LILIJA OPRYSK*

Digital Consumer Contract Law without Prejudice to Copyright: EU Digital Content Directive, Reasonable Consumer Expectations and Competition

The EU Digital Content Directive sets out to facilitate the cross-border distribution of digital content and ensure a high level of consumer protection by harmonising certain aspects concerning contracts for the supply of digital content. The Directive acknowledges the variety of licensing agreements involved in the distribution of digital content, such as between the holders of intellectual property rights, intermediaries and end-users. It is recognised that the consumer's use of digital content could be restricted under end-user licensing agreements pursuant to intellectual property rights, at the same time, the Directive is without prejudice to other EU law, including copyright. Rather, under Art. 10, the consumer is entitled to remedies from the trader of digital content for lack of conformity where restrictions resulting from a violation of intellectual property rights prevent or limit the use of the content. As the traders of digital content frequently are not the owners of intellectual property rights but rely themselves on a licence, the question arises as to the potential implications of Art. 10 for digital content markets. This paper discusses two such potential implications. The first is whether the efforts to safeguard reasonable consumer expectations could be undermined by the Directive leaving the arrangements between traders and intellectual property right holders out of scope. The second is whether Art. 10 could reinforce the network effects and dominant position of the established players on the market.

I. Introduction

Digital content is an indispensable part of daily life. Digital consumption of literary and audio-visual material has long surpassed traditional forms of distribution that rely on tangible carriers such as paper or CDs. Whereas the digital environment has enabled direct interactions between creators of the content and consumers, it has also advanced the role of online intermediaries. Creators rely on intermediaries such as online platforms for the use of a distribution system and access to a user base. Consumers, on the other hand, rely on intermediaries for discovering content as well as for technical means to consume the content from an abundance of personal devices.

Intellectual property rights (IPRs), which are vested in works included in digital content (in particular copyright), play a significant role in digital content markets. Distribution of copyright-protected works, for instance, is subject to exclusive rights, on the basis of which the copyright holder decides on the circumstances of distribution, territorial restrictions, permitted use by end-users, etc. Hence, intermediaries wishing to distribute digital content to third parties such as consumers need to obtain permission from copyright holders. Arrangements typically include end-user licensing agreements (EULAs) defining the parameters of use by the individual end-users. This is particular to digital content, as in the realm of tangible copies, once a protected work (or a copy thereof) has been put on the market, it remains largely out of the control of the right holder, pursuant to the exhaustion principle. Access to digital copies and their use do not fall under the principle and are subject instead to lengthy terms and conditions as well as technical and organisational characteristics of the system.

The fact that copyright holders are granted the exclusive rights to control the dissemination of their works does not mean that they are in fact in a position to freely decide over the circumstances of this distribution. Apart from cases where copyright holders operate their own distribution platforms, they normally rely on some kind of intermediary offering solutions, be it for content distribution, promotion or access to a user base. The theoretically strong negotiating position based on the exclusive IPRs might be weakened by the characteristics of the market, such as the network effects, where both consumers and creators might be driven to an intermediary with a larger user base and more content variety.

The recently adopted EU Digital Content Directive (DCD) acknowledges the special position of intermediaries in the distribution of digital content to consumers. Article 10 DCD grants consumers a claim for remedies against the trader of digital content when the use of the acquired content in accordance with their reasonable expectations is hindered by third-party rights, such as copyright. The trader ought to be in a position to adjust the conditions of supply and (re)negotiate an appropriate

---

1 Extensively on the exhaustion principle, see Péter Mezei, Copyright Exhaustion: Law and Policy in the United States and the European Union (Cambridge University Press 2018) 6-14.

2 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L136.
licence with the third-party right holder. However, given that copyright holders can enforce rather wide control over the use of their works and given the absence of a standard for reasonable consumer expectations, the question that arises is to what extent Art. 10 DCD puts the traders of digital content in a similar position.

The aim of this paper is to discuss two possible consequences of Art. 10 DCD given that the Directive is without prejudice to IPRs and does not address the arrangements between the traders of digital content and the IPR holders. The first is whether the efforts to safeguard reasonable consumer expectations could be undermined. The second is whether there are implications for competition in digital content markets. The paper is structured as follows. Part II provides a background by looking at the implications of exclusive IPRs for competition and the limited means of addressing the concerns under either competition or copyright law. Part III discusses the ability of Art. 10 DCD to further consumer expectations against the background of the Directive being without prejudice to IPRs. Part IV explores the potential competition implications of Art. 10 DCD in light of the particularities of digital content markets. Part V concludes by summarising the potential impact of Art. 10 DCD on digital content markets.

II. Intellectual property and competition: limited efficacy of fragmented approaches

IPRs provide limited exclusivity as a means to a particular end. Under the utilitarian approach to copyright, for instance, exclusivity facilitates a market for creative works which is otherwise undermined by the public good nature of information, it being non-rival and non-excludable. A market for a work is enabled by eliminating free-riding on the investment of others. Although the exclusivity impedes competition for the duration of protection, such intrusion is justified, inter alia, by incentivising the creation of works. Furthermore, the exclusivity is not absolute, i.e. the rights come with their scope, duration and exceptions. Given that the IPRs are erga omnes, entitlement to exclusive control that is unlimited through the entire value chain could, to a larger extent, exclude competition.

The conflict between IPRs and competition is not as self-evident in the long run. According to Ullrich, there is no conflict between the two, because both constitute market regulation, and the property rights represent means of competition rather than an exemption to it. In the same vein, Squiteri distinguishes between two ways of looking at the relationship between IPRs and competition. The first is to consider IPRs as a short-term encroachment on competition which in the long run encourages it. The second is to acknowledge the conflict between the ways in which the two fields aim to increase welfare; the dilemma is hence to find a balance between less innovation which is widely exploited and limited exploitation of greater innovation.

IPRs are, of course, not the sole way to promote innovation and provide incentives. As the aim is to foster creativity and innovation, Schovsbo and Kur argue that exclusivity should be a dominant regulatory approach only when and to the extent that other schemes cannot achieve the same or better results. Accordingly, the question is not only how to address the anticompetitive effects of IPRs but also how to factor in competition concerns already at the stage of defining the scope of protection with the means best suited to the particular task. To that end, norms aimed at addressing the undesirable effects of exclusivity are found on multiple levels of regulation. First, the exercise of IPRs is subject to competition law, in particular Arts. 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). Second, some balancing norms have already been introduced within the IPR system.

As will be discussed below, the fragmented nature of the approaches often stands in the way of comprehensive regulation. This is to a large extent due to a lack of comprehension of the circumstances of the markets and a narrow view of the objectives of regulation. The balancing mechanisms might also offer one-sided benefits. The trade-off between the incentive to innovate and public dissemination of innovation at the heart of the IPRs-competition interface in fact further benefits the right holders through potential market enlargement by network effects. The availability of different means of recourse can also be an issue, such as is the case with the copyright right holders benefiting from the availability of claims both on the basis of IPRs and contract.

1. Exercise of IPRs and competition law

The exercise of IPRs has occasionally been subject to an assessment of its interference with Arts. 101 and 102 TFEU, which aim to safeguard competition in the internal market. Merely making the good excludable by means of exclusive rights is not as such the concern of competition law, which accepts the basic proposition of IPRs that exclusivity provides the necessary incentive to companies to invest in knowledge and entails a net social benefit, as the value of an innovation market outweighs the losses suffered on a product market. It is the excessive control or abuse of a position enabled by granted exclusivity, 

---

3 See extensively, Niva Elkin-Koren and Eli Salzberger, The Law and Economics of Intellectual Property in the Digital Age: The Limits of Analyses (Routledge 2012) 72-132. Also, Ole-Andreas Rognstad, Property Aspects of Intellectual Property (Cambridge University Press 2018) 15-20.
4 Rolf H Weber, ‘Data Interfaces: Tensions between Copyright and Competition Law – A New Swiss Court Practice for an Old Problem’ [2020] GRUR International 119, 120.
5 Hanns Ullrich, ‘Intellectual Property: Exclusive Rights for a Purpose – The Case of Technology Protection by Parents and Copyright’ in Katarzyna Kłafkowska-Łękowska and Maciej Matalczyński (eds), Problemy Polskiego i Europejskiego Prawa Prywatnego, Księga pamięciowa Profesora Mariana Kepinskiego (Wotlers Kluwer Polska 2012) 8.
6 Mauro Squiteri, ‘Refusals to License Under European Union Competition Law After Microsoft’ (2012) 11 Journal of International Business and Law 65, 77.
7 Annette Kur and Jens Schovsbo, ‘Expropriation or Fair Game for All? The Gradual Dismantling of the IP Exclusivity Paradigm’ (2009) Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper No 09-14 2.
8 Ullrich (n 5) 7.
9 Jens Schovsbo and Thomas Riis, ‘Concurrent Liability in Contract and Intellectual Property Law: Licensing Agreements in Light of Case C-666/18 IT Development SAS’ [2020] GRUR International I, 2. The authors advocate making the contract the preferable recourse, with the IPR track being available only if specifically mandated by IPR legislation, see ibid 8-9.
10 Jens Schovsbo, ‘IPR’s Constitutionalisation and Expansion: Can the “common Goals” Description Cope?’ (2012) University of Copenhagen Faculty of Law Research Paper No 20017-40, 39.
resulting in barriers to entry or great disproportionalities in bargaining power, which raises concerns. In particular, competition regulation intervenes when the right holder exercises the legally conveyed exclusive position in an abusive manner.\textsuperscript{11} It is not uncommon, for instance, that the right holders attempt to multiply the reward effect of exclusivity (instead of innovation) by claiming protection for various ‘secondary’ markets, where there is no innovation on its own or none at all.\textsuperscript{12} In the context of IPRs, market power reinforced by exclusive rights may lead to the abuse of foreclosing exclusive contracts or refusing to deal or license, elevating the risk that network effects become a barrier to entry for competitors.\textsuperscript{13}

