Digital Content Directive And Copyright-related Aspects

by **Gerald Spindler***

Abstract: This article deals with the difficult relationship between the Digital Content Directive and copyright principles. Applying the objective consumer expectation test as laid down in Art 8 DCD, typical copyright restrictions such as those related to the exhaustion principle or limiting the use to a narrow circle of users are examined. Moreover, the triangle between rightholders, traders, and consumers as reflected by licenses are scrutinized.

Keywords: Copyright Law; Digital Content Directive; Copyright restrictions; Exhaustion principle; objective consumer expectations; license contracts

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A. Introduction

1 The Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services[1] has led to an intense discussion about reforms in contract law and consumer protection regarding all kinds of digital content contracts and services.[2] Whilst issues of consequential losses or standards and benchmarks for defects – in particular the subjective and objective standards and tests in Art 6 of the proposed DCD – have largely been discussed with regards to the first proposal of the DCD,[3] the relationship between copyright law and

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1 European Parliament and Council Directive 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (Text with EEA relevance.) [2019] OJ L 136/1 (hereafter cited as DCD).

2 Cf. Karin Sein and Gerald Spindler, 'The new Directive on Contracts for the Supply of Digital Content and Digital Services – Scope of Application and Trader's Obligation to Supply – Part 1' (2019) 15 ERCL 292; Axel Metzger, 'Verträge über digitale Inhalte und digitale Dienstleistungen: Neuer BGB-Vertragstypus oder punktuelle Reform?' [2019] JZ 577; for the first proposals cf. Gerald Spindler, 'Contracts for the Supply of Digital Content – Scope of application and basic approach' (2016) 12 ERCL 183; Christiane Wendehorst and Brigitta Zöchling-Jud (eds), *Ein neues Vertragsrecht für den digitalen Binnenmarkt?*, (Manz Vienna 2016); Lydia Beil, 'Conference Report: ERA Conference „New EU Rules for Digital Contracts"' [2016] EuCML 110; Jan M. Smits, 'New European Proposal for Distance Sales and Digital Contents Contracts: Fit for Purpose?' [2016] ZEuP 319; Stojan Arnerstål, 'Licensing Digital Content in a Sale of Goods Context' [2015] GRUR Int. 882.

3 Johannes Druschel and Michael Lehmann, 'Ein digitaler Binnenmarkt für digitale Güter' [2016] CR 244, 247ff; Wolfgang Faber, 'Bereitstellungspflicht, Mangelbegriff und Beweislast im Richtlinienvorschlag zur Bereitstellung digitaler Inhalte' in Wendehorst/Zöchling-Jud (eds) (n 2) 90, 98 ff; Gerald Spindler, 'Contracts for the Supply of Digital Content' (n 2) 183, 196ff; Dirk Staudenmayer, 'Verträge

the proposed amendments to contract law had been widely ignored.[4] This might have been due to the fact that Art 3 No 9, Recital 20 and 36 of the DCD explicitly exclude copyright law from its scope of application. Moreover, the fact that the first DCD proposal stuck to a subjective conformity test, rather than to the now adopted mixed subjective-objective approach of conformity in Arts 7, 8 DCD which provides much more room for an objective control of End User License Agreements (EULA-) clauses, which contravene objective consumer expectations.[5]

2 However, copyright law is deeply intertwined with any kind of services and performances concerning digital content.[6] Frequently digital content is protected by copyright, be it music, movies, books, software or databases, even if just tiny pieces of content are at stake.[7] All of the mentioned digital content is explicitly covered by the DCD as stated in recital 19 DCD.[8] Thus, contracts on digital content are often closely related to transfer of copyrights – however, nearly all these transfers of rights are operated under a so-called license contract, which is deemed to be concluded directly between the user of the digital content and the rightholder, encompassing all kinds of different contractual obligations in addition to the main sale (or service) contract between the supplier and the user/ customer. Whether these so-called "end user licenses agreements" (EULAs) can be brought in line with traditional contract law and how the DCD will affect those contracts, and vice-versa, will be one of the main focal points of this article. In this context, we will concentrate on issues of conformity of digital content in the light of (complicated) copyright transfers and licenses (B). We will show both, how the conformity test of Art 8 DCD influences contract law between the supplier and the buyer, as well as its indirect impact on copyright principles laid down in the EULAs between rightholders and users (C).

B. Licenses

I. Licenses as two sides of the same coin

3 The transfer of rights is operated by license agreements; they are the only tool to entitle the user (consumer) to use copyrighted material as long as no limitation or exception applies. Even though the focus of licenses relies upon the transfer of rights, such reproduction etc. licenses are usually a two-sided contract containing all kinds of (contractual) obligations. Thus, it should be expected that licenses are regulated either by copyright law or by contract law. However, neither copyright nor contract law encompasses provisions on licenses, or they regulate licenses on a very low level. National contract law like German contract law ignores the concept of license contracts as they are not mentioned in the German civil law code (Bürgerliches Gesetzbuch). Whereas national copyright law at least provides some provisions, such as mandatory remunerations on an adequate level, Section 32 German Copyright Law (UrhG), the bulk of contractual provisions (e.g. restrictions of use etc.) are only slightly regulated by copyright law. Even in insolvency law the legislator has not been able to codify license contracts and the effect of insolvency on copyrighted goods – in particular software – despite the huge impact of software on industry.[9]

4 Given the absence of specific provisions, licenses and their general terms and conditions are to a large extent still left to court practice in each member state of the EU. As mentioned, we have

über digitale Inhalte' [2016] NJW 2719, 2721; Christiane Wendehorst, 'Hybride Produkte und hybrider Vertrieb - Sind die Richtlinienentwürfe vom 9. Dezember 2015 fit für den digitalen Binnenmarkt?' in Wendehorst/Zöchling-Jud (eds) (n 2) 45, 65ff.

4 Exceptions are Liliia Oprysk and Karin Sein, 'Limitations in End-user Licensing Agreements: Is there a Lack of conformity under the new Digital Content Directive?' [2020] IIC 594; Metzger (n 2) 578; Michael Grünberger, 'Verträge über digitale Güter' [2018] 218 AcP 213; Michael Grünberger, 'Die Entwicklung des Urheberrechts im Jahr 2019' [2020] ZUM 175.

5 Cf. now for more extended discussion Oprysk/Sein (n 4) 595ff.

6 In detail on possible subject matter and relevant acts of use for digital contents according to (German) copyright law cf. Grünberger (n 4) 228ff.

7 Case C-5/08 *Infopag International A/S v Danske Dagblades Forening* [2009] ECR I-06569, para 51.

8 As recently decided by the CJEU Case C-476/17 *Pelham v Huetter* [2019] EU:C:2019:576, para 39; cf. also Linda Kuschel and Darius Rostam, 'Urheberrechtliche Aspekte der Richtlinie 2019/770' [2020] CR 393; Sein/Spindler (n 2) 292.

9 Christian Berger, 'Lizenzen in der Insolvenz des Lizenzgebers' [2013] GRUR 321; Winfried Bullinger and Kai Hermes, 'Insolvenzfestigkeit von Lizenzen im zweiten Anlauf einer Insolvenzrechtsreform?' [2012] NZI 492; Mary-Rose McGuire, 'Lizenzen in der Insolvenz: Ein neuer Anlauf zu einer überfälligen Reform' [2012] GRUR 657; Roman Trips-Hebert, 'Lizenzen in der Insolvenz – die deutsche Insolvenzordnung als Bremsklotz' [2007] ZRP 225; Ralf Dahl and Jan Schmitz, 'Der Lizenzvertrag in der Insolvenz des Lizenzgebers und die geplante Einführung des § 108a InsO' [2007] NZI 626.

to distinguish two core elements of licenses, the transfer of rights and the (contractual) obligations between the rightsholder and user.[10] Both are in a complex manner intertwined, as compliance with contractual obligations is often combined with the transfer of rights. For instance, the widely used General Public License for open source code may serve as a blue print for this relationship: Users of an open source code may modify and alter the code, however, under the condition that they offer third parties the modified code for free[11] and place the code under the same license (GPL).[12] When users do not comply with these obligations (and others as well) they will forego their rights under the GPL and will eventually not be entitled to modify the code anymore. The mechanism of the GPL thus ties contractual obligations to the transfer of rights.[13]

II. Distribution chain and End User License Agreements (EULA)[14]

5 In contrast to the analogue world where buyers (users) did not have to acquire specific (copy)rights in order to make use of their work, the era of digital content reverses that situation: Every use of a digital content entangles different kinds of copyright relevant acts such as reproduction, transmitting/broadcasting or making the content available to the public. Without a reproduction in a (temporary) cache or memory they can scarcely be displayed or made audible etc.

6 However, copyright law tries to take these technically necessary actions into account by establishing specific limitations to copyrights. Mandatory limitation of ephemeral reproduction, Art 5 (1)(d) InfoSoc-Directive[15], which allows users to reproduce and copy the digital content in their cache memories if the reproduction is only due to technical requirements and is limited in time while not being able to be exploited economically, may serve as an example in this context. In a similar way, Article 5 (1) of the Software-Directive provides a mandatory right for the user to use his software in the usual way according to his rational expectations.[16]

7 Even though copyright law thus provides for some mandatory limitations to copyright in order to enable users to use the acquired digital content without asking for consent of the rightholders, a lot of contractual obligations and direct restrictions in copyright are still enforceable by means of EULAs. A famous example is the restriction in licenses by Apple to reproduce digital content on 5-6 computers or to limit reproductions to the proprietary digital environment (operating systems).[17] Such licenses limit the extent to which a piece of work might be used. Another example refers to restrictions particularly used in software licenses, providing

10 Ansgar Ohly, 'Commentary on Vor § 31 UrhG' in Gerhard Schricker and Ulrich Loewenheim (eds), *Urheberrecht Kommentar* (C.H.Beck 6th edn Munich 2020) para 5; Andreas Wiebe, 'Commentary on Vor §§ 31 ff. UrhG' in Gerald Spindler and Fabian Schuster (eds), *Recht der elektronischen Medien* (C.H.Beck 4th edn Munich 2019) paras 1ff; Martin Soppe, 'Das Urhebervertragsrecht und seine Bedeutung für die Vertragsgestaltung' [2018] NJW 729, 730; Gordian N. Hasselblatt, '§ 43 Urheberrecht und verwandte Schutzrechte' in MAH Gewerblicher Rechtsschutz (C.H.Beck 5th edn Munich 2017) paras 11ff.

