Clash of cultures – integrating copyright and consumer law

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Abstract

Purpose – *This article seeks to deal with the fundamental conceptual differences between consumer law and copyright law that render the application of consumer law to copyright-law related conflicts difficult.*

Design/methodology/approach – *Following a normative approach to copyright and consumer law based on an analysis of the relevant literature and case law, the article examines in which situations consumers encounter obstacles when trying to rely on consumer law to invoke ''privileges'' granted to them under copyright law, such as the private copying exception.*

Findings – *Research shows that most difficulties lie in the fundamental conceptual differences between consumer law and copyright law regarding the objectives and beneficiaries of each regime, as well as diverging conceptions of ''property'', ''user rights'' and ''internal market''. Such discrepancies undeniably follow from the fact that each regime traditionally never had to deal with each other's concerns: consumers never played a role in copyright law, whereas copyright protected works were not seen as consumer goods.*

Originality/value – *By identifying the main conceptual differences between the two legal regimes, the article contributes in an inter-disciplinary manner to the discussion on the place of the digital consumer under European law.*

Keywords *Copyright law, Consumers, European law, Information society*

Paper type *Research paper*

1. Introduction

At first sight, copyright law and consumer law have not much in common. Copyright law is about creators, their creations and right to control the use and distribution of creative products. Consumer law is about consumers, consumption and their rights in relationship with product suppliers. Two areas of the law, operating in different spheres, with different policy objectives and entirely different conceptions of consumers, users, authors and traders – like galaxies that revolve next to each other, oblivious to the presence of the other and busily absorbed in their own system. And yet, both copyright law and consumer law have more in common than may first meet the eye: they both form part of a larger cluster of digital consumer law (Loos *et al.*, 2011, p. 109).

The digitization of creative products has favoured the emergence of increasingly diversified and sophisticated digital content markets. Fine-grained technologies of control allow the selling of digital books, music, videos or games via physical carriers such as CDs and DVDs, as well as over the internet, in form of download, pay-per-view, subscription or streaming service. Digital content markets are no niche markets either. The economic and social impact of digital content markets are so important that they are at the heart of the EU's digital agenda, with the goal of making Europe ''the largest information economy of the world''.

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In digital content markets, access to and use of digital content products are largely subject to contractual agreements and licensing conditions between suppliers and consumers

(Elkin-Koren, 1998, p. 1155). The fact that consumers acquire digital content by way of contractual arrangements implies that their relationship with the suppliers of these products is governed by two sets of rules: consumer law and copyright law (Radin and Wagner, 1998, p. 1295). Copyright law grants authors limited exclusive rights in their creations that entitle them to control the manner in which their works are being used, including their distribution and sale. Consumer law ensures that the terms and conditions under which digital content is sold are fair, and that the products purchased conform to consumers' reasonable expectations.

Many of the consumers' concerns when purchasing digital content have their source in the way copyright law governs the distribution and consumption of digital content, that is, the way copyrights are managed and enforced. In response, there is a recent trend in law and policy making to place the exercise of copyright law in its larger context and to consider its interaction with other areas of law, including consumer law. The newly adopted Consumer Rights Directive made incursions into aspects of copyright law, granting consumers clear (information) rights in their relation to suppliers of digital content that is subject to copyright law[1]. The protection of consumers of (copyright protected) digital content also figures prominently in the European Commission's proposal for a Regulation on a Common European Sales Law[2]. Also in the copyright law discourse, the interaction between copyright and consumer law and policy, and the call for ''copyright consumer rights'', is subject to on-going discussions (Schovsbo, 2008, p. 394; Elkin-Koren, 2008, p. 1119; Liu, 2008, p. 1099; Guibault, 2002, p. 252).

Attempts to integrate copyright and consumer law and policy and to accommodate the interests of the consumer of copyright protected content soon encounter conceptual and political challenges. The question that this article examines is what the main conceptual differences between consumer and copyright law, and the resulting ''clash of cultures'' are that need to be overcome before dealing successfully with copyright law related matters in consumer law. After an overview of the most pressing consumer concerns related to the exercise of copyright law (section 2), the article will focus in particular on the differing objectives of consumer and copyright law (section 3.1), the differing conceptions of the user, aka consumer (section 3.1), the different ideas about user rights (section 3.2) and what ''property'' actually is and how it can be transferred (section 3.3) as well as the seemingly deep gap between copyright law's concept of territoriality and European consumer policies' focus on the realization of one single market for consumer; not to mention the differing political agendas and interests involved (section 3.4). The research for this article is based on desk research, including research into the relevant European directives and their legal history, examples from national copyright and consumer law as well as secondary legal literature and consumer research literature.