When it comes to EU competition law, the exercise of IPRs has been subject to Arts. 101 and 102 TFEU. Article 101 TFEU comes into the picture where an agreement is made between the undertakings (or a practice established) which by object or effect prevents, distorts or restricts competition within the internal market, unless it contributes to improving the production of goods or promoting technical or economic progress and allows consumers a fair share of the resulting benefits. Hence, in principle, it prohibits distorting competition unless considerable consumer benefits are evident. Article 102 TFEU, in turn, prohibits any abuse of a dominant position by one or few undertakings so far as it affects trade between the Member States, in particular by imposing directly or indirectly unfair purchase or selling prices or trading conditions; limiting production, markets or technical development to the prejudice of the consumer; placing particular trading partners at a competitive disadvantage; or making the acceptance of a contract subject to irrelevant supplementary obligations.\textsuperscript{16}

One of the central elements of Art. 102 is the dominant position occupied, taking into account the market power, market share and other relevant factors such as entry barriers.\textsuperscript{14} Whereas IPRs are often described as granting a monopoly, this does not necessarily mean monopoly in the sense of competition law. It may nevertheless be the case when the relevant market coincides with the product developed under IPR protection.\textsuperscript{15} One of the chief examples of the abuse of a dominant position in the context of IPRs has been the refusal to license. As such, refusal to license particular rights in respect of a protected subject matter cannot be considered an abuse of dominant position in itself. However, when access to a subject matter is essential, in particular in connection with a potential secondary market, refusal can amount to an abuse.\textsuperscript{17}

The measures against abuse of dominant position were historically justified by protecting the competitors; later, however, the focus shifted to the consequences of abuse for consumers.\textsuperscript{18} In particular, in the 1995 Magill case, the CJEU found an abuse of dominant position where the refusal to license copyright-protected material prevented the appearance of a new product which was not offered by the right holder and for which there was potential consumer demand.\textsuperscript{19} Furthermore, by refusing to license access to basic information necessary to produce a product, the right holder had also reserved the secondary market for itself.\textsuperscript{20} In a later case, IMS Heath, the CJEU reiterated the three conditions for finding an abuse outlined in Magill: an action (1) preventing the emergence of a new product with potential consumer demand, which is (2) unjustified and (3) such as to exclude any competition on a secondary market.\textsuperscript{21} The suitability of the test has been contested. Squitieri, for instance, holds that if the legal system assigns IPRs to provide an incentive to innovate, it is contradictory to reason that the protection shall be enforced at the expense of the general interest in the development of different and better products.\textsuperscript{22}

In the later Microsoft case, concerning the contested European Commission (EC) conclusion that the development of a new product had been blocked by the lack of interoperability and disclosure of information, the General Court further clarified that the impediment to innovation is an important consideration. In examining the impact of the refusal to license and whether a new product could have emerged, one ought to focus on the competitor’s incentive to innovate rather than the right holder’s, as the latter is achieved by the grant of exclusive rights.\textsuperscript{23} Furthermore, it was concluded that Art. 102 covers not only practices directly prejudicing consumers but also those impairing an effective competitive structure.\textsuperscript{24}

Scepticism towards competition law’s ability to address the emerging issues in digital markets has been voiced in recent years.\textsuperscript{25} The self-correction of digital markets is...
derivative innovation has by that point already suffered. In fact, which according to Ullrich is too late to regulate, as stated by Bjoërn Lundqvist and Michal S Gal (eds), Podszun and Kreifels (n 13) 35-36; Bundeskartellamt, 'Digitale Innovation should be reduced in favour of an evolutionary view of markets, ibid 16-20. It has also been argued that the impact of the market definition and behaviour should play a crucial role. In particular, in respect of discriminatory exclusionary practices, see ibid 28.

26 Substantial harm to economic welfare follows from the impeded competition, see further Peter Alexiadis and Alexandre de Streel, ‘Designing an EU Intervention Standard for Digital Platforms’ (2020) Robert Schuman Centre for Advanced Studies Research Paper No 2020/14.4.

27 Bjorn Lundqvist, ‘Regulating Competition in the Digital Economy’ in Bjorn Lundqvist and Michal S Gal (eds), Competition Law for the Digital Economy (Edward Elgar 2020) 2-3.

28 In particular, in respect of discriminatory exclusionary practices, see ibid 16-20. It has also been argued that the impact of the market definition should be reduced in favour of an evolutionary view of markets, which function goes beyond the mere establishment of market power. See Podszun and Kreifels (n 13) 35-36; Bundeskartellamt, ‘Digitale Ökonomie – Internetplattformen zwischen Wettbewerbstreit, Privatsphäre Und Verbraucherschutz’ (Hintergrundpapier Bundeskartellamt 2015) 20-22. Also, see Lundqvist on dominance and market power in the digital economy, Lundqvist (n 27) 9-15.

29 Ullrich (n 5) 9.

30 ibid.

31 ibid 8-9.

32 Schovsbo (n 10) 39.

33 ibid 41. The recent ‘constitutionalisation’ of IPRs bringing a human rights perspective to IPRs is a parallel development; the analysis of potential impediments to competition would also benefit from such non-economic insights, see ibid 43-47, 50.

34 Jens Schovsbo and Olga Kokouliana, ‘Cutting into Diamonds: Competition Law, IPR, Trade Secrets and the Case of Big Data’, Liber Discipulorum for Hanns Ullrich (Springer 2020) 13.

Another concern is the failure to appropriately account for market power and consumer preferences. There have been proposals to focus less on dominant market players because dominance is difficult to prove and because it would capture only a few actors. Instead, significant market power deserves attention wherever a market player has significant power over strategic bottleneck and the capacity to control actors’ market access. The notion of bargaining power known from the context of consumer and trader relations could also be extended to a more general concept of imbalance in the market. The circumstances of digital markets also necessitate a shift from emphasising consumers’ ‘exit’ option (i.e. ability to switch to a different provider) to consumers’ ability to exercise ‘voice’ by influencing product quality.

However, we might soon be entering a new era of digital market regulation, following the publication of the Digital Services Act package by the European Commission in December 2020. The Digital Services Act (DSA) proposal covers the responsibilities and obligations of providers of intermediary services, inter alia by revising the e-Commerce Directive. The Digital Markets Act (DMA) concerns so-called gatekeepers, which are providers of core platform services, including intermediation, if they have a significant impact on the internal market, serve as an important gateway for business users to reach end-users and (will) enjoy an entrenched and durable position on the market. The DMA proposal contains obligations for gatekeepers towards both business users and end-users. Although the DMA proposal does not directly concern IPRs, the possible adoption would nearly certainly have an impact on the market of digital content.

2. Instruments within copyright

Some anticompetitive effects of exclusive rights are addressed already within the copyright system. However, once the rules are laid down under statutory law, they bear the danger of being too static and inflexible to account for the changeable circumstances of the markets. Although inquiries under Arts. 101 and 102 TFEU take
place on a case-by-case basis and assume appreciation of the circumstances at stake, intervention comes rather late to effectively mitigate the harm and with limited consequences for market players other than those involved in the proceedings.