11 Other expenses etc. may be, however, claimed.

12 LG Köln [2014] CR 704, 705; Gerald Spindler, 'Commentary on Vor §§ 69a UrhG' in Gerhard Schricker and Ulrich Loewenheim (eds), *Urheberrecht Kommentar* (C.H.Beck 6th edn Munich 2020) para 25ff; Gerald Spindler, 'Open Source Software Lizenztypen und Abgrenzungen' in Gerald Spindler (eds), *Rechtsfragen bei Open Source* (Otto Schmidt Cologne 2004) paras 101, 102; Thomas Dreier, 'Commentary on § 69a UrhG' in Thomas Dreier and Gernot Schulze (eds), *Urheberrechtsgesetz Kommentar* (C.H.Beck 6th edn München 2018) para 11; Thomas Hoeren, 'IT-Verträge' in Graf von Westphalen (eds), *Vertragsrecht und AGB-Klauselwerke* (C.H. Beck 38. EL 2016) para 210; Jochen Marly (ed), *Praxishandbuch Softwarerecht* (C.H. Beck 7th edn Munich 2018) para 955.

13 LG Frankfurt a.M. [2006] CR 729,731; LG München I [2004] MMR 693, 695; Spindler (n 12) para 31.

14 An overview about the discussion whether a transfer of software has to be classified as "Sale" or "License-Agreement" is given by Marly (n 12) paras 695ff.

15 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 [2001] OJ L 167/10.

16 OLG Düsseldorf [1997] CR 337, 339; Gerald Spindler, 'Commentary on § 69d UrhG' in Gerhard Schricker and Ulrich Loewenheim (eds), *Urheberrecht Kommentar* (C.H.Beck 6th edn Munich 2020) paras 7, 8; Marly (n 12) para 247ff; Thomas Dreier, 'Commentary on § 69c UrhG' in Thomas Dreier and Gernot Schulze (eds), *Urheberrechtsgesetz Kommentar* (C.H.Beck 6th edn Munich 2018) paras 7ff.

17 "The End of Apples Copy Protection" is described by Marco Dettweiler, 'Kein Kopierschutz mehr! Na und?' *Frankfurter Allgemeine Zeitung*(Frankfurt, 7 January 2009) < http://www.faz.net/aktuell/technik-motor/computer-internet/itunes-kein-kopierschutz-mehr-na-und-1751781.html> accessed 11 November 2020; by now Apple reinforced these restrictions cf. 'Sec. B, G Apple Media Service Terms and Conditions' (last updated: 16 September 2020) <https://www.apple.com/legal/internet-services/itunes/us/terms.html> accessed 23 November 2020.

that the software can only be implemented on certain types of Central Processing Units (so called CPU-clauses) and thereby prohibiting to use it on more powerful machines. The German Federal court acknowledged such limitations on the contractual level by invoking copyright arguments.[18] Even more, if a rightholder uses Digital Rights Management Systems, they overrule some limitations such as the right to reproduce the work for private purposes, Article 5(2)(b) InfoSoc-Directive.

8 Thus, in spite of some mandatory limitations in copyright law in favor of the user, license agreements still play a decisive role in transferring the necessary rights and also restricting their use. In contrast to the traditional distribution chain in the analogue world where the supplier/seller transfers the property to the buyer without the buyer having to contact the producer of the good (chain model) the digital world is characterized by a direct sale of the digital content (seller and buyer/user). Here, the sale is comprised of a license agreement that is directly concluded between the buyer/user and the rightholder at the moment when the buyer/user wants to implement the (bought) digital content[19], be it a software, a computer game, or any other (copyrighted) item of digital content – the famous End User License Agreement (EULA).[20]

9 It is, however, somehow surprising that there are scarcely any court cases which attack this model of EULAs as they clearly contradict the traditional logic of contract law and transfer of property rights.[21] Click-wrap and shrink wrap contracts have been discussed widely[22] as the idea of concluding a contract with the rightholder just by clicking an install button is certainly not in line with the distribution of obligations and rights in a contractual relationship between the buyer and seller. Moreover, buyers are usually not aware of the additional contractual duties which are placed upon them when they install software or digital content and when they have to agree to the EULA – a refusal to approve the EULA terms usually ends in the abortion of the implementation procedure so that the digital content cannot be used. In many cases, users are predominantly interested in using the software and not in concluding a further binding contract, therefore it seems at least legally questionable to interpret the installation procedure as an affirmative declaration of intent.[23]

10 EULAs are usually not part of the contract concluded with the retailer (seller) nor in some sort of performance definitions. Only in certain cases, such as computer games, the packaging sometimes contains a (small-printed) hint that playing the game

18 BGH [2003] GRUR 416 – CPU-Klausel; Spindler (n 16) para 15; Andreas Wiebe, 'Commentary on § 69d UrhG' in Gerald Spindler and Fabian Schuster (eds), *Recht der elektronischen Medien* (C.H.Beck 4th edn Munich 2019) paras 34ff.

19 *Authorized dealer model*, where the characteristic is to establish a double contractual relationship with the end customer, with the distributor and with the rights holder; in detail about the different models: Hans Peter Wiesemann, '§ 24 Vertrieb von Software' in Astrid Auer-Reinsdorff and Isabell Conrad (eds), *Handbuch IT- und Datenschutzrecht* (C.H. Beck 3nd edn Munich 2019) para 116; in some cases the distributors try to act merely as an agent in order to avoid possible warranty obligations, to the legal (in)validity of this construction: Sascha Kremer 'Vertragsgestaltung bei Entwicklung und Vertrieb von Apps für mobile Endgeräte' [2011] CR 769, 771.

20 Matthias Lejeune, 'Softwarevertrieb über Distributoren' [2014] ITRB 234, 237; Manfred Rehbinder and Alexander Peukert, *Urheberrecht - Ein Studienbuch* (C.H. Beck 18th edn Munich 2018) paras 771ff.

21 Although this trend was not unexpected, in times of advancing digitization and the associated mass or automated use of protected digital works it is hardly possible to negotiate all acts of use individually, cf. Thomas Dreier and Leistner 'Urheberrecht im Internet: die Forschungsherausforderungen' [2013] GRUR 881, 892; whereby it is of course noticeable that the conditions do not necessarily correspond to legitimate consumer expectations, on consumer expectations see part B. 2. and in detail Aaron Perzanowski and Chris Jay Hoofnagle, 'What we buy when we buy now' [2017] University of Pennsylvania Law Review 315.

22 Marly (n 12) paras 987ff; Hans Peter Wiesemann (n 19) paras 119ff; Hoeren (n 12) paras 207ff; Alex Freiher v. d. Bussche and Tobias Schelinski, 'IT-Vertagsgestaltung' in Andreas Leupold and Silke Glossner (eds), *Münchener Anwaltshandbuch IT-Recht* (C.H. Beck 3rd edn Munich 2013) paras 149ff.

23 Declining with regard to the conclusion of the contract in shrink wrap situations: Hoeren (n 12) para 209; also critical in this respect, Wiesemann (n 19) paras 119, at least if there was no clearly emphasized explicit mention of the necessity to conclude a second contract; hinting in this direction is also an older decision of the Regional Court (LG) Hamburg on gaming software, which states that a consumer generally observes the instructions on the product packaging of a software, since he examines the packaging, for example, in terms of the minimum requirements for the use of the software. Based on this, a note on the packaging could be sufficient Regional Court (LG) Hamburg (2007) 324 O 871/06, para 17.

requires an activation of an account or some other actions by the user[24], establishing a direct contact between the "buyer" and the rightholder.

11 Thus, if buyers do not agree to the EULAs, in theory they may turn to the retailer requesting remedies, such as delivering a digital content without the contractual obligations and restrictions of the EULA or to withdraw from the contract. However, in most cases the set of remedies will be reduced just to the withdrawal as retailers in general are not in the position to request from their supplier a waiver of the EULA (more precisely: of the enshrined contractual obligations therein). Given the fact that obviously every digital content which is sold is accompanied by such an EULA, consumer protection and traditional contractual remedies are reduced to a "take it or leave it" situation – which is apparently not what contract law intended to establish.

12 Apart from remedies against retailers – which are absolutely rare in (court) practice – it may be argued that users/customers are not bound by the EULA obligations even if they agreed to them whilst installing the digital content. If their rational expectations do not match the content of an EULA (for instance, not to be subject to inspections (audits) by a rightholder) these terms and conditions could be treated as not being part of the finally concluded EULA. However, as EULA terms and conditions are displayed on the screen or made available before an implementation starts, the customer may take notice of their content. Moreover, as copyright law explicitly allows for restriction *in rem* on the specific use of copyrighted works, it is arguable how to construe objective expectations of a user contradicting these restrictions. In other words, the rational expectations of a customer/buyer regarding the original sales contract (between trader and consumer) may not be transformed to those expectations on the level of the EULA. The customer/buyer may well refer to these rational expectations with regard to his seller (retailer) – but not to the rightholder. Accordingly, unfair terms and conditions of an EULA have to be attacked in principal on the level of the contract with the rightholder and their unfairness has to be claimed with regard to the rightholder. Furthermore, it is and will remain difficult to determine what the user can legitimately expect from the contract with the distributor, as no reliable common practice has yet been developed in this regard.[25] Depending on the individual situation, requiring the user to sign or accept an EULA may constitute a legal deficiency in itself, but it would be deficient in any case if the contracts were not congruent, meaning that the distributor granted the customer more extensive rights of use than those granted by the rightholder in his EULA (missing *back-to-back protection*).[26]

13 The situation gets even more complicated if rightholders opt for similar legal constructions in their EULA such as the General Public License (GPL) for open source code, i.e. that any breach (or non-acceptance) of contractual obligations by a customer/user leads to the automatic termination of the license, thus, also of transferred rights. However, if EULA terms and conditions would be declared as void (as unfair), the license would not automatically be terminated and the rights would not fall back per se, as these terms would then be replaced by the correspondent provisions in contract law. The liability exemptions of the GPL, which even provides liability exemption in case of intentional behavior, may serve as an example: Whereas these clauses are clearly void under EU law (and national laws as well[27]) they are just replaced by the corresponding civil code provisions such as liability privileges of donation contracts (under continental law, under common law: promise of a gift).[28]

24 In detail on this model: Wiesemann (n 19) paras 124ff.; Chrocziel 'Branchenspezifische Besonderheiten im Vertriebsrecht' 11th chapter § 48 Computer und Software in Michael Martinek, Franz-Jörg Semler and Eckhard Flohr (eds.) *Handbuch des Vertriebsrechts* (C.H. Beck 4th edn Munich 2016) para 37.

25 Wiesemann (n 19) paras 121ff.

26 Wiesemann (n 19) para 118.

27 Whilst it seems that in general it has not yet been completely clarified whether EULAs are per se considered as general terms and conditions within the meaning of Art. 3 (2) Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (Unfair Contract Terms Directive) so that a legal examination within the meaning of Art 3 (1) Unfair Contract Terms Directive would be possible, or whether they have to be measured on the basis of the evaluations of copyright law and general principles of contract law; for more detail on this question with regard to the German legal situation: Matthias Berberich, 'Der Content „gehört" nicht Facebook! - AGB-Kontrolle der Rechteeinräumung an nutzergenerierten Inhalten' [2010] MMR 736, 737ff.