2. Consumer concerns related to copyright law and the way it is exercised

Many if not most items of digital content are subject to intellectual property rights, and here in particular to copyright law. Copyright law lays down the rights of authors or other rightholders (e.g. publishers) with respect to their ''works''. ''Works'' can include any form of creative output, including video, music, text, books, pictures, games and software. Copyright law grants authors a set of economic exploitation rights (like the right to control the copying, physical and online distribution of their works) and moral rights (like attribution and adaptation). Economic rights are subject to exceptions and limitations as a means to balance the interests of the rights owners with those of the public, such as private use and privacy, access to and wide dissemination of works, news reporting, education, religion, etc.

Digitization offers new and exciting opportunities for authors to disseminate and sell their works: on new carriers, such as DVDs and CDs, online per download or streaming, and across new platforms such as game consoles, MP3 players, tablets, mobile phones and e-book readers. Along with digitization, however, new challenges have emerged for rightholders as a result of the improved possibilities to copy works and disseminate them at low cost. This again magnifies copyright holders' concerns about piracy and unauthorised use. Part of the response to the new perceived risks but also to the nature of digital content

markets was a legal one: it resulted in the further expansion of exclusive rights (like the introduction of the making available right to cover online distribution) and discussions on how to reduce existing user privileges, such as the private copying exception. Other solutions were technological, leading to the development of new technologies to control the dissemination and consumption of digital content, such as Technical Protection Measures (TPMs), Digital Rights Management solutions (DRMs) and electronic access control or Conditional Access systems (CAs), including watermarking and tracking technologies. Common to all these technologies is that their ultimate goal is to enable rightholders to exercise precise control over who may access and use which content on which devices and under which conditions (Schovsbo, 2008, p. 398).

The resulting usage restrictions and the way rightholders control the consumption and distribution of their works are an important cause of some of the consumers' most pressing concerns regarding digital content.

2.1 Access and interoperability

At the top of the list of problems consumers experience with digital content, access problems hold the first place. These include technical access issues, for example where access has been restricted by CA, DRM or TPM. Another form of technical access issues are interoperability problems, such as the ability to play, listen and watch digital content on equipment produced by different manufacturers. Consumers who purchase digital content from one provider cannot be certain that it is compatible with the hardware and software produced by another manufacturer if this supports other technical standards. The lack of interoperability as a result of the use of DRM, CA or TPMs has already led to various legal disputes, controversial discussions and calls for concrete consumer rights.

2.2 Usage restrictions

Once access is secured, consumers have concrete expectations regarding digital content. These expectations can be divided in two categories: the first category relates to the capacity to perform certain lawful usages that consumers are already accustomed to from traditional media (Cohen, 2005). Examples include the ability to play a CD on different devices, for example a CD player, a car audio system or a computer or to make private copies. Consumers become concerned when they experience that these forms of usage are restricted by DRM, and the contractual conditions they enforce (Dufft *et al.*, 2005, 2006). A second category of expectations relates to new forms of usages brought about by digitization, e.g. the ability to forward digital content, share it electronically with friends, access and use it on different devices, etc. Consumers have grown to expect these customary features of digital products, even if they have to pay extra for them. The usability and functionality of digital content is often subject to restrictions of the ability to copy, print, forward, share or otherwise use digital content. Restrictions can be contractual or technical.

2.3 Legal uncertainty

One consequence of copyright law's expansion is that the number of potentially infringing acts of consumption of works is increasing, covering uses that are generally considered by consumers as ''normal'', ''private'', or simply part of the advantages offered by digital/online media. Whether or not consumers are entitled to perform these uses will often be a matter addressed in the respective licensing conditions and terms of use. The licensing conditions and terms of use can vary from supplier to supplier, and even from product to product. At the same time, copyright law itself does not mandate any legally binding form of usage that consumers should be entitled to expect. The result is considerable legal uncertainty for consumers about which uses are legitimate. The obscure wording of copyright rules, as well as existing inconsistencies and incoherencies between the different European directives (Hugenholtz *et al.*, 2006, p. 231), further add to the lack of legal certainty.