In the past years, the topic of exclusivity under copyright has gained momentum. Whereas exclusive rights remain a predominant way of incentivising intellectual creations, there are also other means, such as remuneration rights. As noted by Kur and Schovsbo, although the exclusive rights might yield a better position in theory, in practice the rights are regularly transferred to others who are able to exploit the market; statutory remuneration rights might hence be better suited for individual creators.43 Remuneration rights, for example, are granted for particular ‘secondary uses’, such as mechanical reproduction and broadcasting.44 Their use, however, requires systematisation, as remuneration rights can take different forms, which has an impact on the legal implications and their exercise.45

Another way to deal with the competitive implications of exclusivity is to provide for specific exceptions or limitations to exclusive control, such as the decompilation of an independently created computer program from the authorisation of the right holder, subject to three conditions.46 First, those acts must be performed by the licensee or otherwise authorised person; second, the necessary information must not have previously been readily available; and third, those acts are confined to what is necessary to achieve interoperability. Exceptions and limitations such as decompilation are there to support innovation in a dynamic perspective, whereas exclusion from protection supports innovation in a static perspective.48

The effect is nevertheless limited by the fact that the provision does not provide a subjective right to access but only exempts certain acts from the scope of copyright protection.49 There has been a general tendency to read the exceptions and limitations to exclusive rights narrowly, in particular under the CJEU jurisprudence.50 Also, technological protection measures coupled with contractual overrideability of exceptions and limitations offer a possibility for an expansive interpretation of the scope of protection.51 Nonetheless, as argued by Ullrich, the rationales of exceptions and limitations allow them to be read broadly rather than narrowly, in accordance with the overall purpose of protection, which also helps to control the reach of protection where the exercise of rights serves no innovation purpose or frustrates its achievement.52

Another mechanism is to subject the exercise of the exclusive rights to statutory (compulsory) licences.53 They present an instrument to remedy undesirable competition-related market structures and can take the form of collective management of the exclusive rights or limitation of the exclusive right coupled with a compensation scheme.54 Although compulsory licences are often viewed in terms of competition and access to the market, they also might remedy the adverse effects of exclusivity on consumer welfare.55 Nevertheless, the use of compulsory licences must be subject to a balancing exercise between the exclusivity necessary to incentivise innovation and the interest in its dissemination, as it might have a chilling effect on innovation.56

The need to adapt copyright as well as take any external measures to address its anticompetitive effects has been emphasised by various commentators. For instance, Synodinou stresses the difficulty of dealing with issues linked to cross-border access to protected content solely by means of competition law mechanisms without

43 Kur and Schovsbo (n 7) 15.
44 Ibid 10-11.
45 For instance, they can be provided in the form of an ‘extra’ right on top of already granted rights or as an exception to an exclusive right; although the scope of protection would not differ based on the type of remuneration right, in practice there might be differences, as an exception to an exclusive right would normally have to conform to the three-step test. See Thomas Riss, ‘Remuneration Rights in EU Copyright Law’ (2020) 51 IIC 446, 448-449. Also, the CJEU jurisprudence shows inconsistencies in calculating remuneration pursuant to the remuneration provision does not provide a subjective right to access but only exempts certain acts from the scope of copyright protection.
49 There has been a general tendency to read the exceptions and limitations to exclusive rights narrowly, in particular under the CJEU jurisprudence. Also, technological protection measures coupled with contractual overrideability of exceptions and limitations offer a possibility for an expansive interpretation of the scope of protection. Nonetheless, as argued by Ullrich, the rationales of exceptions and limitations allow them to be read broadly rather than narrowly, in accordance with the overall purpose of protection, which also helps to control the reach of protection where the exercise of rights serves no innovation purpose or frustrates its achievement.
52 Another mechanism is to subject the exercise of the exclusive rights to statutory (compulsory) licences. They present an instrument to remedy undesirable competition-related market structures and can take the form of collective management of the exclusive rights or limitation of the exclusive right coupled with a compensation scheme. Although compulsory licences are often viewed in terms of competition and access to the market, they also might remedy the adverse effects of exclusivity on consumer welfare. Nevertheless, the use of compulsory licences must be subject to a balancing exercise between the exclusivity necessary to incentivise innovation and the interest in its dissemination, as it might have a chilling effect on innovation.

The need to adapt copyright as well as take any external measures to address its anticompetitive effects has been emphasised by various commentators. For instance, Synodinou stresses the difficulty of dealing with issues linked to cross-border access to protected content solely by means of competition law mechanisms without

Focus on Data Access and Portability’ in Josef Drexl (ed), Datenzugang, Verbraucherinteressen und Gemeinwohl (Tagungsband des Verbraucherrechtstage 2019) (Nomos 2020) 5.
50 Morten Rosenmeier, Kacper Szkałej and Sanna Wolk, EU Copyright Law: Subsistence, Exploitation and Protection of Rights (Wolters Kluwer 2019) 17-24. Furthermore, fundamental rights (in particular, the right of property) have been used to elevate IPRs while disregarding the interests of consumers in the disposal of digital goods. See extensively Rössin A Costello, ‘Conflicts Between Intellectual and Consumer Property Rights in the Digital Market’ (2020) 11 EJLT 1. Also, Christophe Geiger, ‘Intellectual Property Shall Be Protected! – Article 17(2) of the Charter of Fundamental Rights of the European Union: A Mysterious Provision with an Unclear Scope’ [2009] European Intellectual Property Review 113.
51 Karapapa (n 13) 347.
52 Ullrich (n 5) 31.
53 On the nature and subtle differences between the use of the terms statutory and compulsory licence, see João Pedro Quintais, Copyright in the Age of Online Access: Alternative Compensation Systems in EU Law, vol 40 (Wolters Kluwer 2017) 26-27.
54 Rolf H Weber, ‘Improvement of Data Economy through Compulsory Licences?’ in Sebastian Lohse, Reiner Schulze and Dirk Staudenmayer (eds), Trading Data in the Digital Economy: Legal Concepts and Tools (Hart-Nomos 2017) 137-139. Some possibilities for compulsory licensing have been embedded into the Berne Convention, such as, for instance, in relation to cable retransmissions, see Wee Loon Ng-Loy, ‘Compulsory Licences as an Enabler of New Business Models’ in Kung-Chung Liu and Reto M Hilty (eds), Remuneration of Copyright Owners: Regulatory Challenges of New Business Models, vol 27 (Springer 2017) 296.
55 See Synodinou on compulsory licences as remedying adverse effects of copyright interoperability welfare, discussing possibilities for overcoming geo-blocking in the EU, Tatiana-Eleni Synodinou, ‘Geoblocking in EU Copyright Law: Challenges and Perspectives’ [2020] GRUR International 139, 147-150.
56 Axel Erazchi and Maratertesa Maggiolino, ‘European Competition Law: Compulsory Licensing, and Innovation’ (2012) 8 Journal of Competition Law & Economics 595, 610-614. It could also be argued that, if statutory law lays down a strict rule on compulsory licensing, the right holders are able to take it into account and adapt their models.
adapting copyright law accordingly. 57 Schovsbo suggests that instead of viewing competition law as an emergency brake, competition should be an ever-present factor to take into account when drafting IPR legislation. 58 Similarly, it has been concluded elsewhere that the developments under the CJEU jurisprudence on the EU copyright acquis indicate that competition, even if not explicitly recognised, is a relevant factor for examining the extent of the reach of the exclusive rights. Although such development is welcomed, it also calls for a clarification of the degree to which the right holder is to be protected from competition by means of exclusive rights. 59

3. Exhaustion principle and its denial in the digital realm

The exhaustion principle deserves a separate mention as one of the most powerful tools of creating the EU single market. The principle is formally harmonised under the respective IPR legislation; under the EU copyright acquis, its roots lie in the CJEU jurisprudence on the free movement of goods, which is safeguarded under the TFEU, and the conflicting exercise of IPRs granted under national laws. 60 In basic terms, the principle exempts secondary distribution of copies of a protected work from the authorisation of the right holder, i.e. first sale of a copy ‘exhausts’ the right of distribution, enabling free resale and disposal, whether or not involving a third-party intermediary such as a reseller. In the context of EU law, the principle is of a two-fold nature. First, it (partially) eliminates the obstacles to cross-border trade; second, it draws a general boundary of copyright protection, recognising the potentially excessive control of the right holder in cases where secondary distribution is subject to authorisation. 61

The principle is straightforward only at first sight; in practice, it would (almost) certainly exempt only secondary distribution of unaltered physical copies and, generally, would not sanction any other modes of exploitation, such as lending or public performance. 62 Even though the exact scope of exempted acts is far from clear, the principle has important implications for competition in markets for physical goods. The exhaustion of the right of distribution facilitates a secondary market of distributed copies, hence exempting the secondary market from the right holder’s control. The secondary market facilitated through exhaustion is seen as mitigating some deadweight losses from granting exclusive rights (which enable pricing above the competitive level) by putting competitive pressure on prices exercised by the right holders. This in turn provides access to intellectual goods to consumers who otherwise would not (be able to) obtain access. 63

Second, as a by-product of a secondary market, exhaustion is considered to trigger more innovation, which is explained by the need to stay competitive in the market of used copies. 64 Right holders are pushed to innovate by offering extra features and adjusting their business models. 65 The effect of exhaustion on dynamic efficiency in the market is ambiguous; its contribution through enabling access to and use of IPRs and by preserving culture and knowledge in the long term is nevertheless recognised. 66 Third, besides the diversified supply on the market and potential innovative products, the exhaustion principle also helps to prevent consumer lock-in by partially mitigating network effects and enabling switching between the providers. 67 This aspect is particularly pressing in digital markets, characterised by strong network effects, which are reinforced by the restrictions laid down under the EULAs as well as the technical protection measures (TPMs) restricting the permissible use of the content, often in conflict with copyright exceptions and limitations. 68