28 Gerald Spindler, 'Vertragsrecht' in Gerald Spindler (eds), *Rechtsfragen bei Open Source* (Otto Schmidt Cologne 2004) paras 6ff; Malte Grützmacher, 'Commentary on § 69c UrhG' in Artur-Axel Wandtke and Winfried Bullinger (eds) *Praxiskommentar Urheberrecht* (C.H.Beck 5th edn Munich 2019) para 113; Marly (n 12) para 983; Axel Metzger and Till Jaeger, 'Open Source Software und deutsches Urheberrecht' [1999] GRUR Int. 839, 847; Helmut Redeker, *IT-Recht* (C.H. Beck 7th edn Munich 2020) paras 617ff.

14 Still, even though customers/users may attack the EULA contract terms, they cannot request the rightholder to transfer rights as their claims concerning the transfer of rights relate only to their contracting partner, the retailer, as the one who has to fulfill the contractual obligations; the rightholder is not directly bound by the sales contract.[29] In practice, relevant cases would refer to interoperability and DRM-systems (or product activations) as the customer/user here needs the release (clearance) of DRMs in order to transfer his digital content to other items or other users. A mere disregard of (unfair) EULA contract terms would not be sufficient as they do not lead to additional rights and product activations (as may have been expected by the customer on the level of the contract with the retailer), the customer still has to claim his rights against the rightholder before court. However, the rightholder may uphold that contract terms (with the retailer) may be void but that he is not obliged to transfer more rights than provided for by the EULA – in contrast to the expectations the customer/buyer has had when he bought the digital content at the store of the retailer. In other terms, the customer/buyer cannot refer to these expectations stemming from the contract with the retailer (regarding transfer of rights, for instance) in order to claim this transfer against the rightholder. Only if jurisdictions would follow the French example of an "action directe" against anyone involved in the distribution chain concerning contractual claims, the problem would be avoided and solved.[30]

15 However, the traditional chain model may be modified in such a way that retailers do not act on their own account anymore rather than presenting themselves to the buyer as agents for rightholders (like in the "app stores" and platforms).[31] Nevertheless, regarding these "agent models" EULAs have to be part of the contract then concluded by the agent. Moreover, it depends on the individual case whether the position of the retailer as a mere agent of the rightholder has become clear to the customer.[32] Thus, app stores and similar platforms may also be treated as traders in the sense of the DCD[33] – especially if it is not made clear to the consumer that only an intermediary role is taken on, with whom the contract is actually concluded and with what content.[34] A bare mention in the general terms and conditions that the contract is not concluded with the distributor will not be sufficient to eliminate the legitimate consumer expectations.[35]

16 Finally, even though the contractual relationship between rightholder and user/consumer is usually connected "only" to copyright law, there might also be a case to establish a contractual relationship under the DCD regarding rightholders and users/consumers, in particular if the user/consumer has to deliver data when they install the digital content (or service). As Art. 3 (1) DCD provides for an equal treatment of "paying with data" (notwithstanding the opponent position of the European Data Protection Officer/Board[36]) still the DCD covers explicitly these kinds of contractual "exchanges". However, we have to distinguish between different kinds of data provided by the user/consumer to the rightholder: if data is being provided that allows diagnosis of the installed digital content/service, this kind of data exchange does not belong to the contractual exchange of goods and services – it just rather serves as a means to keep the digital content/service up to date. Moreover, it is very unlikely that the rightholder promised services in the EULA to the consumer/user.

17 However, if the rightholder requires data going beyond the mere guarantee of the functionality

29 Cf. Karin Sein and Gerald Spindler The new Directive on Contracts for the Supply of Digital Content and Digital Services – Conformity Criteria, Remedies and Modifications – Part 2, 15 *European Review of Contract Law* (2019), 365, 372; Oprysk/Sein (n 4) 599; also Kuschel/Rostam (n 8) para 8.

30 Markus Beaumart, *Haftung in Absatzketten im französischen Recht und im europäischen Zuständigkeitsrecht* (Duncker& Humblodt Berlin 1999) 93ff; Sabrina Salewski, *Der Verkäuferregress im deutsch-französischen Rechtsvergleich* (Mohr Siebeck Tubingen 2011) 171ff.

31 Cf. also Sein/Spindler (n 2) 261 concerning the contractual relationships under the DCD.

32 A detailed analysis of the contractual relationships between consumer, seller and rightholder can be found in Jochen Schneider, *Handbuch des EDV-Rechts* (Otto Schmidt 5th edn Cologne 2017) Chapter J paras 7ff.

33 Sein/Spindler (n 2) 261.

34 So already prior to the adoption of the Digital Content Directive Kremer (n 19) 771.

35 Therefore, such a clause would be considered as non-transparent in the sense that the Unfair Contract Terms Directive or in any case would constitute an unfair disadvantage for the consumer, in detail: Kremer (n 19) 771ff.

36 EDPS Opinion 8/2018 on the legislative package "A New Deal for Consumers" [2018] <https://edps.europa.eu/sites/edp/files/publication/18-10-05_opinion_consumer_law_en.pdf> accessed 27 November 2020; EDPS Opinion 4/2017 on the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content [2017] <https://edps.europa.eu/sites/edp/files/publication/17-03-14_opinion_digital_content_en.pdf> accessed 27 November 2020.

of the digital content it may be argued that there is some sort of contractual exchange. Again, the distinction can be drawn along the parallel lines of the GDPR which allows in Art 6 (1 b) data processing for contractual purposes, whereas every other kind of data requires the consent of the data subject.

III. Digital Right Management-Systems

18 These restrictions of copyright law are even aggravated if we consider Digital Rights Management Systems (DRM). These technical means to protect digital content against piracy and unjustified use are themselves strongly protected by Art 6, in particular Art 6 (4) InfoSoc-Directive, and also by Art 7 (1) (c) the Software Directive.[37] Even though users/customers may benefit from a mandatory limitation on copyrights such as a private copy limitation as enshrined in Sec. 53 (1) German Copyright Act, some of these limitations are overridden by DRM-Systems as Art 6 (4) InfoSoc-Directive clearly states.

19 Thus, DRM-Systems may even prevent the user/customer from making copies for private purposes (for instance, using music or eBooks on multiple devices etc.). It is evident that once again interoperability and reasonable expectations on the level of the contract between customer and retailer may deviate – unless the retailer clearly stated that DRM-systems may prevent the customer/consumer from exercising his otherwise given rights. Once again, the customer/consumer can only take recourse to the retailer claiming withdrawal from the contract if the rightholder does not agree to activate the digital content or to release the DRM-blocking feature – so that the rightholder still keeps control of the digital content, whereas the customer/consumer probably expected to use the digital content in the same way as other goods.

C. Copyright and Conformity

20 Even though licenses are essential for digital content, the DCD explicitly leaves licenses untouched (Recital 19, Art 3 Nr. 9 DCD).[38] Only Art 10 DCD mentions licenses indirectly when Member States have to ensure that "the consumer is entitled to the remedies for lack of conformity provided for in Article 14" when "a restriction resulting from a violation of any right of a third party, in particular intellectual property rights, prevents or limits the use of the digital content or digital service in accordance with Articles 7 and 8". The previous iteration of Art 8 of the DCD proposal, which suggested that the supplier was required to deliver the good "free of third party rights" has been dropped as it was misleading[39] because the customer especially needs these third party rights (belonging to the rightholder). This clearly means that Art 10 DCD refers to conflicting third-party rights which may prevent the customer from using the digital content.

21 Hence, the DCD explicitly confirms the traditional stance that (consumer) contract law does not have an impact on the license agreements and the copyright situation;[40] thus, the consumer has to turn to his trader in order to claim remedies for any infringement due to non-conform EULAs, and the rightholder remains unaffected.[41]

22 Given the fact that the DCD deliberately does not regulate any copyright issues we would not expect any impact on licenses – and vice versa concerning the contract with the supplier/retailer. While the first proposals of the Commission and of the Council indeed left the question of the impact of EULAs on the conformity of a contract untouched,[42] the European Parliament was the first to raise the

37 Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs OJ L 111/16, for example such an action as a removal of a Dongle, Spindler (n 16) para 11.

38 Dirk Staudenmeyer in Reiner Schulze and Dirk Staudenmayer, *EU Digital Law* (C.H.Beck Munich 2020) Richtlinie (EU) 2019/770 Art. 3 paras 140ff; critical to this exclusion Reiner Schulze, 'Die Digitale-Inhalte-Richtlinie – Innovation und Kontinuität im europäischen Vertragsrecht' [2019] ZEuP 695, 702.

39 Cf. also Simon Geigerat and Reinhard Steenot, 'Proposal for a directive on digital content – Scope of Application and Liability for a Lack of Conformity' in Ignace Claeys and Evelyne Terryn (eds.), *Digital Content & Distance Sales. New Developments at EU Level* (Intersentia Cambridge 2017) 143: "nonsense".

40 Cf. Frank Rosenkranz in Reiner Schulze and Dirk Staudenmayer, *EU Digital Law* (C.H.Beck Munich 2020) Art 10 paras 57, 74.

41 Sein/Spindler (n 2) 262; Oprysk/Sein (n 4) 599; cf. already for the DCD-proposal Spindler (2017) 226ff.

42 Commission, 'Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content' COM (2015) 634 final. European Commission; Council's General Approach. [Fn. 4: Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (First reading)– General approach. 2015/0287 (COD); summarized by Oprysk/Sein (n 4) 595ff.

problem.[43] However, in particular in relation to the conformity test laid down in Art 8 DCD, Recital 53 clearly states:

> *"Such restrictions can arise from the end-user license agreement under which the digital content or digital service is supplied to the consumer. This can be the case when, for instance, an end-user license agreement prohibits the consumer from making use of certain features related to the functionality of the digital content or digital service. Such a restriction could render the digital content or digital service in breach of the objective requirements for conformity laid down in this Directive, if it concerned features which are usually found in digital content or digital services of the same type and which the consumer can reasonably expect. In such cases, the consumer should be able to claim the remedies provided for in this Directive for the lack of conformity against the trader who supplied the digital content or digital service."*

23 Consequently, the fundamental issue remains unresolved: should contract law (and the DCD) follow copyright restrictions or should (lawful) copyright restrictions be counterbalanced by contractual rights (as provided by the objective conformity test of the DCD)? And if the latter would apply, how and according to which criteria should the objective conformity test be assessed (or construed)?