2.4 Territoriality

Individual as well as public interest objectives are also at stake in realizing the availability of access to services from other Member States and with regard to cross border contracts.

Consumers can be faced with geographical (technical) restrictions making it impossible for users from one country to access television broadcasts or downloads from another European country, as well as discrimination on basis of geographical location (Helberger, 2007-2008, p. 472). Often, these restrictions are the result of the way in which copyrights are licensed, e.g. on a territorial basis. This constitutes another problem consumers frequently mentioned, and one that can seriously hamper the functioning of an Internal Market for Digital content Service[3].

2.5 Privacy

Finally, the enforcement of the rightholders' exclusive rights may encroach on the consumers' other rights, such as their freedom of expression, right to personal property or privacy. DRM technologies can be, and are used, to monitor user behavior and collect personal data, thereby posing a risk to user's right to privacy and right to fair processing of personal data (Cohen, 2005). Recently, the use of filters to identify unauthorized content online, and possible conflicts with user's privacy raised serious controversy. In two recent cases, the Court of Justice of the European Union emphasized that filtering measures to manage and enforce copyright must seek a fair balance with users' right to privacy[4].

3. Clash of cultures

All of the aforementioned concerns could, in principle, form the basis for a digital consumer's claim under consumer and contract law. Consumer law grants consumers certain rights against suppliers of products and services that deviate from consumer's legitimate expectations, and fail to observe their lawful interests. Under consumer sales law, consumers can complain about products that are sub-standard in a sense that they do not conform to the level of functionality that consumers of the same product are normally entitled to expect. In other words, where a piece of digital content fails to play on the consumers' hardware or cannot be copied, the consumer might be afforded the right to request repair or to return the content pursuant to the rules of consumer sales law (Loos *et al.*, 2011, p. 109). Contract law offers tools to review the fairness of contractual conditions, including those that restrict the consumers' actions to certain uses of digital content or that affect consumers' privacy and right to fair processing of personal data. As demonstrated in the pages which follow, dealing with copyright law-related concerns of consumers within the framework of consumer law encounters a number of obstacles.

3.1 Differing objectives and conceptions of the user

Copyright law and consumer law pursue different objectives. In consumer law, the relationship between the consumer and supplier occupies centre stage. Consumer law sets the basic rules for the negotiations between persons acting as consumer in the market place and their counterparts, the businesses. The role of consumer law in mediating between consumers and business is twofold: Consumer law empowers the consumer and creates room for the exercise of autonomous action and self-protection where possible. It also protects the consumer in her commercial dealings with enterprises where necessary[5]. Important ''tools'' in this context are transparency requirements, the protection of competition and contractual freedom.

The consumer is not always empowered and in control, however. She can also find herself in a structurally weaker position in commercial negotiations because she lacks information, education, experience, and awareness or negotiation power (Hondius, 2004, p. 245; Reich, 1992, pp. 260-1). In such situations, the primary role of consumer law is to intervene where consumers suffer harm or are treated unfairly in commercial relationships. The overall goal of both approaches is to ensure fair dealings and that that outcome of commercial negotiations is individually, as well as socially, acceptable. This aspect of fair dealings is at the heart of notions such as ''reasonable expectations'', ''fairness'' and ''conformity'' in consumer sales law, contract law or the rules on unfair commercial business practices. It can include considerations of corrective justice as well as distributive or social justice (Helberger and Hugenholtz, 2007, pp. 1082-3), though in general a functional approach to consumer

protection will prevail. The latter means in particular that judges, when assessing the fairness of commercial dealings will look primarily at whether a particular product or service is suitable to function ''normally'' as compared to comparable products and services, and less on abstract interests, such whether the product or service sufficiently respects social, political or cultural considerations of a more abstract nature (Loos *et al.*, 2011, p. 106).