Whether the exhaustion principle could (to a certain degree) mitigate some of the concerns surrounding digital content is not settled; its application to digital copies is not supported under current EU law. Besides the landmark UsedSoft judgment, where the extension of the exhaustion principle to downloaded copies of computer programs accompanied by a time-unlimited licence under the Computer Programs Directive took place, 69 other types of digital content remain governed by the Copyright Directive, which has been interpreted as prohibiting the application of the principle to digital copies. 70 While the recent Tom Kabinet decision’s denial of the application of the exhaustion principles under the Copyright Directive to e-books resold via the Tom Kabinet platform ought not to be interpreted as conclusively settling the question of the extent of exclusive control, it made it rather difficult to rely on the alternative interpretation. 71

57 Synodinou (n 55) 137.
58 Schovsbo (n 10) 41-42.
59 Lilia Oprysk, Reconciling the Material and Immaterial Dissemination Rights in the Light of the Developments under the EU Copyright Acquis (Tartu University Press 2020) 317-319.
60 Guido Westkamp, ‘One or Several Super-Rights? The (Subtle) Impact of the Digital Single Market on a Future EU Copyright Architecture’ in Liu and Hilfy (n 54) 43.
61 Antoni Rubi Puig, ‘Copyright Exhaustion Rationales and Used Software: A Law and Economics Approach to Oracle v. UsedSoft’ (2013) 4 JIPITEC 139, 160-162.
62 Oprysk (n 59) 177-179.
63 Ariel Katz, ‘The Economic Rationale for Exhaustion: Distribution and Post-Sale Restraints’ in Irene Calboli and Edward Lee (eds), Research Handbook on Intellectual Property Exhaustion and Parallel Imports (Edward Elgar 2016) 25.
64 Wolfgang Kerber, ‘Exhaustion of Digital Goods: An Economic Perspective’ (2016) MAGKS, Joint Discussion Paper Series in Economics No 23-2016 7. Also, Ole-Andreas Rognstad, ‘Legally Flawed but Politically Sound? Digital Exhaustion of Copyright in Europe after UsedSoft’ (2014) 4 Oslo Law Review I, 17.
65 Caterina Sganga, ‘A Plea for Digital Exhaustion in EU Copyright Law’ (2018) 9 JIPITEC 211, 232.
66 See closer Katz (n 63) 26.
67 Sganga (n 65) 232. The latter also has positive implications for the protection of privacy and personal data, see Kerber (n 64) 18-20. Also, Rubi Puig (n 61) 161.
68 Beata Maihaniemi, Competition Law and Big Data: Imposing Access to Information in Digital Markets (Edward Elgar 2020) 60-61. On the position of the consumer in digital distribution of content, see Lucie Guibault, ‘Individual Licensing Models and Consumer Protection’ in Liu and Hilfy (n 54) 208-211.
69 On UsedSoft being problematic in respect of policy-making by the courts but moving copyright in the right direction, see Thomas Riis, Jens Schovsbo and Henrik Rüden, ‘Vidersalg af digitale eksemplarer – anden UsedSoft-dommen rutsuløshed?’ (2013) 82 NIR 457, 478.
70 Case C-263/18 Nederlandse Uitgeversverbond, Groep Algemene Uitgevers v Tom Kabinet Internet NV ECJ:2019:1111.
71 On Tom Kabinet not setting the issue for good, see Lilia Oprysk, ‘Secondary Communication under the EU Copyright Acquis after Tom Kabinet: Between Exhaustion and Securing Work’s Exploitation’ (2020) 11 JIPITEC 200, 210-213. It has also been suggested by Sganga that the conservative reading of art 4(2) Copyright Directive could be challenged on the basis of disproportionate restriction of the right to property under art 17 Charter of Fundamental Rights (CFR), the right to respect of one’s private
What has worked well in the realm of tangible copies might not produce a comparable solution in digital markets. In particular, making the exhaustion principle ‘digital’ merely by extending it to the digital copies might not achieve the desired outcome. To address the various aspects of online content distribution, a sophisticated combination of copyright, consumer law and competition regulation tools might be necessary. This does not mean, though, that the exhaustion principle should be abandoned as such – it can be used together with competition law to guarantee a competitive structure for the European Digital Single Market (DSM). For the time being, however, it is appropriate to explore the implications of the DCD against the background of the exhaustion principle’s non-applicability to digital content.

III. Digital Content Directive: safeguarding reasonable consumer expectations without prejudice to copyright

Having looked at the different approaches to tackling the anticompetitive effects of exclusive rights and their limited efficacy, we will now turn to examining the DCD as a sector-specific instrument of consumer contract law with direct implications for the market of digital content, but without prejudice to copyright law. First, the objectives of the DCD are explored, followed by the rationales behind the Directive being without prejudice to copyright. Next, the effectiveness of Art. 10 DCD in safeguarding reasonable consumer expectations is discussed.

1. Objectives of the DCD and reluctance to touch upon copyright

As the original proposal for the Directive put it, its general objective is to contribute to faster growth of the DSM, to the benefit of both consumers and businesses. Instead of an optional regime with a comprehensive set of rules, the proposal envisaged a targeted and focused set of fully harmonised rules to eliminate the contract law barriers hindering cross-border trade. The main rationale of the DCD is the facilitation of the DSM and cross-border trade, which is undermined by the way differences of consumer protection frameworks between the Member States upset legal certainty.

The original proposal contained a recital on the importance of competition for a well-functioning DSM, which did not make it into the final text of the DCD. Recital 46 of the proposal specified that to stimulate competition, consumers should be able to respond to competitive offers and to switch between suppliers. The understanding of competition as switching between suppliers might, however, have been rather narrow, as the recital further emphasised the way consumers are hindered by legal, technical and practical obstacles to retrieving uploaded, produced or generated data. The focus thus seems to have been on switching between the providers of services which enable creating one’s own digital content rather than on switching between the suppliers of digital content protected by third-party copyright.

Recital 2 of the final text provides that the Directive ‘aims to strike the right balance between achieving a high level of consumer protection and promoting the competitiveness of enterprises while ensuring respect for the principle of subsidiarity’. Better access for consumers to digital content and services as well as greater ease for businesses to supply such content and services should contribute to boosting the digital economy and stimulating overall growth, furthering the DSM Strategy. Article 1 on the subject matter and purpose of the DCD further emphasises the interplay of the internal market and consumer protection rationales, as the Directive is ‘to contribute to the proper functioning of the internal market while providing for a high level of consumer protection’.

Unlike the original proposal, the final text of recitals also stresses the benefits for small and medium-sized enterprises (SMEs). The harmonisation of certain aspects of the supply of digital content was intended to increase legal certainty and reduce transaction costs, in particular for SMEs. Although SMEs were not mentioned in the recitals of the original proposal, the impact assessment of proposed rules emphasised expected benefits, in particular a harmonised set of rules throughout the EU decreasing the compliance costs that confined SMEs to their home market. The EC noted that: ‘SMEs face a problem in finding customers. This would be easier to cope with in the online context since the internet enables online sales at reduced costs compared to offline trade.’

It should be noted at the outset that varying consumer laws are not the only difficulty an SME is likely to face in digital content markets. Considering that the supply of digital content is dependent on licensing arrangements with the IPR holders (unless the trader produces the content itself), it is obvious that the competition aspect of the assessment is not complete. Whereas, on the one hand,
traders indeed benefit (in theory) from a single set of rules when supplying to consumers, their competitiveness depends to a large extent on their reliability and their ability to supply digital content in a form appealing to consumers. Hence, competitiveness also depends on the ability to secure the necessary licences from the copyright holders. It is thus not to be excluded that certain rules are to the detriment of competition, particularly in respect of SMEs, with consequences for consumers.

Already in the Directive proposal, the EC clearly marked the intent to leave out questions of the interrelation of consumer protection with the field of IPRs. Rather boldly, recital 21 of the proposal stated that ‘[t]his Directive should not deal with copyright and other intellectual property related aspects of the supply of digital content. Therefore it should be without prejudice to any rights and obligations according to copyright law and other intellectual property rights.’

To prevent any conflicts between the consumer and copyright holders’ rights to digital content, Art. 8 of the proposal provided that at the time of supply the digital content shall be free from any third-party rights, including IPRs, so that the digital content can be used in accordance with the contract.

This means that the supplier would have to ensure that the content is free from any third-party rights such as copyright claims.

The proposal for Art. 8 has rightly encountered criticism. As noted by Spindler, the provision is somehow misleading, as a consumer actually needs third-party rights to be able to use the digital content. The original provision was also criticised for the ambiguity of what belongs to ‘use in accordance with the contract’. European Law Institute (ELI) suggested rules for determining the range of lawful types of use which consumers may expect, which besides uses guaranteed under copyright law (e.g. the right to use lawfully acquired copy, the right to make private copies, the right to make a safety copy of software) should also include uses beyond those explicitly recognised under copyright law, provided that they could be reasonably expected.