I. Objective conformity test

24 Even though Art 7 DCD also provides for subjective criteria concerning the conformity, the objective conformity test has to be equally respected.[44] In summary, according to Art 8 (1) – (4) DCD the digital content must meet the following objective criteria: the general suitability for the purpose of the contract, an average performance quality, the content's ability to meet the expectations set e.g. by advertising, the provision of the necessary support, and the basic identity of the content with any test versions or equivalent that may be shown prior to the conclusion of the contract.[45]

25 Hence, the test of objective conformity has now become crucial in order to assess if the trader has fulfilled his obligations. However, Recital 53 just states that some restrictions contained in EULAs can contravene objective requirements for conformity given. The test at hand is then modified, asking if the features in question can be "usually found in digital content or digital service of the same type" and even more important "which the consumer can reasonably expect". Thus, the test is three-fold:

- The concerned features should "usually be found";
- In the "same type of digital content";
- And which the consumer can "reasonably" expect.

26 However, this test raises some fundamental problems which are not easily answered:

- First, there is scarcely any settled normative experience and expectation of consumers as the digital content and services are relatively new and are subject to constant change – the determination of whether a product is customary will therefore most likely become a task of the courts,[46] which initially leads to legal uncertainty for both parties.
- Second, in order to assess the objective conformity, we have to consider the specific descriptions of digital content and services which then turns the objective conformity test into something subjective again.[47] Hence, it has been stressed that the industry may manipulate the expectations of consumers so that eventually we have to turn to a more normative standard.[48]

27 Nevertheless, it seems at least feasible to distinguish some scenarios which may allow to formulate objective conformity criteria:

43 Commission, 'Report on the proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content' COM (2015) 634 – C8-0394/2015 – 2015/0287 (COD). Available at: http://www.europarl.europa.eu/doceo/document/A-8-2017-0375_EN.html.

44 This results from the use of the term "in addition" in Art. 8 (1) DCD.

45 See also for the objective criteria: Kristina Ehle and Stephan Kreß, 'Neues IT-Vertragsrecht für digitale Inhalte und Dienste gegenüber Verbrauchern' [2019] CR 723, 725.

46 Cf. Vanessa Mak, 'The new proposal for harmonized rules on certain aspects concerning contracts for the supply of digital content' Report for the JURI Committe of the European Parliament 2016, p. 16ff; Ehle/Kreß (n 45) 726.

47 Cf. Grünberger AcP 218 (2018) 213, 250, 259; Oprysk/Sein (n 4) 611; see also Kuschel/Rostam (n 8) para 11.

48 Oprysk/Sein (n 4) 611 referring to Marco B.M. Loos et al., 'Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts' (University of Amsterdam 2011), p. 105 <https://dare.uva.nl/search?identifier=7d3d806d-8315-4aa6-8fb6-1fc565d2b557> accessed 21 November 2020 and Peter Rott, 'Download of copyright-protected content and the role of (consumer) contract law' (2008) 31 Journal of Consumer Policy 441, 449.

- where the consumer expects a constant availability of the digital content like in the analogue world in the case of a sale, combined with the expectation to do whatever he likes with the digital content (free use);

- in contrast, where the consumer expects only a temporary availability of a service or content.

28 Nevertheless, it must be noted that the goal of the mixed objective-subjective concept of conformity has not been fully achieved and the weaknesses of a purely subjective concept[49] of conformity have not been completely eliminated. Critical regarding the subjective concept of conformity in the original Commission proposal was the fact that this gave preference to the supposed private autonomy in a context in which it cannot prevail at all, at least not at present.[50] Even in the analogous context, the supposed correctness of the legal consensus of two market parties can be doubted; in the digital area, the assumption of such an informed and autonomous consensus would be a *fiction*.[51] Due to the ever-increasing asymmetry of information and the superiority of some market participants, there can be no parity of action. Distributors of digital goods have a de facto unilateral right to formulate the contract, which they regularly use in extensive general terms and conditions.[52] The consumer has hardly any actual possibilities to assert his interests. Even in the case of individual software the consumer has neither the necessary knowledge about the functionality of the software nor the muse to study the usually very detailed general terms and conditions. Therefore, a purely subjective concept of conformity based on the contractual agreements would mean that the retailers would have it in their hands to determine whether there is a deficiency and thus whether any warranty rights apply. This should and can be counteracted by introducing objective criteria, although these are still inadequate in their current form: firstly because, as already mentioned, subjective circumstances have to be taken into account to determine some objective criteria, and secondly because the relationship between objective and subjective deficiencies has not yet been fully clarified.[53] The Directive initially indicates that they are of equal rank and that, unlike in consumer goods law,[54] there is no general priority of the subjective concept of defect,[55] but Art 8 (5) DCD allows a deviation from objective criteria as long as the consumer has been notified and has agreed to the deviation, thereby enabling a subjective concept to prevail again. Hence, although the final DCD turned to the objective conformity test, Art 8 (5) DCD allows derogations according to Recital 53 only:

> *"if the trader specifically informs the consumer before the conclusion of the contract that a particular characteristic of the digital content or digital service deviates from the objective requirements for conformity and the consumer has expressly and separately accepted that deviation."*

29 This in turn gives the contributors the right to determine the content of the contract quasi unilaterally and thus the possible intervention of warranty rights.[56] Thus, *Oprysk/Sein* rightfully stated that:

49 Cf. Mak (n 46) 15ff.; Grünberger (n 4) 255ff.

50 Grünberger (n 47) 255; critical of the Commission proposal at the time: European Law Institute, Statement on the European Commission's Proposed Directive on the Supply of Digital Content to Consumers, COM (2015) 634 final, 7. 9. 2016, p. 18 available at: <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Statement_on_DCD.pdf>; Axel Metzger, Zohar Efroni, Lena Mischau and Jakob Metzger, 'Data-Related Aspects of the Digital Content Directive' [2018] JIPITEC 90, paras 57ff.

51 So correctly Heike Hummelmeier in Executive Comittee of the Association of German Jurists (eds) *Verhandlungen des 71. Deutschen Juristentages 2016* (C.H.Beck Munich 2017) pt. II/1 ch. K, 39; also Grünberger (n 47) 257.

52 Heike Hummelmeier, in Executive Comittee of the Association of German Jurists (eds) *Verhandlungen des 71. Deutschen Juristentages 2016* (C.H.Beck Munich 2017) pt. II/1 ch. K, 39; Grünberger (n 47) 257.

53 Cf. Andreas Sattler, 'Neues EU-Vertragsrecht für digitale Güter' [2020] CR 145, 149; in this direction also Metzger (n2) 581; Mak (n 46) 16ff.

54 See Art 2 of the 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 amended by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, it should be noted, however, that the Directive on the sale of goods, which will soon come into force, follows the mixed objective-subjective model, the clear prioritization of the subjective definition of a deviation is not maintained, see Art 6 and 7 of Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods.

55 Reiner Schulze, 'Die Digitale-Inhalte-Richtlinie – Innovation und Kontinuität im europäischen Vertragsrecht' [2019] ZEuP 695, 709.

56 Critical of the question of whether and to what extent Art 8 (5) DCD actually gives distributors scope for their services Ehle/Kreß (n 45) 726.

"Nevertheless, with the wide variety of digital content, determining what is reasonable to expect from a particular type of digital content becomes rather blurred."[57]

1. Transfer and Resale of digital content and accounts

30 The first situation – a contract which seemingly is similar to a sale – already comes into conflict with some EULAs, which are widely used in the market as these usually restrict the free use of the acquired digital content, in particular the resale of a digital content or the transfer. Usually, the content is associated with an account which is registered with the provider.[58] Thus, a transfer of the digital content going beyond the user's account is not being allowed.

a) The exhaustion principle in copyright law

31 In the old analogue offline world, the exchange of goods with copyrighted content did not pose huge problems: the distribution right as laid down in Art 4 InfoSoc-Directive[59] may be invoked by the rightholder up to the first consented sale or other transfer of ownership. Once the good has entered the market cycle, the rightholder cannot claim his distribution rights anymore, the right is thus exhausted. However, this exhaustion principle is closely linked to content enshrined in physical goods, Art 4(2) and Recital 29 of the InfoSoc-Directive, from a national perspective Sec. 17 of the German Copyright Act.[60] Hence, at the first glance a mere download of a digital content would not exhaust the distribution rights of the rightholder as it has not been brought physically into the market cycle so that the customer may not resell it or hand it to somebody else. Legal qualification and treatment thus differed widely between tangible goods and immaterial goods, as the latter one could not be traded without the consent of the rightholder.

32 This situation changed when the CJEU decided the famous case "Used Soft" regarding the resale of software which previously had been downloaded by the (reselling) customer – instead of buying a CD/DVD etc. The prevailing doctrine in Germany (where the case originated) had upheld previously that due to the non-tangible distribution of the software, the rightholder could prohibit any resale of a bought software – on the level of copyright law.[61] The German High Federal Court (BGH) referred the case to the CJEU asking if this distinction fits under the Software-Directive.[62] Surprisingly to many commentators, the CJEU focused on the wording of the Software-Directive[63] which speaks of a "sale" of software regarding the exhaustion principle. Thus, the CJEU, in a nutshell, concluded that the buyer of a software which has been downloaded (and not transferred on a physical medium) and which usage terms are not limited in time, has to be in the same position as the buyer of a tangible good. Therefore, the buyer may exercise all rights of an owner without the rightholder having any chance to prohibit the first owner the resale of the "used" software.[64] Even patches etc. which had been added to the original software are part of the code which can be transferred without the consent of the rightholder. The CJEU, however, stated also that it

57 Oprysk/Sein (n 4) 598.

58 For example, part 4 of Google Play Services terms; part 1 of Amazon Kindle Store Terms; in depth analysis at Oprysk/Sein (n 4) 609ff.

59 European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10.

60 Copyright Act (Urheberrechtsgesetz – UrhG) of 9 September 1965 (Federal Law Gazette I, p 1273, as last amended by Art 1 of the Act of 28 November 2018 (Federal Law Gazette I, p 2014).

61 Cf. for the German discussion Gerald Spindler, 'Der Handel mit Gebrauchtsoftware – Erschöpfungsgrundsatz quo vadis?' [2008] CR 69; Gerald Spindler, 'Commentary on § 69c UrhG' in Gerhard Schricker and Ulrich Loewenheim (eds), *Urheberrecht Kommentar* (C.H. Beck 6th edn Munch 2020) para 32ff; Grützmacher (n 28) para 32ff; Truiken Heydn and Michael Schmidl, 'Der Handel mit gebrauchter Software und der Erschöpfungsgrundsatz' [2006] K&R 74, 75; Frank A. Koch, 'Lizenzrechtliche Grenzen des Handels mit Gebrauchtsoftware' [2007] ITRB 140, 141ff; Gernot Schulze, 'Commentary on § 17 UrhG' in Thomas Dreier and Gernot Schulze (eds), *Kommentar zum Urheberrechtsgesetz* (C.H. Beck 6th edn Munich 2018) paras 24ff; Olaf Sosnitza, 'Die urheberrechtliche Zulässigkeit des Handels mit "gebrauchter" Software [2006] K&R 206, 207; Andreas Wiebe, 'Commentary on § 69c UrhG' in Gerald Spindler and Fabian Schuster (eds), *Recht der elektronischen Medien* (C.H. Beck 4th edn Munich 2019) paras 21ff.