Realizing these more abstract social, cultural and political aspects of the distribution and consumption of digital content is central to copyright law's mission (Helberger and Hugenholtz, 2007). To begin with, unlike consumer law, copyright law does not deal with goods and services in general, but concentrates on a subset of digital content in the form of creative works, such as books, films, music, photos, games, software, etc. These forms of creative expression are considered of particular relevance for creativity, culture and human progress. In copyright law, the focus is on the author, to grant her control over her creations and to create the legal framework allowing her to economically benefit from them. To this end, copyright law in Europe grants authors a catalogue of exclusive exploitation rights (such as the right to control the distribution, making available online as well as copying of protected works) as well as some moral rights (including the right to attribution and to oppose alterations or adaptations of the work). Because of the social and cultural value of creative works, there is also broad acknowledgement of the fact that the protection of exclusive rights of authors should not stretch *ad infinito*. One important justification to limit the exclusive rights of rightholders is the interest of ''users'' to access and use protected subject matter and, in so doing, to help to reconcile the cultural and the economic dimension of the information society.

The existing set of limitations and exceptions on copyright is designed to accommodate selected, pre-defined cases of ''user'' interests in performing specific uses. These uses are believed to contribute to the cultural, social or political development of Europe's citizenship and, ultimately, to serve also the individual consumer (Guibault, 2002, p. 302). Examples are activities of research, teaching, news reporting, or archiving. The exceptions that probably come closest to traditional aspects of ''consumption'' are those allowing reproductions for private purposes, for caching and for the benefit of persons with disabilities. To the extent that users, aka consumers, are increasingly involved in the process of creation themselves, other particularly relevant exceptions are those of quotations for purposes such as criticism or review, use for the purpose of caricature, parody or pastiche, or incidental inclusion of a work in another work. Most of the other existing limitations are targeted at ''professional'' or ''semi-professional parties'' such as libraries, journalists, teachers, and scientists who act in the course of their business. A frequently discussed question in this context is whether the existing catalogue of exceptions still reflects the way users actually use works and whether other or new exceptions would be needed (e.g. an exception for user created content) (Liu, 2003, p. 402).

Copyright law is silent about the question to what extent the objectives behind copyright law – the stimulation of creation and the dissemination of culture – carry on into the consumer (contract) law analysis. The question to what extent rightholders may attach conditions to, or even restrict the exercise of limitations by contract or technological means is notoriously controversial and has led to a number of court cases in which consumers invoked the rules of consumer (contract) law, albeit with limited success (see section 3.2). The only relevant provision in the Information Society Directive, Art. 6 (4), is not very helpful to the consumer either, as it offers rightholders the leeway to contractually restrict the exercise of certain limitations, without signalling under which conditions such restrictions can be considered ''unfair'' under consumer contract law.

None of the European copyright directives actually defines the consumer of works or makes any coherent reference to the consumer of digital content (Schovsbo, 2008, p. 394). European copyright law uses the term ''consumer'' only in one instance: in recital 9 of the Information Society Directive. Copyright law rather speaks of the ''user'', the ''user of protected subject matter'', ''beneficiaries of exceptions'', sometimes ''individuals'' (recital 57 Information Society Directive) or ''individual members of the public'' Article 5 (3) (n) Information Society Directive), a ''natural person'' (Article 5 (2) (b) Information Society

Directive) or more specifically of, e.g. ''users of computer programs''. Interestingly, the term ''user'' is occasionally even used to signal a contrast to the notion of ''consumer''. However, the prevalent characterization of ''the consumer'' in European copyright law but also in the academic literature is still the economic representation of an individual whose main interest is passive consumption at an attractive price (in case of works, listening, watching, reading, etc.) (Ramsay, 2000, p. 59), or, as Liu puts it, the ''couch-potato view'' (Liu, 2003, p. 402). In contrast, the ''user'' in the traditional sense of copyright law does not ''consume'' but ''uses'' works actively, in order to teach, create, inform, criticise or review. She is considered an aspirant ''author'' or at least a productive user rather than a ''consumer''. This ''active user'' is the one addressed by copyright law through the previously-mentioned limitations and exceptions.

Against this background, it may come as no surprise that copyright law lacks rules that address the commercial relationship between suppliers/rightholders and consumers. Consumer interests are, if at all, only indirectly taken into account. Ideally, the protection of creators, publishers and consumer interests goes hand in hand, as shown by Recital 9 of the Information Society Directive:

> Any harmonization of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large.