In the same vein, other commentators suggested that the Directive could have addressed consumer expectations more concretely, such as through providing the right to repeated downloads, the right to make back-up and private copies, the right to resell digital content and the right to essential updates and maintenance.

Reliance on EULAs to define the parameters of use of digital content has been seen as particularly problematic, as they are often forced upon consumers after acquiring content or contain forfeiture clauses threatening to block the user account and prevent further access in the event of a breach of EULAs.

Hence, it was proposed that if a EULA undercut consumers’ rights or reasonable expectations – as, for example, in respect of resale of software or continued access to acquired content – the consumer must have a remedy against the supplier, namely through alleged non-conformity of the digital content.

Also, the limitations of contract law in dealing with consumer expectations for content protected by IPRs have been noted. As emphasised by Mak, digital content might correspond to a contract and be in conformity with the formal requirements; still, the revision of other areas of law might be necessary to do justice to consumer expectations.

Following the negotiations and criticism of the original proposal, the adopted text of the DCD refrains from placing an obligation on traders to ensure that digital content is free from third-party rights. Instead, Art. 10 DCD provides that consumers are entitled to remedies for lack of conformity where a restriction resulting from a violation of third-party rights prevents or limits the use of the digital content or service.

Before examining Art. 10 in detail, let us outline the general perspective on the relation between IPRs and consumer protection expressed under the various recitals of the Directive. First, similarly to the original proposal, recital 36 of the DCD states that it should be ‘without prejudice to other Union law governing a specific sector or subject matter, such as telecommunications, e-commerce and consumer protection. It should also be without prejudice to Union and national law on copyright and related rights, including the portability of online content services.

Next, recital 53 expands on the possible conflict between IPRs and consumer law. It recognises that the restrictions of the consumer’s use of digital content could result from limitations imposed by the holder of IPRs in accordance with intellectual property law, for instance those arising from EULAs. Such restrictions could render digital content in breach of the objective requirements for conformity if it concerns features usually found in digital content or digital services of the same type and which the consumer can reasonably expect.

Recital 54 further provides two examples of when a violation of IPRs

---

82. It must be kept in mind that the implementation of the Directives into national law leaves quite some room for manoeuvre.

83. European Commission (n 75) recital 21. The Directive being without prejudice to copyright is confirmed under art 3(9) of the final text.

84. ibid, art 8.

85. ibid, recital 31.

86. See, in particular, Martin Schmidt-Kessel, ‘Stellungnahme zu den Richtlinienvorschlägen der Kommission zum Online-Handel und zu Digitalen Inhalten’ (2016) Anhörung des Ausschuss für Recht und Verbraucherschutz am 11.5.2016, 6-7. Also, Schulze and Staudenmayer (n 76) 187; Simon Greigert and Reinhard Steenmot, ‘Proposal for a Directive on Digital Content: Scope of Application and Liability for a Lack of Conformity’ in Ignace Claeys and Evelyne Terryn (eds), Directive on Digital Content: Scope of Application and Liability for a Lack of Conformity (Intersentia 2017) 142-144.

87. Gerald Spindler, ‘Contract Law and Copyright – Regulatory Challenges and Gaps’ in Reiner Schulze, Dirk Staudenmayer and Sebastian Lohse (eds), Contracts for the Supply of Digital Content: Regulatory Challenges and Gaps: Münster Colloquia on EU Law and the Digital Economy II (1st edn, Hart-Nomos 2017) 25.

88. European Law Institute, ‘Statement of the European Law Institute on the European Commission’s Proposed Directive on the Supply of Digital Content to Consumers’ COM (2015) 634 final, 24-25.

89. Rafał Manko, ‘Contracts for Supply of Digital Content: Legal Analysis of the Proposed New Directive’ (2016) European Parliamentary Research Service 32-34.

90. European Law Institute (n 88) 25.

91. ibid art 26.

92. Vanessa Mak, ‘The New Proposal for Harmonised Rules on Certain Aspects Concerning Contracts for the Supply of Digital Content’ (European Parliament 2016) 18 <https://op.europa.eu/en/publication-detail/-/publication/6cb903b-c295-11e6-a6db-01aa75ed71a1> accessed 31 March 2021.

93. Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (2019) OJ L136, art 10.

94. ibid, recital 36.

95. ibid, recital 53.
prevents or restricts the use of digital content. First, the third party may rightfully compel the trader to stop infringing the rights and discontinue its offer. Second, consumers might not be able to use digital content without infringing the law.96

The recitals hence recognise other stakeholders in digital content markets, namely the right holders of third-party rights such as copyright and the plethora of licensing agreements concluded between the right holders and consumers as well as between the right holders and traders of digital content. Whereas the first category of licensing contracts receives a mention under the recitals, the arrangements between (copy)right holders and traders are out of sight. Basically, the Directive aims to strengthen consumer protection by providing remedies for the lack of conformity without getting into the issue of traders’ arrangements with the owners of IPRs, which can be questioned.

2. Article 10: providing transparency and meeting reasonable expectations

As noted above, the final text of the DCD provides under Art. 10 that the consumer is entitled to remedies for lack of conformity where a restriction from a violation of third-party rights prevents or limits the use of the digital content or service:

Where 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 Arts. 7 and 8, Member States shall ensure that the consumer is entitled to the remedies for lack of conformity provided for in Art. 14, unless national law provides for the nullity or rescission of the contract for the supply of the digital content or digital service in such cases.97

Hence, the DCD encourages the traders to provide the digital content to consumers subject to a licence enabling its use in accordance with objective and subjective requirements of conformity. Objective requirements for conformity are there in order to ensure that consumers are not deprived of their rights where a contract sets very low standards.98 According to recital 53, the trader99 is only able to avoid liability by informing the consumer about the particular characteristic deviating from the objective requirement before the contract, and where the consumer expressly and separately accepts that deviation.100 It is, however, far from clear what constitutes normal use of digital content as defined by the reasonable expectations of consumers towards a particular type of content.101 Furthermore, the established prevailing features of a particular market could have an impact on legitimate expectations.102

The main rationale is to provide consumers with redress possibilities for digital content which one is unable to use due to the violation of third-party rights.103 However, the task of defining the objective requirements for conformity to concretise the use has not been embarked on. Furthermore, the option of delivering content deviating from reasonable expectations has also been reserved, on the condition that consumers are explicitly informed beforehand. Whereas providing clear information to consumers assumes they are going to decide on a provider, the impact is limited in practice if the supply is not diverse or a consumer is locked into using a particular platform anyway. It raises the question of whether such a provision has implications for the market and entrance to it, given that the reasonable expectations of consumers are not defined.

a) Transparency of the conditions of supply

Without a doubt, the DCD improves the position of consumers at least to the extent that it facilitates transparency in regard to the characteristics and the conditions of use of digital content. In order to avoid claims of non-compliance of supplied digital content, the trader would need to:

1. make sure that the content is supplied in accordance with the contract (subjective requirements for conformity under Art. 7 DCD) and that the contract provisions are clear enough to prevent any doubt about its functionality, compatibility, interoperability;

2. make sure that the digital content also complies with objective requirements for conformity under Art. 8 DCD for the particular type of content, or alternatively inform consumers beforehand about the deviations and make them expressly and separately accept that deviation pursuant to Art. 8(5) DCD.

Hence, the trader is encouraged to provide clear information on what is supplied and under what conditions and to explicitly bring the attention of consumers to the fact that the terms of use potentially deviate from their expectations in order to obtain their explicit acceptance. The question is, of course, to what extent the mere transparency of terms would be able to address the consumer expectations towards the digital content.104 The mere provision of information could be of limited impact.105

96 ibid, recital 54.
97 ibid, art 10.
98 ibid, recital 45.
99 The trader being (in accordance with art 2(5) of the DCD) a person acting for purposes of that person’s trade, business, craft or profession, in relation to contracts covered by the Directive. Although mere intermediaries might not directly fall within the scope, recital 18 allows MS to consider platform providers as traders. See also Schulze and Staudenmayer (n 76) 49-50, 62-65.
100 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L 136, recital 53.
101 On it being a ‘moving target’, see Schulze and Staudenmayer (n 76) 131. See also Geiregat and Steennot (n 86) 130.
102 Schulze and Staudenmayer (n 76) 193.
103 Although art 10 uses the term ‘violation’ and makes it seem like infringing the third-party legal position is required, the aim of the provision suggests that art 10 is applicable when a legal position is invoked, whether or not it is in fact founded. See ibid 190-191.
104 More transparency and pre-contractual information do contribute to reducing inequalities between parties, see Lucie Guibault, ‘Accommodating the Needs of Consumers: Making Sure They Get Their Money’s Worth of Digital Entertainment’ (2008) 31 Journal of Consumer Policy 409, 417. See also Busch and others on the issue of platform operators’ liability, arguing that it cannot be reduced to a question of clean and unambiguous information. Christoph Busch and others, ‘The Rise of the Platform Economy: A New Challenge for EU Consumer Law?’ (2016) 2 Journal of European Consumer and Market Law 3, 8.
105 For instance, standards are preferred to the mere information model. See Marco Loos and others, ‘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) 278 <https://dare.uva.nl/search/identi fier?7d3d806d-8315-4aa6-8f6e-1c5632d557>; accessed 31 March 2021; Peter Rott, ‘Download of Copyright-Protected Internet Content and the Role of (Consumer) Contract Law’ (2008) 31 Journal of
Indeed, transparency would be of greater importance if there were viable alternatives, and if a consumer could choose and easily switch between them. In practice, the licences could remain on a take-it-or-leave-it basis with no satisfactory alternatives.