62 BGH [2011] GRUR, 418 – UsedSoft I.

63 European Parliament and Council Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs [2009] OJ L 111/16.

64 Case C- 128/11 *UsedSoft GmbH v Oracle International Corp* EU:C:2012:407, paras 59ff, 63.

should be guaranteed that the first owner shall delete the transferred software so that no copy is left; just a certificate by a notary would not be sufficient.[65]

33 This decision was qualified by commentators as "revolutionary" as it put an end to the distinction between offline and online distribution.[66] Even though a lot of details are still being discussed, such as the specification of "use without time restraints" or the necessary actions in order to guarantee a deletion of the software, it is now widely accepted that software will be exhausted when it is traded, without regard to the nature of distribution (offline or online). Concerning the relationship between contract law – in particular the DCD – and copyright law, the focus of the CJEU on the notion of "sale" is relevant: The court used the contractual obligations to transfer property rights finally to the buyer in order to construe the exhaustion principle, thus he used contract as a leitmotif for copyright law.

34 It is not surprising that in the aftermath of the CJEU decision, the exhaustion of other digital content (distributed solely online or per download) like eBooks, movies, or music was questioned as some commentators argued for an analogous application of the court's ruling on these goods. Indeed, it seemed highly arguable to distinguish offline and online distribution for the same sort of content. Nevertheless, the InfoSoc-Directive remains opaque on that point as the directive does not explicitly mention – unlike the Software-Directive – a "sale" to the customer. In contrast, Recital 29 of the InfoSoc-Directive seems to exclude any exhaustion principle to online services including downloaded digital content.[67] Only by a restrictive interpretation of of the term "online services" as not encompassing downloads, the exhaustion principle could be extended to online distribution of digital content.

35 German courts of appeal who had to deal with actions of consumer associations against terms and conditions of eBook-sellers held that contractual obligations and prohibitions to resell the eBook are not unfair: They argued that copyright does not provide for exhaustion in case of mere downloading a digital content so that corresponding contract clauses could not be deemed as unfair.[68] The same method – analyzing contractual limitations in an EULA according to the copyright situation – had been applied before by the German Federal Court in the Central Processing Unit CPU-clause case, upholding a restriction to use software on more powerful machines.[69] Hence, the German courts just adopted the contrary position to the CJEU in the "Used Soft" decision, focusing on copyright law as determining the range of contractual terms.

36 However, the CJEU put an end to this heated discussion by ruling in the "Tom Kabinet" decision that the offer of "second-hand" eBooks on an electronic platform would not fall under the distribution right rather than the right to communicate to the public.[70] The CJEU based its decision strictly on copyright law by invoking the preparatory texts for the InfoSoc-Directive (such as the explanatory memorandum of the EU Commission) as well as international law like the WCT,[71] pointing out that from the perspective of the CJEU the EU legislator did want to draw a clear distinction line between tangible and intangible goods.[72] Thus, the CJEU emphasized:

65 Case C- 128/11 *UsedSoft GmbH v Oracle International Corp* EU:C:2012:407, para 70.

66 Cf. for all implications of the CJEU Used Soft decision Jochen Schneider and Gerald Spindler, 'Der Kampf um die gebrauchte Software – Revolution im Urheberrecht?' [2012] CR 489; Jochen Schneider and Gerald Spindler, 'Der Erschöpfungsgrundsatz bei "gebrauchter" Software im Praxistest' [2014] CR 213; Thomas Hartmann, 'Weiterverkauf und Verleih online vertriebener Inhalte' [2012] GRUR Int. 980; Reto M. Hilty, 'Die Rechtsnatur des Softwarevertrages' [2012] CR 625; Jochen Marly, 'Der Handel mit sogenannter "Gebrauchtsoftware"' [2012] EuZW 654; Nikita Malevanny, 'Die UsedSoft-Kontroverse - Auslegung und Auswirkungen des EuGH-Urteils' [2013] CR 422; Michael Rath and Christoph Maiworm, 'Weg frei für Second-Hand-Software?' [2012] WRP 1051; Malte Stieper, 'Anmerkung zu EuGH, Urteil vom 3. Juni 2012 – C-128/11 – UsedSoft' [2012] ZUM 668; Detlef Ulmer and Peter Hoppen, 'Die UsedSoft-Entscheidung des EuGH: Europa gibt die Richtung vor' [2012] ITRB 232; Hans-Werner Moritz, 'Eingeschränkte Zulässigkeit der Weiterveräußerung gebrauchter Software' [2012] K&R 456.

67 OLG Hamburg [2015] MMR 740, 741ff; OLG Stuttgart [2012] ZUM 811, 813; Hartmann (n 66) 980, 982; Hilty (n 66) 630; Matthias Kloth, 'Der digitale Zweitmarkt: Aktuelle Entwicklungen zum Weiterverkauf gebrauchter E-Books, Hörbücher und Musikdateien' [2013] GRUR-Prax. 239, 240; Stieper (n 66) 670, who questions the exhaustion of the distribution rights in case of an online transfer of digital content such as music, movies and eBooks.

68 OLG Hamburg [2015] GRUR-RR 361, paras 15ff; OLG Stuttgart [2012] ZUM 811ff; with regard to audio files also OLG Hamm [2014] ZUM 715, 720ff.

69 BGH [2003] GRUR 416 – CPU-Klausel.

70 Case C-263/18 *Nederlands Uitgeversverbond, Groep Algemene Uitgevers vTom Kabinet Internet BV et al.* EU:C:2019:1111.

71 Case C-263/18 *Nederlands Uitgeversverbond, Groep Algemene Uitgevers vTom Kabinet Internet BV et al.* EU:C:2019:1111, paras 40ff.

72 Case C-263/18 *Nederlands Uitgeversverbond, Groep Algemene*

> *"51 Furthermore, recitals 28 and 29 of Directive 2001/29, relating to the distribution right, state, respectively, that that right includes the exclusive right to control 'distribution of the work incorporated in a tangible article' and that the question of exhaustion of the right does not arise in the case of services and online services in particular, it being made clear that, unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every online service is in fact an act which should be subject to authorisation where the copyright or related right so provides."*

37 Moreover, the court contrasted its decision to the case of "Used Soft" in stressing that the Software-Directive has to be considered as *lex specialis* to the InfoSoc-Directive.[73]

> *"56 Such assimilation of tangible and intangible copies of works protected for the purposes of the relevant provisions of Directive 2001/29 was not, however, desired by the EU legislature when it adopted that directive. As has been recalled in paragraph 42 of the present judgment, it is apparent from the travaux préparatoires for that directive that a clear distinction was sought between the electronic and tangible distribution of protected material."*

38 The CJEU also took the stance that from an economic point of view software cannot be compared to eBooks:

> *"58 The supply of a book on a material medium and the supply of an e-book cannot, however, be considered equivalent from an economic and functional point of view. As the Advocate General noted in point 89 of his Opinion, dematerialised digital copies, unlike books on a material medium, do not deteriorate with use, and used copies are therefore perfect substitutes for new copies. In addition, exchanging such copies requires neither additional effort nor additional cost, so that a parallel second-hand market would be likely to affect the interests of the copyright holders in obtaining appropriate reward for their works much more than the market for second-hand tangible objects, contrary to the objective referred to in paragraph 48 of the present judgment."*[74]

39 However, it is doubtful whether the decision really bars the application of the exhaustion principle to online-files that can be downloaded, since the CJEU also stressed the fact that, in the case of Tom Kabinet's platform, no technical measures were taken to limit the use of an online available copy of the eBook to a single person.

> *"69 In the present case, having regard to the fact, noted in paragraph 65 of the present judgment, that any interested person can become a member of the reading club, and to the fact that there is no technical measure on that club's platform ensuring that (i) only one copy of a work may be downloaded in the period during which the user of a work actually has access to the work and (ii) after that period has expired, the downloaded copy can no longer be used by that user (see, by analogy, judgment of 10 November 2016, Vereniging Openbare Bibliotheken, C-174/15, EU:C:2016:856), it must be concluded that the number of persons who may have access, at the same time or in succession, to the same work via that platform is substantial. Consequently, subject to verification by the referring court taking into account all the relevant information, the work in question must be regarded as being communicated to a public, within the meaning of Article 3(1) of Directive 2001/29."*

40 The CJEU hereby referenced the decision concerning a case stemming from the Netherlands and concerning the online lending of eBooks.[75] In particular the Rechtbank Den Haag (District Court, The Hague) decided to stay in proceedings and refer the question whether Art 1(1), 2(1)(b) and 6(1) of Directive 2006/15[76] would allow for a lending of eBooks by placing a digital copy while others - and even the lending institution - are excluded from using another or their digital copy of the lent eBook. The court widely followed the opinion of AG Szpunar in stating that online should be treated in the same way as offline. Furthermore, the court stated that the questioned Articles would cover the lending of digital copies of an eBook if the involved reproduction had been limited to a single user at once and the use of the reproduction to a certain time period.[77] However, the CJEU limited its decision to lending and did not extend it to the renting of online versions, as renting would refer exclusively to copies fixed in a physical medium.[78]

Uitgevers vTom Kabinet Internet BV et al. EU:C:2019:1111, paras 44ff.

73 Case C-263/18 *Nederlands Uitgeversverbond, Groep Algemene Uitgevers vTom Kabinet Internet BV et al.* EU:C:2019:1111, para 55.

74 Case C-263/18 *Nederlands Uitgeversverbond, Groep Algemene Uitgevers vTom Kabinet Internet BV et al.* EU:C:2019:1111.

75 Case C-174/15 *Vereniging Openbare Bibliotheken v Stichting Leenrecht* EU:C:2016:856.

76 Directive 2006/15/EC of 7 February 2006 establishing a second list of indicative occupational exposure limit values in implementation of Council Directive 98/24/EC and amending Directives 91/322/EEC and 2000/39/EC, [2006] OJ L 38/36.

