to and could be amended to in order to accommodate the regulation of digital content contracts.

In this respect, it is important to reiterate that, as was mentioned above, in practice all legal systems apply the conformity test in order to establish whether the digital content that was delivered meets the expectations the consumer could reasonably have of it. This suggests that the provisions of the Consumer Sales Directive and the Expert Group's draft could indeed be applied to digital content contracts with some amendments and additions. Before turning to the application of the conformity test to digital content contracts and to remedies for non-conformity, two other matters need to be discussed. A characteristic trait of ordinary sales law is the transfer of ownership of the goods. Such transfer typically does not take place with regard to digital content. Instead, usage rights are transferred. Second, the provisions on transfer of risk require some attention.

4.4.1 *Transfer of Usage Rights Instead of Ownership*

In some legal systems, the transfer of ownership of the goods is seen as a legal consequence of the conclusion of the sales contract, whereas in other legal systems ownership typically passes at delivery of the goods.⁹¹ In the case of digital content contracts, ownership of the tangible medium on which the digital content is stored may be transferred, but the trader is typically *not* required to transfer the ownership of the digital content itself or, more specifically, of the intellectual property rights associated with the digital content.⁹² In contrast, the consumer is provided with a license to use the digital content.⁹³ Conclusion of the contract then implies that the consumer is made aware of the existence of such intellectual property rights and, more importantly, that the trader cannot be held liable *for the mere fact* that a third party argues that her intellectual property rights are infringed. Nevertheless, the consumer may reasonably expect that she will be able to peacefully enjoy the use of the digital content in accordance with its ordinary use. Where the consumer is not informed of restrictions as to the normal use of the digital content and rights of third parties have not been cleared or stand in the way of the consumer's peaceful

⁹¹ Cf. C. VON BAR *et al.* (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (Full Edition)*, vol. 2, Sellier. European Law Publishers, Munich 2009, Note 2 to Art. IV.A.-2:101 DCFR (Overview of obligations of the seller), p. 1255. Art. 94(1)(b) of the Expert Group's draft indicates that the seller must transfer ownership but does not indicate when ownership passes. The definition of a sales contract in Art. 2(15) of that draft leaves both options open.

⁹² Cf. also SCHMIDT-KESSEL *et al.*, p. 3.

⁹³ Cf. also BRADGATE, p. 5, No. 26; RUSTAD, p. 578.

enjoyment of the digital content, this constitutes a non-conformity for which the trader is liable.

That the trader – save contractual arrangements to the contrary – is not required to transfer the ownership of the digital content, or more in particular the intellectual property rights associated with it, is not controversial. In practice, traders hardly ever intend such transfer to take place when concluding the contract and merely grant the consumer usage rights. In this sense, consumers could not reasonably expect that the transfer of the ownership of the digital content or the intellectual property rights associated with it is included in the digital content contract. The question is, therefore, merely whether or not this should be expressed explicitly in the text of the Optional Instrument or should be considered self-evident and therefore not subject to explicit regulation. It is, however, suggested that an explicit rule is indeed required to avoid legal uncertainty and, in particular, to prevent any reasoning on the basis of analogous application of the main obligation under sales law pertaining to the transfer of ownership. In this sense, it should be noted that without an explicit provision to the contrary, it could be argued that the ordinary rules of sales law would at least suggest that in the case where the digital content is contained on a physical medium, such transfer should also include a transfer of the intellectual property rights associated with the digital content. This, in itself, could create uncertainty as to the legal obligations of the trader. Moreover, if the analogy would be taken even further, one could argue that where the digital content is only contained in an intangible medium, the transfer of ownership – which is quintessential for sales contracts – must then pertain to the ownership of the intellectual property rights themselves. Even though it seems unlikely that a court would accept such analogy, it would take considerable time and effort for providers of digital content to obtain legal certainty in this respect. It is submitted that the importance of intellectual property rights for digital content contracts and the fact that the *normal* situation for digital content contracts explicitly departs from the normal rule for sales contracts – where a transfer of ownership is at the heart of the sales contract – require an explicit provision indicating that the trader is not required to transfer the ownership of the digital content.