b) Reasonable expectations beyond transparency

Whereas a considerable step has been made in the direction of guaranteeing reasonable consumer expectations, its efficacy can be challenged. Indeed, the objective requirements of conformity of the digital content relying on reasonable consumer expectations towards a particular type of content supplement the subjective requirements to ensure that consumers are not deprived of their rights where a contract sets very low standards. Exceptions to copyright protection of computer programs which are not overridable by contracts are one example. A more recent one is the adoption of the Portability regulation, which facilitates access to purchased content in cross-border situations, thus complementing the DCD in safeguarding the reasonable expectations of consumers regarding access to the content. It is a challenging task to address (changeable) consumer expectations within copyright, and its development points to the opposite direction of expanding protection. Nevertheless, it has been argued that copyright is flexible enough to balance user and right holder interests through outlining some user rights. It should also be kept in mind that the limitations under copyright law do not guarantee a particular use if they are not made mandatory, most importantly, immune to overridability by contracts. As has been emphasised by Guibault, contracts present means of controlling access to content which is not necessarily protected by IPRs. They allow for a re-definition of what is protectable and legally excludable; hence, copyright cannot be examined in isolation from other elements of the general public policy of innovation, culture and information.

There have been suggestions to tackle the discrepancy between consumer expectations and contractual limitations on use within copyright, consumer protection or contract law. One way would be to declare limitations under the copyright imperative, at least in standard form contracts. Party autonomy should prevail where it does not conflict with public policy, but if the legislator has deemed it appropriate to limit the scope of IPR protection, there is no reason to allow parties to derogate from it. Compulsory licensing is another option, resulting from applying competition law principles to circumstances where the exercise of copyright has an adverse effect on consumer welfare or is an abuse of dominant position. The issue could also be addressed by consumer law. For instance, Synodinou suggested that consumers could have a right under consumer law to access copyright-protected works all over Europe under the same general terms, provided the appropriate licensing fee is paid in their country. Guibault suggested introducing an item to unfair contractual clauses, whereby a term in non-negotiated contracts would be deemed unfair if it departed from provisions of copyright law.

When considering the markets for digital content, the issue lies not so much in the incompatibility of consumer protection with copyright, but rather in the licensing practices. Not least the impact of the landmark copyright judgment of the CJEU in UsedSoft sanctioning transfer of software licence has been diluted by the software vendors adapting their licensing agreements and moving to subscription-based access. Where consumer interests are undermined by contract provisions, it might be necessary to find other balancing mechanisms between exploitation rights and the reasonable use of works by users, such as the restriction of contractual freedom.

---

107 On the difficulties of establishing reasonable consumer expectations in the digital realm, see Lilia Oprysk and Karin Sein, ‘Common Limitations on the Use of Digital Content in the EULAs: When Do They Constitue a Lack of Conformity under the New Digital Content Directive?’ (2020) 51 IIC 594, 596-599. It should also be emphasised that copyright law alone ought not to be considered an objective standard of reasonableness, given that its rationale does not concern consumer interests.

108 For the discussion on reasonable consumer expectations, see Natali Helberger, ‘Standardizing Consumers’ Expectations in Digital Content’ (2011) 13 Info 66; Loos and others (n 105); Guibault (n 68); Guibault (n 104); Koukal (n 76).

109 Under art 8 of the Computer Programs Directive, any contractual provision contrary to exceptions for making a backup copy, studying the program and decompiling it for the purpose of interoperability shall be null and void. Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version) [2009] OJ L111 (n 46).

110 Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market [2017] OJ L168.

111 Koukal (n 76) 12.

112 See Schosvbo on such rights as democratic/information/transformation/personal/reasonable commercial use, Jens Schosvbo, ‘Integrating Consumer Rights into Copyright Law: From a European Perspective’ (2008) 31 Journal of Consumer Policy 393, 404-407.

113 Lucie Guibault, ‘Wrapping Information in Contract: How Does It Affect the Public Domain?’ in P Bernt Hugenholtz and Lucie Guibault (eds), The Future of the Public Domain: Identifying the Commons in Information Law (Wolters Kluwer 2006) 94-97. On terms often being more restrictive than permitted by copyright law, see also Guibault (n 104) 410.

114 Guibault, ‘Wrapping Information in Contract: How Does It Affect the Public Domain?’ (n 113) 103-104. Also, Oprysk and Sein (107) 597.

115 Guibault (n 104) 419-421.

116 Synodinou (n 55) 148.

117 ibid 147.

118 Guibault (n 104) 418-419.

119 Koukal (n 76) 10-11.

120 Oprysk (n 72) 176.

121 Ris, Schosvbo and Udsen (n 69) 479.
On the other hand, where copyright provisions are interpreted restrictively (in the sense of user freedom), the conclusions ought not to be mechanically transferred into the field of consumer law. For instance, the outcome of the CJEU judgment in the Tom Kabinet case, denying the exhaustion principle in the context of resale of e-books facilitated by the Tom Kabinet platform, should not be seen as settling the question of whether being able to transfer digital content is a reasonable consumer expectation.122

Hence, it remains to be seen to what extent the DCD serves the (undefined) reasonable expectations of consumers in practice, in particular where those expectations are not guaranteed under copyright. Similarly, it will be seen to what extent the DCD incentivises the traders to meet these expectations, to innovate and invest in building their distribution system accordingly. Even when the lack of conformity is established by the absence of sufficient pre-contractual information and the content does not do justice to consumer expectations which, in turn, are considered reasonable, the remedies are limited to bringing the content into conformity, terminating the contract or reducing the price.123 The practical side of it is, of course, that termination might not be a real option for a consumer in the absence of viable alternatives, due to network effects or technological incompatibility with other systems. The content would continue to be offered on a take-it-or-leave-it basis if the traders are not in a position to request the waving of the EULAs, and if consumers are not able to refer to their expectations stemming from the contract with a trader to claim the transfer of rights to use digital content from the right holder.124

To this end, Busch et al. suggest that, in order to take a holistic view of regulating digital markets and safeguarding consumer interests, it might be beneficial to consider a ‘layered regulation’ with an ‘intermediate normative layer’ as a combination of general clauses (e.g. stemming from consumer law, unfair commercial practices and terms, e-commerce law), techno-legal standards and the application of principles to diverse business models.125 ELI Model Rules on Online Platforms present such an example, where the general obligations of platform operators are combined with more concrete duties towards various categories of platform users.126

IV. Article 10 DCD and competition in digital markets

This part looks at Art. 10 DCD from the perspective of competition in digital content markets. Whereas the adoption of a Directive focusing on digital content presented an opportunity for comprehensive regulation of the field, it appears that some important aspects have not been addressed. Offering the EU-wide set of rules is of huge value to the stakeholders and improves transparency. The arrangements with the right holders, however, are one of the key determinants of competition on the market,127 and leaving them completely outside could lead to the reinforcement of dominant positions of established traders.

1. Complying with Art. 10 DCD

As discussed above, to avoid a claim for remedies under Art. 10 DCD, the trader ought to provide the content on terms corresponding to reasonable consumer expectations under the objective requirements for conformity or obtain consumers’ acceptance of terms deviating from those expectations. This applies regardless of the fact that some restrictions could stem from legitimate third-party rights such as copyright. Whereas a trader is often also the right holder of copyright in digital content such as software, the situation is less common for other types of content such as music or e-books.

Digital content is typically distributed through platforms, where a trader attracts both content creators (copyright holders) and end-users. The degree of influence the platforms have on the terms enforced by the right holders differs drastically. Depending on the market and available alternatives, the copyright holder, if faced with the requirements to license their content on particular terms by the trader operating a platform, can choose to stop or refrain from offering it. In theory, the provision requiring any trader to supply the content under conditions that do not interfere with concrete legitimate expectations of consumers puts the traders in a similar position, potentially promoting competition. Setting the minimum threshold of expectations could not only facilitate competition between the traders but also further promote the development of innovative use features going beyond that minimum.

The nuance lies in the fact that the legitimate expectations are far from defined. The grey area is likely to benefit first and foremost the already existing platforms with a large user base, ultimately forming a picture of what is customary. Although there is an option to escape a claim by explicitly mentioning deviations pursuant to Art. 8(5) DCD, it must also be clear what constitutes a deviation.128 Furthermore, even if reasonable expectations are defined, another issue is the necessary arrangements between the right holders and the trader. Traders are unlikely to be ‘in the same boat’ when it comes to negotiations with right holders.129 As will be explored below, the negotiations are influenced not only by the scope of protection granted to digital content under copyright.