77 Case C-174/15 *Vereniging Openbare Bibliotheken v Stichting Leenrecht* EU:C:2016:856, para 54.

78 Case C-174/15 *Vereniging Openbare Bibliotheken v Stichting Leenrecht* EU:C:2016:856, para 35.

41 Last but not least, one of the major business models concerning digital content highlights the problems of contract and copyright law: computer games. As this "digital content" consists of a variety of works such as software, movies, music, text scripts etc. it is hard to assess them according to the traditional categories of work such as enshrined in the InfoSoc-Directive. As the CJEU puts it in the famous Nintendo-case, every directive and every category has to be applied to computer games.[79] However, such a versatile approach ends up in a very complicated assessment regarding which provision of which directive is to be applied and how it relates to other norms. Unfortunately, the Software-directive as well as the InfoSoc-Directive do provide for different treatments of works, in particular concerning exceptions and limitations. Moreover, it is far from clear whether and how the exhaustion principle would apply to downloaded computer games. In addition to that, most contracts on computer games provide specific prohibitions for customers as well as requirements to activate their games on particular platforms – so that the use of the game depends on a constant connection with the (original) supplier of the game, even though the seller is not identical with the supplier of the game. Given these differences it is very likely that contract lawyers will tend to implement more "access"-like contracts than real "sale"-types.[80]

b) Exhaustion principle and the DCD

42 What is then the position of the DCD on the issue of exhaustion? In principle, none! As the DCD explicitly gives priority to copyright law, we cannot take recourse to contract law shaped by the DCD concerning the relationship between rightholder and user. However, with regard to the relationship between the consumer (user) and the trader, the objective conformity test may intervene by obliging the trader by contract to enable the consumer to resell the digital content. This is in particular the case when the consumer could have objectively expected the free use of the digital content, which is very likely in the case of a "sales"-like contract,[81] as already pointed out by the CJEU in the "Used soft" case. *Oprysk/Sein* carved out that "buy now" transactions are usually being perceived by consumers as given them unrestricted abilities to use the acquired content,[82] referring to some empirical studies.[83] The same study has also shown that half of the consumers did not know which rights they were acquiring ("I do not know") when being presented with the "license now"-option.[84] With these objective expectations of user/consumers in mind, restrictions on the resale of digital content by EULAs – such as in the case of eBooks in the CJEU decision "Tom Kabinet" – may only be adequate, if they are expressly accepted by the consumer (Art 8 (5) DCD).[85] Otherwise they would not match the objective conformity test of Art 8 (1) DCD.[86]

43 Even though it has been argued that the decision of the CJEU "Tom Kabinet" does not have any impact on the contractual objective expectations of the

79 Case C-355/12 *Nintendo v PC Box* EU:C:2014:25, para 23.

80 Cf. Andreas Sattler, `Urheber- und datenschutzrechtliche Konflikte im neuen Vertragsrecht für digitale Produkte' [2020] NJW 3623 para 25 – 27.

81 Michael Grünberger, 'Verträge über digitale Güter' [2018] 218 AcP 213, 249; Michael Grünberger, 'Die Entwicklung des Urheberrechts im Jahr 2019' [2020] ZUM 175, 190; Gerald Spindler and Karin Sein, 'Die Richtlinie über Verträge über digitale Inhalte' [2019] MMR 488, 490; differing Franz Hofmann, 'Recht der digitalen Güter: eine digitale Erschöpfung bei der Weitergabe von E-Books – Anmerkung zu EuGH, Urteil vom 19.12.2019 – C-263/18 – NUV u. a./Tom Kabinet Internet u. a.' [2020] ZUM 136, 138 who contradicts the assumption of stated consumer expectations by emphasizing the need to take the specifics of digital goods (like lack of wear and tear) into account in contract law.

82 Oprysk/Sein (n 4) 619ff; see already Sein/Spindler (n 29) 373ff.

83 Aaron Perzanowski and Chris Jay Hoofnagle, 'What we buy when we buy now' [2017] University of Pennsylvania Law Review 315, 340ff regarding the option "buy now" for eBooks, MP3s and digital movies on the US market; cf also the study of Sabrina Helm, Victoria Ligon, Tony Stovall and others, 'Consumer interpretations of digital ownership in the book market' (2018) Electronic Markets Research Paper 28:177, 181ff. <https://link.springer.com/content/pdf/10.1007/s12525-018-0293-6.pdf> accessed 23 November 2020, coming to the result that most consumers see a decrease in value when being confronted with the fact that they cannot resell, share or gift the content.

84 Perzanowski and Hoofnagle (n 82) 343ff Concerning the option „License now".

85 Cf. Kuschel/Rostam (n 8) para 20.

86 To avoid false consumer expectations from the very beginning, Perzanowski/Hoofnagle (n 82) 345ff, 375 suggest "short, prominent, easily readable, bullet-point list[s] of the behaviors consumers could engage in and those that they could not", which is not hidden in the depths of terms and conditions, as this short information leads to a strong reduction of misconceptions of the consumers according to their study results. Critical to the question to what extent this type of information can break down existing expectations and behavior patterns based on them Grünberger (n 4) 272ff .

consumer,[87] there are some doubts: If the copyright legal assessment would be part of the objective expectations of a "normative" consumer, the objective conformity test in favor of an exhaustion rule would fail. This had been the approach of several German courts of appeal concerning the control of standard terms and conditions of EULAs according to Sec. 307 German Civil Code which provides for a strong judicial control of any deviations from general legal principles ("gesetzliches Leitbild"). Instead of having recourse to the contractual model of sale, the majority of courts of appeal called in the copyright principles as the "gesetzliche Leitbild". No exhaustion was applicable here, so that these courts maintained the restriction contained in the standard terms and conditions.[88]

44 On the other side, the CJEU in the "Tom Kabinet" decision put special emphasis on the distinction to the previous decision regarding the lending of eBooks. Obviously, Tom Kabinet's platform had not established any measures to restrict the redistribution of copies of eBooks – which the CJEU had pointed out in the decision regarding the lending of eBooks as well as in the "Used Soft" decision. Hence, if a trader can still retain some control on the distribution of digital content by tying the content to an account, there is a strong argument that the consumer may pass on / transfer his account to a third party as the interests of rightholders are still being guaranteed.[89] However, without these guarantees there should be no normative objective expectation of consumers to do whatever they like with the digital content as there are significant differences between analogue and digital content, such as the non-rivalrous quality of digital goods and the 1:1 quality preserving quality in case of copies so that it may well be argued that a "digital content sale" has to be treated somehow differently to the traditional sale.[90] Hence, the interest of the rightholder to keep control of the distribution of his digital content is also obvious – and granted by copyright law such as the InfoSoc Directive.[91]

87 Kuschel/Rostam (n 8) para 21; Oprysk/Sein (n 4), 619.

88 OLG Hamburg [2015] MMR 740, 741; OLG Hamm [2014] MMR 689, 690; OLG Stuttgart [2012] MMR 834, 836.

89 Similar Oprysk/Sein (n 4), 619ff; cf also Sattler (n 53), 151.

90 In this direction Hofmann (n 80), 138; contrary (for a completely adequate treatment of sales) Kuschel, 'Der Erwerb digitaler Werkexemplare' (Mohr Siebeck Tübingen 2019) 111ff, 281.

91 Summarized recently in Case C-263/18 *Nederlands Uitgeversverbond, Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others* EU:C:2019:1111, para 58.

2. Further Restrictions of use

a) Preliminary remark: ad rem restrictions by copyright law

45 The story of contract and copyright gets even more complex if we consider so-called in rem restrictions, for instance the unknown uses of a copyrighted work. These are qualified to restrict the transfer of rights in such a way that a rightholder may grant the customer the right just to use a work in a specified way, such as a hardcover edition instead of a paperback, even though the acts of reproduction and distribution may be the same. These restrictions apply to all stages of a distribution and are therefore qualified as restrictions ad rem – and not just contractual obligations.[92] However, the distinction between restrictions ad rem and just mere contractual obligations is sometimes not easy to assess: The German Federal Court (BGH) qualified the OEM-versions of software as well as those for just educational purposes not as ad rem restrictions, thus allowing traders to rip off the software of hardware that had been sold at a reduced price to educational institutions.[93] Accordingly, the exact qualification of use – if ad rem or not – is sometimes hard to determine, e.g. distinguishing between streaming and broadcasting.[94] However, whereas OEM software has been considered as a mere contractual obligation and not binding ad rem (in the distribution chain), it is not yet clear if courts would accept these restrictions as binding on the contractual level. In this regard the parallels to the judgements cited above concerning the exhaustion principle are nevertheless evident.

b) Restrictions on obtaining a (backup) copy,

46 As an empirical study on EULAs of major content providers such as Apple, Google Play, Amazon, or

92 BGH [1959] GRUR 200, 202 – Der Heiligenhof; BGH [1986] GRUR 736, 737 f – Schallplattenvermietung; BGH [1992] GRUR 310, 311 – Taschenbuch-Lizenz; BGH [2001] GRUR 153, 154 – OEM; Deutscher Bundestag, Drucksache 16/1828, 24 „abstrakte Beschränkung"; Gernot Schulze, 'Commentary on § 31a UrhG' in Thomas Dreier and Gernot Schulze (eds), *Kommentar zum Urheberrechtsgesetz* (C.H. Beck 6th Edition München 2018) para 68; Artur-Axel Wandtke and Wilhelm Grunert, 'Commentary on § 31a UrhG' in Artur-Axel Wandtke and Winfried Bullinger (n 28) para 12.

93 BGH [2001] GRUR 153, 154 f - OEM; BGH [2014] GRUR 264, para 31ff – UsedSoft II.

94 Cf. Thomas Dreier, 'Commentary on § 19a UrhG' in Thomas Dreier and Gernot Schulze (n. 61) para 10.

Microsoft has shown, most of these EULAs do not deal explicitly with a right of the user to make a backup copy[95] – even though at least for software it is explicitly provided by Art 5 (2) of the Software directive,[96] and can also be established by national copyright law by implementing Art 3 (2) (c) InfoSoc-Directive.

47 Hence, even under copyright law the user is often entitled to create a back-up copy which cannot be sold to third parties.[97] Moreover, if the trader's offer has raised the expectation of the user that the digital content will be constantly available and usable, there are good reasons for a consumer's objective expectation that the user can make at least one copy of the digital content in order to have a backup copy.[98] Even though the DCD did not take up former proposals in the literature to introduce such a mandatory contractual right in favor of consumers,[99] such an objective consumer expectation can still be based on the usual horizon of understanding of consumers that they acquire a content for free use.[100] On the other side, it can be argued that such an expectation is limited by options provided by the trader to re-download a digital content in case it has been destroyed etc.[101] However, since even copyright law does not provide for a prohibition, there are strong arguments that in these cases a backup copy should be part of the objective consumer expectation.