4.4.2 *Transfer of Risk*

The provisions on the passing of risk should be supplemented by a specific provision for digital content contracts. Such a provision would basically have to state that insofar as the digital content is not provided on a tangible medium but is provided on a one-time permanent basis (e.g., the contract pertains to an individual download and not to a subscription), the risk does not pass until the consumer has obtained the control of the digital content.⁹⁴ Such a provision would then mean that the risk of the loss or deterioration of the digital content (i.e., the corruption of the data)

⁹⁴ Compare also SCHMIDT-KESSEL *et al.*, p. 13.

would not pass when the download takes place, but only when the download is completed and the digital content is within the consumer's control, for example, because it is stored on the consumer's hardware. Any deterioration of the quality or damage to the digital content during the download thus remains for the risk of the trader. This is different when the trader proves that the damage is caused by circumstances for which the consumer is responsible, for example, because her system has damaged the files during the download of the digital content.

4.4.3 *Application of the Conformity Test to Digital Content Contracts*

As was stated above, in practice, the question of whether the digital content provided is in conformity with the contract is answered on the basis of the same criteria as those applied to determine the conformity of 'ordinary' consumer goods. Member States have broad experience in applying the different implied terms embodied in the conformity test of the Consumer Sales Directive and the general rules on defective goods in sales law to contracts whereby digital content is permanently transferred – for example, cases where the digital content is stored on a tangible medium or sent by the trader or downloaded by the consumer for permanent use by the latter. Less certain is whether the conformity test is equally fit to deal with digital content that is not permanently transferred but only on a temporary basis (e.g., by allowing access for only a limited number of times or a limited period) or merely made accessible to the consumer – either by way of streaming or by way of access to a database.⁹⁵ In particular, one may wonder whether the ordinary conformity test sufficiently takes into account that in the case of *long-term contracts* (concluded either for a determined or an undetermined period of time) the digital content should not only conform to the contract at the start of the contract period but also throughout the contract period – which may include regular updates of the digital content if such could reasonably be expected. It is suggested that for such contracts a specific provision that requires the trader to keep the digital content in accordance with the contract throughout the contract period, in much the same way as is suggested in Article IV.B.-3:104 of the Draft Common Frame of Reference (DCFR; Conformity of the goods during the lease period) for contracts pertaining to the lease of movable goods, is needed.

4.4.4 *Remedies*

In section 3.4.1, it is indicated that, by and large, the remedies under the Consumer Sales Directive and national general contract law come to the same result. It has, however, been argued that the rules on termination need to be amended with regard to the consequences of termination. Under Article 176(1) of the Expert Group's draft, in accordance with the normal rules for termination, the consumer would be required to return the digital content, just as the trader would be required to return

⁹⁵ See critically SCHMIDT-KESSEL *et al.*, p. 13.

the payments made.⁹⁶ Such return is largely unproblematic insofar as the digital content is provided on a tangible medium and cannot be copied from the tangible medium on the consumer's computer or other device due to technical protection measures: In such a case, the consumer can simply return the tangible medium and this ensures also that the consumer cannot make further use of the digital content. In other cases, the return of the trader's performance by the consumer is simply impossible for the digital content is no longer available. This is the case with streamed content but also where the consumer was provided access to the trader's server, for example, in the case of a subscription to an online game. In this case, Article 177(1) of the Expert Group's draft indicates that the restitution by the consumer is made by paying the monetary value of the digital content. The same would apply, the provision indicates, where return is possible but would cause unreasonable effort or expense to the consumer. In yet other cases, the digital content could, in theory, be returned, but there would be no way for the trader to know whether the consumer had not secretly made and kept a copy of the digital content. For instance, if digital content was provided on a DVD without technical protection measures against private copying, the consumer could - depending on national copyright law - in theory lawfully have made private copies of the digital content and then return the DVD with the original digital content on it. The same would apply insofar as the digital content was downloaded without technical protection measures. Such technical protection measures may, to some extent, make it possible to disable the use of the digital content after the termination of the contract. This is the case, for instance, if access to an online medium or software within the control of the trader is needed to play the digital content. However, it may not be possible for all types of digital content to make sure they are returned or deleted after termination of the contract. In this situation, as the return of the digital content is both possible and would not cause unreasonable effort or expense to the consumer, Article 177(1) of the Expert Group's draft would not be applicable. We believe that this provision should be amended for digital content contracts in such a manner that where the trader is not able to control whether the consumer has returned the digital content without having kept a copy, the consumer's obligation to return the digital content should also be converted into an obligation to pay the monetary value of the obligation.