---

122 Oprysk and Sein (n 107) 618.
123 It has been suggested by Koukal that termination should be a directly available option and that consumers would not first have to request the trader to enable portability guaranteed under Regulation (EU) 2017/1128 of the European Parliament and of the Council on 14 June 2017 on cross-border portability of online content services in the internal market (2017) CJ L168. See Koukal (n 76) 17.
124 Spindler (n 87) 224.
125 Christoph Busch and others, ‘The ELI Model Rules on Online Platforms’ (2020) 2 Journal of European Consumer and Market Law 61, 62-64.
126 European Law Institute, ‘ELI Model Rules on Online Platforms’ (European Law Institute, 2019) <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Model_Rules_on_Online_Platforms.pdf> accessed 31 March 2021.
127 See the Commission on the availability of the relevant rights as the key determinant of competition in digital markets, European Commission, ‘Final Report on the E-Commerce Sector Inquiry’ COM(2017) 229 final 7.
128 Schulze and Staudenmayer (n 76) 163.
129 See a remark by Geiregat and Steennot on the potentially devastating effects for small enterprises bargaining with giant right holders, Geiregat and Steennot (n 86) 147-148.
but also by the network effects and bargaining power of the trader in the market.\textsuperscript{130}

What could be helpful are the particular instruments within copyright, such as exceptions and limitations, which could not be denied by the right holder.\textsuperscript{131} This is, however, not a reality for digital content, the use of which falls to a larger degree under the acts protected under copyright. In the realm of tangible copies, consumers benefited from the exhaustion principle, which enabled them to dispose of a lawfully acquired embodiment of a work as they wished.\textsuperscript{132} In the digital realm, the principle does not apply to digital copies and, hence, cannot guarantee the user the disposal of acquired content. Whereas the non-application of the exhaustion principle to digital copies under EU law is perhaps for the best, the absence of a comparable limit on the reach of the exclusive rights under copyright is less so.\textsuperscript{133}

What a general delimitation such as the exhaustion principle achieved is two-fold. First, it guaranteed the user certain acts of disposal of content.\textsuperscript{134} Second, it guaranteed entry to the secondary market for other economic actors becoming intermediaries for the sanctioned transfer and disposal of copies, as they would not automatically be in breach of the dissemination rights under copyright.\textsuperscript{135} This aspect is even more important in digital markets, where there is much more room for add-on services or intermediation of exchange of digital content in comparison with physical copies.

In the absence of clearly defined limitations under copyright which are ‘immune’ to contractual overridability,\textsuperscript{136} the only way for a trader to distribute content on terms corresponding to reasonable consumer expectations is to compel the right holders to grant the necessary licence. Whether or not to grant a licence honouring consumer expectations is at the sole discretion of the right holder. One may ask what the incentives are for the right holders to allow uses which fall under the restricted acts safeguarded under copyright, and whether they would be similar in relation to any potential trader operating a platform.

2. Networks effects and bargaining power of traders of digital content

As discussed in Part III, the trader can escape Art. 10 and supply the digital content on terms deviating from reasonable expectations, provided that those are clearly communicated and accepted by consumers beforehand. It already has some implications for the actors, as established traders might be in a better position to grasp consumer expectations on the basis of user data, both when it comes to offering content and innovation through further development.\textsuperscript{137} This part, however, focuses predominantly on the compliance with Art. 10 by actually supplying content on terms corresponding to reasonable expectations. As was also discussed previously, the availability of exceptions and limitations under copyright is limited with respect to digital copies.\textsuperscript{138} This means that the (potential) traders would largely be unable to rely on them when securing the necessary licences from the right holders.\textsuperscript{139} The question that arises, then, is to what extent the traders would be in the same position to negotiate necessary licences.

Digital markets are characterised by strong network effects, where the net value of action within the network is affected by the number of network users.\textsuperscript{140} This is also true for digital content markets, where the first-mover advantage is reinforced by network effects driving consumers to particular platforms.\textsuperscript{141} Consumers purchasing digital content profit from the larger customer base of a particular trader, as it also attracts the right holders, who benefit from the same network effects of multi-sided platforms.\textsuperscript{142} Network effects are influenced not only by the number of users but also by the entire technological and organisational setup. For instance, they are reinforced by the limited interoperability between the platforms and content operated by different traders, i.e. lock-in. Identity-based network effects connected to the value of user profiles reinforce the lock-in effect even further.\textsuperscript{143}

Network effects as such do not necessarily threaten competition, but concerns arise when they allow an undertaking to foreclose competitors.\textsuperscript{144} In the context of digital content distribution, the extreme case would be exclusive dealing agreements with the right holders that preclude them from offering the content elsewhere. A less obvious one would be the influence of established traders on the market conditions, which discourages new entrants. Market foreclosure may happen, for instance, when the critical mass of consumers or sellers is so bound to particular trader(s) that it does not make sense for

---

\textsuperscript{130} The scope of protection refers, of course, to a work protected by copyright and which is embodied in the content. Digital content as such is not subject to copyright law; rather, its elements might be protected as works under copyright.

\textsuperscript{131} See sections II.2.-II.3. of this paper on the instruments of dealing with anticompetitive effects within copyright.

\textsuperscript{132} Guibault (n 68) 224.

\textsuperscript{133} On the need for a comparable limit to the rights but in a different form than exhaustion as harmonised under current EU law, see Oprysk (n 59) 328-331.

\textsuperscript{134} Some but not all, as the exhaustion principle typically exempts only the transfer of copies and not any act such as copying and commercial distribution.

\textsuperscript{135} In particular, the right of distribution.

\textsuperscript{136} Also, the recent DSM Directive on copyright in the Digital Single Market, despite a broad title of ‘Measures to adapt exceptions and limitations to the digital and cross-border environment’, in fact introduces only exceptions for specific purposes, limited in number and scope, such as preservation of cultural heritage, use of works in cross-border teaching activities and text and data mining. See title II of the DSM, Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130.

\textsuperscript{137} Also, knowledge of consumer preferences gathered by the platforms is valuable and can be used for other purposes, such as to create new technology or information. See Mäihäniemi (n 68) 35.

\textsuperscript{138} See section II.2.

\textsuperscript{139} Recently the CJEU invalidated the model of the Tom Kabinet platform, relying on the exhaustion principle for facilitating the secondary market of e-books, Nederlands Uitgevers en de Groep Algemene Uitgevers v Tom Kabinet Internet BV (n 70).

\textsuperscript{140} Mäihäniemi (n 68) 60-61.

\textsuperscript{141} Signorell (n 36) 16-17.

\textsuperscript{142} On multi-sided platforms see Podsuzn and Kriefels (n 13) 35. On direct and indirect network effects, see Simonetta Vezzoso, ‘Internet Competition and E-Books: Challenging the Competition Policy Acquis’ in Gintar Burbytë (ed), Competition on the Internet (Springer 2015) 33.

\textsuperscript{143} Podsuzn and Kriefels (n 13) 36.
others to get into that market.\textsuperscript{145} Furthermore, the established platforms possess large amounts of user data that reveal preferences.\textsuperscript{146}

The EC, in its report on the E-commerce Sector Inquiry, rightly noted that the key determinant for competition in digital content markets is the availability of the relevant rights, e.g. copyright.\textsuperscript{147} The key competition concerns, however, were linked to contractual restrictions in licensing agreements, such as bundling of rights, territorial restrictions and geo-blocking, duration of licensing agreements, payment structures and metrics.\textsuperscript{148} Hence, the emphasis has been placed on the general duration and scope of rights to distribute the content rather than on the licensing provisions concerning the consumers’ use of digital content. As explored in the preceding section, complying with Art. 10 against the background of broad rights under copyright invites a discussion on the competition implications precisely in respect of securing EULAs for consumers.

Traders operating established platforms with large user bases would likely be able to exercise considerable bargaining power when it comes to compelling right holders to license their works to the end-users of the platform on more user-friendly terms than guaranteed under copyright. Although the DCD does not deal with the supply side of digital content markets, namely with the arrangements between the right holders of copyright in the content and the trader offering a platform for its distribution, a holistic view of the regulatory framework cannot escape it. Large platforms often shape the business environment for suppliers (e.g. right holders), which the latter are forced to accept. Hence, besides protecting consumers, it might also be necessary to protect the suppliers against the economic power of dominant platforms.\textsuperscript{149}

As explored in Part II, the ability of competition law to effectively address the concerns, whether based on IPRs or multi-sidedness of the markets, has also been questioned. It has been argued by scholars that the special responsibility for dominant undertakings should be strengthened in digital markets, as dominance tends to result in de facto standards.\textsuperscript{150} Furthermore, market power as the power to raise the prices might need to be reassessed or substituted with the power to affect the quality of the product or service, namely, to decide on the level of quality provided.\textsuperscript{151} This appears to be very relevant in the case of traders operating large platforms for distributing digital content, as many right holders in fact depend on them. Such traders then exercise considerable bargaining power to decide over the arrangements with both consumers and the right holders.