48 Finally, it should be noted that this principle can only be applied to the "classical" form of downloading content. In contrast to a download, a backup copy of streamed content, which is stored on the server of the trader and is only accessible, does not fall under copyright law limitations. This is due to the fact that streaming and access refer only to the right of making available to the public where the referred limitations are not applicable. Even if we consider that the contractual level respectively, the objective expectations of consumers may differ from the copyright situation, these cases are more likely to be related to temporary access to a service or content.

c) Restrictions of non-simultaneous use of digital content on few devices belonging to the consumer

49 Most of EULAs also contain certain restrictions on the simultaneous use of digital content, limiting their use to certain devices or tying them to a user account. This is in particular the case with DRM-protected content.[102] Moreover, some terms in EULAs limit the sharing of digital content to a family household.[103]

50 *Oprysk/Sein* have argued that consumers could objectively expect that they are entitled to use digital content on several devices, at least if the use is not simultaneous.[104] Concerning copyright law, users are entitled to make several copies for their own use, at least according to German copyright law, Sec. 53 of the German Copyright Act.[105] Tying these copies to

95 As is extensively being pointed out by Oprysk/Sein (n 4), 601ff.

96 Directive on the legal protection of computer programs, Art 5 (2) provides: The making of a back-up copy by a person having a right to use the computer program may not be prevented by contract in so far as it is necessary for that use.

97 Ulrich Loewenheim and Malte Stieper, 'Commentary on § 53 UrhG' in Gerhard Schricker and Ulrich Loewenheim (eds), *Urheberrecht Kommentar* (C.H. Beck 6th edition München 2020) para 1 ff; Malte Stieper, 'Urheberrecht in der Cloud' [2019] ZUM 1, 4ff; Lucie Guibault, *Copyright Limitations and Contracts. An Analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer Law International 2002) 228.

98 Kuschel/Rostam (n 8) para 13; in principle also Oprysk/Sein (n 4), 612ff.

99 Concerning the proposals under the DCD cf. Hugh Beale, 'Scope of application and general approach of the new rules for contracts in the digital environment' (2016), 27 <http://www.epgencms.europarl.europa.eu/cmsdata/upload/4a1651c4-0db0-4142-9580-89b47010ae9f/pe_536.493_print.pdf> accessed 23 November 2020; European Law Institute, 'Statement on the European Commission's Proposed Directive on the Supply of Digital Content to Consumers' COM (2015) 634 final, 24; Rott (n 48), 454; Loos et al. (n 48), 224.

100 Cf. Oprysk/Sein (n 4), 612 with reference to an empirical study on consumer expectations on eBooks by Sabrina V. Helm et al., 'Consumer interpretations of digital ownership in the book market' (2018) Institute of Applied Informatics at University of Leipzig, 181 <https://link.springer.com/article/10.1007/s12525-018-0293-6> accessed 21 November 2020.

101 Oprysk/Sein (n 4), 613; Before Rott (n 48), 448.

102 See e.g., Part B of Apple Media Services Terms, more in depth the analysis of Oprysk/Sein (n 4), 604ff.

103 Example at Para. 1(2)(b) of Amazon Music Terms of Use, more at Oprysk/Sein (n 4), 606ff.

104 Oprysk/Sein (n 4), 615.

105 Ulrich Loewenheim and Malte Stieper, 'Comment on § 56 UrhG' in Ulrich Loewenheim, Matthias Leistner and Ansgar Ohly (eds) *Urheberrecht Kommentar* (6th edn C.H.Beck

just one device is in turn not provided by copyright law. However, as Art 6 (4) of the InfoSoc Directive stipulates, Digital Right Management systems may override this limitation to the advantage of the rightholder. Hence, even though copyright law may provide for mandatory limitations of private copies, a DRM-environment may restrict making such copies and then also – as a minor restriction – bind them to one device.

51 Thus, once again contract law and objective consumer expectation are decisive to solving the issue: Here, we have to distinguish between digital content that is only readable/usable on one device which is depending upon digital environment provided by the trader – usually (amongst other arguments) at least also for reasons of IT-security – then the consumer cannot objectively expect that his content can be used on other devices.[106] On the other hand, a digital content which can be easily used in different digital environments, such as an MP3-music file or a PDF, should also be allowed to be used on different devices, given a non-simultaneous use.[107] Several empirical studies also suggest that consumers are expecting such a use.[108]

d) Interoperability

52 Closely related to the use on different devices is the issue of interoperability. Here the connection between EULA (copyright) and the contract with the trader is even more evident when we look at Art 7 (1 a) DCD, which mentions the interoperability of the digital content as one of the core elements for subjective requirements of conformity. Art 2 No 12 DCD stipulates the definition of interoperability:

> *"'interoperability' means the ability of the digital content or digital service to function with hardware or software different from those with which digital content or digital services of the same type are normally used;"*

53 If the boundaries for interoperability of the digital content are not made clear by the retailer, Art 6(2) of the Proposal of the DCD refers to industrial standards, expectations of consumers etc. This requirement has been substituted in the final DCD by introducing the objective conformity test in Art 8. However, the explicit notion of interoperability in the subjective requirement test gives us a clear hint that interoperability is not part of the objective conformity. Moreover, Art 8 (1 b) DCD refers only to the functionality and compatibility "normal for digital content or digital services of the same type". Hence, interoperability on devices which use a different digital environment are not encompassed by the objective conformity test and expectations of users/consumers. Thus, the mere reference to an objective expectation that the user should be able to use the digital content in different digital environments[109] falls too short.

54 Furthermore, copyright law only provides in some cases for remedies for the customer to establish interoperability. For instance, Art 7(1) of the Software Directive provides for a right to decompile and reengineer the software in order to establish interoperability of the software with other software – in order not to block secondary markets.[110] However, in contrast to the Software Directive neither the InfoSoc-Directive nor any other copyright related directive such as the Database Directive contain a similar provision. Therefore, the customers/users are not entitled to change anything related to the digital content. This is why the content cannot be used on other devices. Even though the Software Directive would be applicable to the code contained in the digital content (steering its operability on devices etc.) with regard to the CJEU decision in the Nintendo case[111] the InfoSoc-Directive would bar any effort to make the content interoperable. Hence, in contrast to the provisions of the Proposal on Digital Content the customer (consumer) may just claim in most cases withdrawal from the contract with the supplier/retailer, rather than getting a real relief.

München 2020) para 13ff; Thomas Dreier 'Comment on § 53 UrhG' in Thomas Dreier und Gernot Schulze (eds) *Urheberrechtsgesetz* (6th edn C.H.Beck München 2018) para 7ff.

106 Coming to the same results Oprysk/Sein (n 4), 614 by referring to "centralized" systems.

107 Oprysk/Sein (n 4), 614ff.

108 Cf. Perzanowski/Hoofnagle (n 82), 357ff.; Nicole Dufft, Andreas Stiehler, Danny Vogeley and others, 'Digital Music Usage and DRM – Results from an European Consumer Survey' [2005] Research Paper, 50 <http://www.indicare.org/survey> accessed 23 November 2020.

109 Kuschel/Rostam (n 8) para 13.

110 Gerald Spindler, 'Commentary on § 69e UrhG' in Gerhard Schricker and Ulrich Loewenheim (eds) *Urheberrecht Kommentar* (C.H.Beck. 6th edition München 2020) para 1; Malte Grützmacher, 'Commentary on § 69e UrhG' in Artur-Axel Wandtke and Winfried Bullinger (n 28) para 1.

111 Case C355/12 *Nintendo v PC Box* EU:C:2014:25, para 23.

e) Retraction of access to content supplied on a time-unlimited basis

55 Some EULAs restrict the continuous access of the user to digital content by allowing the provider to disrupt the service, even to remove content remotely.[112] However, as *Oprysk/Sein* have shown, most of these restrictions are aiming either at content which is provided as an online-service or is bound to a certain digital environment.[113] In the case of a time-unlimited access to digital content, *Oprysk/Sein* argue that from an objective conformity perspective the consumer could reasonably expect that they will be able to obtain access to the digital content continuously.[114]

56 However, there is a difference between obtaining permanent access to a digital content and the download of a digital content: In the latter case (the download of digital content) the trader has fulfilled his obligations by enabling the consumer to use the digital content. On the other hand, if the consumption or the use of digital content is bound to an account without being limited to a certain time period, so that to the customer the contract resembles more of a sale rather than a rental contract, it is fair to qualify the constant access as an objective consumer expectation. Any deviation would be treated under "usual" contract law as well as contradicting behavior. This is not to say that the consumer would have a right against the trader to remove the tie between the digital content and the account (or verification) as rightholders may have a legitimate interest to exercise control on the distribution of their digital content by using DRM-systems (to which account verification can belong to[115]).

57 However, if the digital content is tied to a certain digital environment and if this relationship has been part of the declaration of the trader, it is arguable that the consumer can expect that this digital environment will be upheld quasi eternally by the trader. Essential is once again the question whether the access to the digital content is being enabled "on the same type" or in the "same manner"; if it turns out that the industry is widely using this account-verification mechanism and the tying to digital environment, it can be difficult to simply qualify such contracts as "sales-alike". This argument is fostered by Art 8 (2 b) DCD which stipulates:

> *"The trader shall ensure that the consumer is informed of and supplied with updates, including security updates, that are necessary to keep the digital content or digital service in conformity, for the period of time:*
>
> *(...)*
>
> *(b) that the consumer may reasonably expect, given the type and purpose of the digital content or digital service and taking into account the circumstances and nature of the contract, where the contract provides for a single act of supply or a series of individual acts of supply."*

58 Hence, the DCD does not in principle require the trader to uphold quasi "forever" a digital environment, even in the case of a single act of supply – however, the DCD once again refers to the period of time "the consumer may reasonably expect".

59 In practice, we should expect traders to avoid the objective conformity test by seeking explicit consent of the consumer to deviating descriptions concerning their obligations.

3. Overblocking

60 Moreover, concerning digital services contracts, which allow sharing of user-generated content with others (be it on social networks, YouTube, Instagram or other platforms), are also at stake with reference to copyright law. Art 17 of the DSM-Directive provides for a liability of certain host providers (massive online content sharing according to Art 2 (6) DSM-D) in a way that these host providers have to prevent uploading of copyright-violating content from users of these platforms, Art 17 (4 b) DSM-D. Even though at least German courts have been reluctant to qualify these contracts more precisely,[116] it cannot be denied

112 See for example the removal of Microsoft Books, https://support.microsoft.com/en-us/help/4497396/books-in-microsoft-store-faq.