4.5 Gratuitous Digital Content Contracts

As was indicated in section 3.5.2, neither the CRD nor the Expert Group's draft currently are intended to apply also the gratuitous contracts. With regard to digital content, we believe that this is a mistake. As was explained in section 3.5.1, in the case of digital content the provision of 'gratuitous' digital content is just another

⁹⁶ With regard to mutually fully performed conforming performances, no digital content or payment is to be returned; see Arts 6(2) and 176(3) of the Expert Group's draft.

business model, in which consumers pay with their personal data rather than with money. In the digital environment, it seems rather artificial to include contracts where micropayments are being made – for example, contracts with a monetary value of EUR 0.99 per downloaded music file – and not to include contract where payments are made in other forms. Moreover, virtual currencies – for example, those used in games played online – represent a monetary value in themselves. Insofar as consumers pay by providing their personal data, these data also represent a monetary value as it may be collected, used for marketing purposes, and even sold to other traders – insofar as allowed under data protection law. In other business models, consumers effectively pay by accepting to be forced to watch advertisement before being able to (continue to) use the digital content.

Moreover, there are also substantive reasons to deal with such contracts. First, apart from the specific provisions dealing with price and payment, most provisions developed in the Expert Group’s draft are fit to be applied to such contracts. In this respect, it should be noted that the fact that the digital content was provided for free will influence the application of the conformity test as this fact will influence the expectations the consumer may have of the digital content: Typically, ‘gratuitous’ versions of digital content offer a more limited functionality than the version for which the consumer pays in money. As consumers generally are aware of these differences, their expectations will generally be lower than in the case where the consumer has paid the market price. Second, applying these rules to ‘gratuitous’ digital content contracts provides for a legal framework against which possibly unfair clauses – for example, clauses limiting the trader’s liability, clauses infringing privacy rights, etc. – can be evaluated. This may equally appeal to traders as such an approach fosters legal certainty for both traders and consumers. Finally, providers of digital content often make use of different business models by offering their standard products for free but offering additional features against a price. In our view, these considerations justify that the same rules apply to ‘gratuitous’ and remunerated digital content contracts.

5. Conclusion

In this article, we have argued that the Optional Instrument should contain provisions dealing with digital content contracts. We have also noted that the provisions of the CRD that already deal with digital content are fit to be included in the Optional Instrument and that most rules prepared by the Expert Group are equally fit to deal with digital content contracts. Only in some areas particular provisions would seem necessary. As regards terminology, it should be made clear that where the Consumer Sales Directive or the Expert Group’s draft currently refers to ‘goods’ and the physical control thereover, these provisions apply to digital content accordingly, and that instead of physical control over the goods the consumer should obtain the possibility to access the digital content. Next, it was argued that for the purposes of legal certainty it would be desirable to include an explicit provision

either allowing or forbidding the use of browse-wrap licenses as a valid manner of incorporating standard contract terms in the contract. In addition, a specific provision dealing with the matter of the passing of risk is needed in case the digital content is not provided on a tangible medium but is provided on a one-time permanent basis, as is the case with an individual download. Moreover, it should be stated explicitly that the trader is, unless express contractual agreement to the contrary, not required to transfer the ownership of the digital content but merely to transfer usage rights. With regard to the conformity test, only an additional provision is needed to deal with long-term contracts. As to remedies, a specific rule is needed to deal with the consequences of termination in the situation where the trader cannot control whether the digital content is returned without any copies remaining within the consumer's control, which she can continue to use. Finally, it was argued that the provisions of the Optional Instrument should also apply, with minor adjustments only, to 'gratuitous' digital content contracts.