Next, the overreliance of the DCD on informing the consumers is surprising. Remedies provided under the Directive aim to secure the consumer’s ‘exit’ option, i.e. ability to terminate a contract and potentially switch to another provider. However, it has long been argued that the dominance of a platform due to network externalities may continue even though all of the consumers agree that rival technology is actually better.\textsuperscript{152} The share of the market might not be linked to a platform simply having a superior offer but rather to lock-in effects or costs of switching. Not least, in the dynamic digital markets, one concern is the continuity of service; the consumer is more likely to stay with a larger platform, as the risks of it discontinuing service might be perceived as smaller. The concerns over the competition implications of the ‘narrow’ approach of the DCD go hand in hand with the remarks on the actual effectiveness of the Directive in serving reasonable consumer expectations.\textsuperscript{153}

One should also not underestimate the possible impact on innovation.\textsuperscript{154} Digital markets are typically characterised as different from traditional markets in the sense that even monopolists often have incentives to innovate driven by the constant need to update their products.\textsuperscript{155} However, innovation is likely to be incremental rather than disruptive; the dominant player would likely want to maintain its position.\textsuperscript{156} Disruptive innovation is more likely to come from smaller companies and start-ups. The latter, as has been argued, should be supported by competition policy, as it affects consumer welfare on a larger scale.\textsuperscript{157} The innovation rationale of competition intervention in digital content markets would also be supported by the special status of digital content as a cultural good and the public interest in its dissemination.

Hence, there is a danger that the DCD will have some unintended consequences for competition with a direct effect on consumer welfare, disrupting the efforts to promote DSM and the competitiveness of SMEs. Whereas the claim for remedies against the traders supplying the digital content without a doubt improves the transparency of the market, its effectiveness in serving reasonable expectations remains to be proven, given the unaddressed arrangements between the traders and actual holders of copyright in the content as well as the lock-in effects of digital platforms. The claim for remedies against the trader of digital content not corresponding to consumer expectations could reinforce the dominance of a few key players on the digital content markets. First, they would be in a better position to negotiate the necessary licences with the right holders due to their bargaining power and access to the broad end-user base. Second, they would also be in a better position to meet the evolving consumer expectations which conflict with the scope of exclusive

\textsuperscript{145} ibid 39.
\textsuperscript{146} Mäihäniemi (n 68) 35.
\textsuperscript{147} European Commission (n 127) 7.
\textsuperscript{148} Notably, the Commission did not consider exclusivity problematic in itself; ibid 14-16.
\textsuperscript{149} Busch and others (n 104) 7. See also the ELI Model Rules on Online Platforms (n 126), especially arts 20-22 on the liability of platform operators to customers and suppliers in a broad sense, e.g. not limited to consumers. On the liability under the ELI Model Rules, see Busch and others (n 125) 65.
\textsuperscript{150} Mäihäniemi (n 68) 102-103. On superior technology having a strategic first-mover advantage and potential to be locked-in as the standard, see also Michael L Katz and Carl Shapiro, ‘Technology Adoption in the Presence of Network Externalities’ (1986) 94 Journal of Political Economy 822, 825.
\textsuperscript{151} Mäihäniemi (n 68) 31.
\textsuperscript{152} Katz and Shapiro (n 150) 825. Also, Mäihäniemi (n 68) 63.
\textsuperscript{153} As discussed in part III of this paper.
\textsuperscript{154} See Kerber extensively on competition policy and law struggling to outline the theoretical models for analysing and promoting innovation, in particular in digital markets. Wolfgang Kerber, ‘Competition, Innovation, and Competition Law: Dissecting the Interplay’ (2017) MAGKS Joint Discussion Paper Series in Economics 42-2017.
\textsuperscript{155} Mäihäniemi (n 68) 69-70.
\textsuperscript{156} Also, knowledge of consumer preferences gathered by the platforms is valuable and can be used for other purposes, such as to create new technology or information; see ibid 35.
\textsuperscript{157} ibid 70.
rights under copyright. Third, the need to rely solely on licensing arrangements with right holders rather than on clear boundaries of copyright protection or an established minimum standard of consumer expectations could also constitute barriers to entry, discouraging any new traders from entering the market.

V. Conclusions on the DCD’s role in digital content markets

The DCD sets out to promote the competitiveness of enterprises and safeguard consumer expectations towards the digital content. It has been discussed here whether the reluctance to address the overlap with rights under copyright or at least to define (minimum) consumer expectations might interfere with these objectives. As discussed in this paper, the impact of the DCD on the protection of reasonable expectations could be undermined by the trader’s ability to escape liability by separately obtaining consent for terms of use which are not in line with the expectations. Furthermore, whereas the DCD ought to improve the position of a consumer through ensuring the transparency of terms, it does not necessarily facilitate the existence of viable alternative sources of supply.

The reasonable consumer expectations on which the DCD relies are difficult to define in practice. Not only is it disputable to which extent these expectations ought to be informed by current supply on the market; the boundaries of copyright protection are also of little help in supporting the expectations. Just recently, the CJEU denied the application of the exhaustion principle to digital copies in the Tom Kabinet case, eliminating one of the most powerful tools under copyright, yet the court did not clarify the reasonableness of consumer expectation to transfer their content. Given the necessary transposition of the DCD into national law, the danger exists that very different standards will emerge in respect of consumer expectations. At the same time, some standard on the EU level could be quite effective in addressing some of the concerns expressed here.

Whereas the DCD rightly recognises the trader’s role in distributing digital content protected by copyright, the understanding of their position appears to be rather narrow. Article 10 presupposes that it is a task for a trader to obtain a licence honouring reasonable consumer expectations from the right holder, potentially granting broader user freedoms than those guaranteed under copyright. What ought to be kept in mind, though, is that it is not necessarily the case that the copyright holder is unwilling to license the content on particular terms – a platform acting as a trader may very well exercise considerable control over the exact terms of use. On the one hand, the right holders in the majority of cases are dependent on intermediaries such as online platforms to distribute their works. On the other hand, the content distributors such as digital platforms are in competition with each other, be it for the availability of different content or the conditions of its supply. Strong network effects in digital markets result in first-mover advantage and ample possibilities of consumer lock-in, be it on a legal, organisational or technological basis. Hence, the consumer’s exit option, i.e. switching to another provider, should be not taken as given.

The question that has been raised here is whether the provision under Art. 10 in isolation could in fact be detrimental to competition and innovation. One could assume that established platforms with large user bases would be in a much better position to negotiate the necessary licences, especially when they allow uses otherwise falling under the exclusive control of copyright holders. Furthermore, it is clear that the platforms exercise considerable control over the right holder’s and consumer’s ability to switch. To what extent, then, would the market be attractive for new players? Although dominant players still have incentives to innovate in the digital realm to stay competitive, such innovation is often incremental rather than disruptive.

To achieve the goal of promoting competitiveness in digital content markets, it is crucial that the provision under Art. 10 DCD be sustained by a level playing field in negotiating the necessary licence provisions with the right holders. The simplest way would be if copyright exempted the uses necessary to cater to consumer expectations and made the exceptions and limitations immune to contract overridability. This is highly unlikely given the copyright’s limited attention to the end-users and the changeability of consumer expectations. Another option could be to define the minimum set of consumer expectations to be safeguarded under the DCD and provide a right to withdraw from the contract for supply if these are not met. A common minimum standard would allow new market entrants to compete on delivering content on such minimum terms and potentially promote innovation when it comes to serving consumer expectations above the minimum. At the same time, additional measures are likely needed to address competition concerns in connection with the operation of platforms.

Hence, although the legislator’s attempt to refrain from dealing with the issue of licensing of third-party rights such as IPRs is understandable, the DCD’s efforts to safeguard reasonable consumer expectations could be undermined. The effectiveness of increased transparency could be doubted in view of the broader picture of network effects and lock-in in the digital markets. What is even more important is the potentially overlooked impact on the competitiveness of traders, given the network effects and differences in bargaining power. As has been discussed, the DCD could contribute to reinforcing the dominant position of already established content distributors. The question of whether this is a desirable outcome merits a broader inquiry than the scope of this paper allows. The concern expressed here is that to the extent provisions of DCD discourage innovation brought by smaller players, its effect will be detrimental to the functioning of digital markets and society at large.

ACKNOWLEDGEMENTS

The author would like to express sincere thanks to Dr. Daria Kim and two anonymous reviewers for their thoughtful comments on the draft, and to the Max Planck Institute for Innovation and Competition for the scholarship that supported the research leading to this paper.

158 See also Geiregat and Steennot (n 86) 131 on standardisation as an important aspect of determining user expectations.