113 Oprysk/Sein (n 4), 608ff with reference to part 5.1. of Amazon Music Terms or part 3 of Kindle Store Terms of Use.

114 Oprysk/Sein (n 4), 617 referring to an empirical study of Perzanowski and Hoofnagle (n. 82) 337ff.

115 For more detailed information on account verification, see Daniela Schulz, 'Der Bedeutungswandel des Urheberrechts durch Digital Rights Management – Paradigmenwechsel im deutschen Urheberrecht?' [2006] GRUR 470, 471ff; concerning the functionality of DRM systems see Matthias-Christian Ott, '*Digital Rights Management*' (2010); Gerhard Fränkl and Philipp Karpf, *Digital Rights Management Systeme – Einführung, Technologien, Recht, Ökonomie und Marktanalyse* (PG Verlag 2004).

116 BGH [2018] NJW 3178, para 18ff; LG Heidelberg [2018] MMR 773, 774; for a contract sui generis: OLG Stuttgart [2020] BeckRS 2019, 5526 para 51; OLG München [2018] MMR 753, para 18; Peter Bräutigam and Bernhard von Sonnleithner, 'Vertragliche Aspekte der Social Media' in Gerrit Hornung and Ralf Müller-Terpitz (eds) *Rechtshandbuch Social Media*

that those digital services also fall under the scope of the DCD as it is sufficient that data of the user is being used in exchange of the service.[117] Hence, users may have a direct contractual claim against the host provider if they can invoke an objective expectation that their content should not be blocked. However, as host providers already have to respect certain limitations in favor of users' objective expectations according to Art 17 (7-9) DSM-D, such as citation, parody, or pastiche, it can be argued that those limitations are also part of objective conformity criteria – thus, making it easier to construe a claim for users which is not provided in the DSM-D.[118]

61 Even though such an approach would allow for contractual claims, we have to bear in mind that host providers can integrate in their standard terms and conditions restrictions for uploading, which they are already doing concerning fake news or humiliating messages.[119]

II. Re-Use of digital content after termination of the contract

62 Moreover, copyright license clauses often transfer a vast manner of copyrights on content which has been created by the user / consumer (user-generated content) to providers, such as social networks or game operators. Many licenses extend this transfer of rights to an indefinite time even after the termination of the contract, thus enabling the provider to use the digital content produced by a user for a longer time than the contract actually lasts.[120] In addition, these providers restrict the use of digital content by a user / consumer by means of copyright license clauses after the termination of the contract.

63 The DCD provides for rules on the termination of the contract and the fate of digital content. In particular, Art 16 DCD also encompasses user-generated content. Concerning personal data, Art 16 (2) DCD refers to the GDPR, which prohibits the further use of personal data once the justification for processing data has ended. This includes the withdrawing consent of the users (Art 7 (3) GDPR) or the termination of the contract, Art 6 (1 b) GDPR. Moreover, Art 16 (3) DCD stipulates that non-personal data has to be returned to the user/ consumer so that the trader cannot use these data after termination of the contract. However, Art 16 (3) DCD also provides for some important exceptions,

> *"except where such content*
>
> *(a) has no utility outside the context of the digital content or digital service supplied by the trader;*
>
> *(b) only relates to the consumer's activity when using the digital content or digital service supplied by the trader;*
>
> *(c) has been aggregated with other data by the trader and cannot be disaggregated or only with disproportionate efforts; or*
>
> *(d) has been generated jointly by the consumer and others, and other consumers are able to continue to make use of the content."*

64 These exceptions aim at user-generated content which is regularly (but not always) being used in the specific digital environment provided by the trader/ service provider or has been generated jointly with others (lit d). On the other hand, the further use of digital content by the trader is in general not allowed so that corresponding clauses in copyright licenses would be void according to Art 16 (2, 3) DCD.[121] Especially due to the exceptions in Art 16 (3) (a) and (b), there is a risk that the rights of consumers are unduly restricted, as these exceptions are very

(Springer Berlin 2015) ch 3.2.1 who call it a "social-media"-contract; for a mixed contract Gerald Spindler, 'Löschung und Sperrung von Inhalten aufgrund von Teilnahmebedingungen sozialer Netzwerke' [2019] CR 238, 239; in this direction also Daniel Holznagel, 'Put-back-Ansprüche gegen soziale Netzwerke: Quo Vadis?' [2019] CR 518, 519.

117 Cf. Kuschel/Rostam (n 8) para 24.

118 Cf. Kuschel/Rostam (n 8) para 26.

119 OLG Dresden [2018] MMR 756, 758 ff; coming to the same result LG Frankfurt [2019] MMR 770, 771; Gerald Spindler (n 115), 238ff; Daniel Holznagel, 'Overblocking durch User Generated Content (UGC) – Plattformen: Ansprüche der Nutzer auf Wiederherstellung oder Schadensersatz?' [2018] CR, 369, 371ff.

120 Cf. Kuschel/Rostam (n 8) para 30 referring for instance to the license-clause § 4 of Epic Games Store-EULA, <https://www.epicgames.com/store/de/eula> accessed 25 November 2020, see also Ehle/Kreß (n 45) 730; for more examples see the license-clauses in Facebooks terms of service clause 3.3.1 (last updated: 22 October 2020) <https://www.facebook.com/legal/terms/update> accessed 25 November 2020, YouTubes terms of service (last updated: 22 July 2020) <https://www.youtube.com/static?gl=DE&template=terms&hl=de> accessed 25 November 25 2020 and Steam's subscriber agreement clause 6. A. (last updated: 28 August 2020) <https://store.steampowered.com/subscriber_agreement/#6> accessed 25 November 2020.

121 Cf. Kuschel/Rostam (n 8) para 34.

extensive[122] - it will be the task of the national courts to interpret them in such a way that the obliged parties cannot always evade the obligations of the GDPR by invoking these exceptions. In this respect, it is appropriate to ask whether the consumer can reasonably claim that there is a utility for the data outside the specific digital content, the mere declaration of the trader that there is no further use should not be sufficient.[123] Irrespective of the question of how far the restriction on use according to Art 16 (3) DCD and its exceptions legally reach, it remains doubtful to what extent compliance will be verifiable in practice.[124]

III. Deviation of objective conformity test (Art 8 (5) DCD)

65 Art 8 (5) DCD requires the expressly and separately declared acceptance by the consumer of any deviation from the objective conformity. Obviously, Art 8 (5) DCD has been conceived of as a permission for the trader to supply digital content subject to restrictions on the basis of intellectual property. As *Staudenmayer* pointed out, "a trader, who is supplying digital content created by a third party and is therefore a mere (sub)license holder and subject to restrictions imposed by the developer of the content, should not be left in a dilemma whereby on one hand he has to conform to the restrictions imposed on him, while on the other hand supplying digital content with restrictions placing him in a position of not complying with objective conformity criteria".[125] It has also been argued that the information was actively brought to the consumer so that a mere hyperlink would not be sufficient.[126]

66 Hence, in a case where a consumer cannot reasonably expect any restrictions by EULAs, they have to be accepted in the manner described by Art 8 (5) DCD.[127] However, the final DCD has not picked up the original proposal of Art 6 (2) DCD which emphasized that terms and conditions of the contract have to be stated in a "clear and comprehensive manner". Regarding EULA licenses with sometimes more than 24 pages of terms and conditions, they seemed to be far away from such a transparency test. This becomes even more evident if we take the required "comprehensive" manner into account. However, since EULAs are not part of the contract between supplier/retailer and customer/buyer, their intransparency should not affect conformity of the digital content even if transparency would still be part of the test of Art 8 (5) DCD.[128] Apparently there is no chance to link them both together. Nevertheless, if we consider that reasonable expectations of a customer (consumer) refer also to his contractual obligations as a whole(what he can expect to be confronted with when buying and using digital content), we may argue that these expectations also concern EULA conditions – so that any intransparency of those terms and conditions also affects the conformity of the digital content regarding the contract between the supplier/retailer and the customer, respectively the express and separate consent by the consumer.

67 Moreover, just a mere reference to the EULA of the rightholder in the standard terms and conditions of the trader would not be sufficient under the test of Art 8 (5), which requires consent of the consumer separately and expressly. The parallels to the required consent in the GDPR according to Art 7 (3) GDPR are evident. Even if just ticking a box would meet the standard of Art 8 (5) DCD, it is arguable[129] if the "box" just consists of a link to EULA which can then be read – even though Recital 49 DCD refers explicitly to such an option as the precondition of specific information can be questioned.[130]

D. Conclusion

68 In sum, this short tour d'horizon revealed complex cross-relations between copyright law and contracts on the level of licenses on one hand and contract law on the other hand. The traditional dichotomy between transfer of rights and contractual obligations seems to be seriously disturbed.[131] The

122 Metzger (n 2) 583; differing: Ehle/Kreß (n 45) 730 who assume without any particular reason that the traders often cannot invoke the exception. However, especially the exception of Art 16 (a) DCD seems very appropriate for video streaming offers, for example, when users create their own favorites lists consisting only of platform-exclusive content, this may be mentioned as one of several examples.

123 So correctly Metzger/Efroni/Mischau/Metzger (n 50) para 54.

124 Critical in this respect Schulze (n 55) 719.

125 Staudenmayer (n 38) Art. 8 para 156.

126 Staudenmayer (n 38) Art. 8 para 164.

127 Kuschel/Rostam (n 8) para 14.

128 Concerning the application of the transparency test according to Art 5 Unfair contract terms directive see Staudenmayer (n 38) Art. 8 para 176.

129 Cf. Sein/Spindler (n 29) 374.

130 See also Staudenmayer (n 38) Art. 8 para 169 ff

131 Cf. Christiane Wendehorst, 'Sachverständigenrat für Verbraucherfragen beim Bundesministerium der Jus-

DCD does not affect this complex relationship, but refers to traditional chain models – which, however, are not prone to solve the problems in the triangle between rightholder, retailer, and customer. Even though the DCD now explicitly addresses the objective conformity test and thus allows one to overcome some copyright restrictions, all remedies remain between the contracting partners and do not encompass the rightholder. One potential solution to consider in depth refers to the French model of recourse to every part of the (retail) chain, including the rightholder. A lot of problems are yet to be discussed, such as how the customer can assert remedies against the rightholder on the basis of expectations based on the relationship with the retailer. Moreover, the objective conformity test raises – especially with regard to the relationship with new emerging business models and descriptions of digital content and services – a lot of unsolved questions. Due to a possible deviation from the objective conformity test in Art 8 (5) DCD, we should expect more efforts by traders to enshrine EULAs with rightholders in their contracts – if the requirements of Art 8 (5) DCD remain at the level of just ticking a box.

tiz und für Verbraucherschutz' (2016) <https://www.svr-verbraucherfragen.de/dokumente/verbraucher-recht-2-0-verbraucher-in-der-digitalen- welt/verbraucher-relevante-problemstellungen-zu-besitz-und-eigentums-verhaeltnissen-beim-internet- der-dinge/> accessed 25 November 2020.