A high level of protection of intellectual property will, as the argument goes, create optimal incentives for authors and publishers to produce, maintain, distribute and invest in culture and knowledge markets. This way, at least in theory, consumers will have access to a wide range of knowledge and culture (Netanel, 1996, p. 286; Liu, 2001, p. 1318; Loren, 1997, p. 1). The question is whether in practice, the distribution, accessibility and usability of digital knowledge and culture is indeed a matter of consumers' choice, or if choice is restricted by restrictive usage rules, interoperability issues and private ordering.

3.2 Different ideas about user rights

Consumer law encompasses a vast array of legislative measures aimed at limiting the stronger party's freedom of contract in order to protect the weaker party to the contract, the consumer. Such measures range from the prohibition of certain contract clauses that are deemed unfair or excessive, to the definition of substantial provisions in favor of the weaker party and to the obligation to fulfill certain formalities (of form or of information) at the time of conclusion of the contract. The newly adopted Consumer Rights Directive attempts at the intersection with copyright law to deal with some of the specific challenges raised by the distribution and sale of digital content, namely by granting consumers clear information rights in their relation to suppliers of copyright protected digital content. These new rights clearly fit within the framework of five fundamental rights of consumers recognized in the European Union's First Consumer Protection Programme, falling more specifically under the consumer's right to information and redress.

These rights do not have the nature of constitutional rights, but can be rather seen as political rights to be implemented by the legislature. In fact, in order to promote the interests of consumers and to ensure a high level of consumer protection, Article 169 of the Lisbon Treaty gives the European Parliament and the Council the mandate to ''contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organize themselves in order to safeguard their interests''. This principle was reiterated on several occasions in the case law of the Court of Justice of the European Union[6]. Moreover, the Rome Convention on the law of contractual obligations of 1980 confirms that in no circumstances may the choice of law work to the disadvantage of the consumer or deprive her of the protection afforded by the law of her country of residence where it is more favorable (Hondius, 2004, p. 390).

By contrast, European copyright law sets forth no explicit consumer rights. Within the existing catalogue of exceptions in copyright law, the one that probably comes the closest to a provision aimed at protecting the interests of the 'common consumer' is the private

copying exception. But this exception is strictly regulated under European copyright law in order to safeguard the rightholder's interests. Hence, European copyright law expressly excludes any possibility for the lawful user, e.g. the consumer, of an electronic database to make a private copy. According to the Computer Programs Directive, the right of the lawful user, e.g. the consumer, is restricted to making a back-up copy of the software insofar as such a copy is necessary for that use. The right to make a private copy of all other categories of works protected by copyright is governed by the Information Society Directive. Since the implementation of this provision was left at the discretion of the Member States, not all of them have chosen to transpose it into their national legal order. As a result, the United Kingdom and Ireland currently admit in their copyright law only a very narrow private copying exception for purposes of time-shifting of broadcasting programs (Gowers, 2006). All other forms of private copying in these countries are subject to the authorization of the rightholder.

Also in contrast to consumer rights, exceptions on copyright are not considered ''rights'', but have been rather qualified by European courts and lawmakers as just that: exceptions! The provisions in copyright law permitting certain unauthorized acts in relation to protected works are mostly seen as a deviation from the general principle of the rightholder's exclusivity and generally not a user's right. Such deviation, or exception, must be interpreted restrictively, according to several national court decisions and the Court of Justice of the European Union. Consequently, although exceptions and limitations are seen as an integral part of the copyright system, the weight they receive is only as strong as the interest behind them (Guibault, 2002, p. 109). It follows from this that consumers have no direct enforceable claim against rightholders to demand the application of an exception. In case of conflict, a judge when deciding whether an exception applies will first have to weigh the interests of the person benefiting from the limitation against the rights of the rightholder. This means that exceptions and limitations on copyright are only exceptionally declared mandatory, with the result that rightholders can easily set them aside either through the application of TPMs or through contractual agreements (van Eechoud *et al*., 2009, p. 106).

In practice, the application of a TPM on a work pursuant to the Information Society Directive may result in preventing the consumer from exercising the exception of private copy recognized in that same Directive. This will happen, for example, each time a rightholder will protect her work by means of any anti-copy device: in this case, the anti-copy technique will prevail over the provisions of the copyright act. The sale of tangible digital supports equipped with anti-copy devices, which prevent consumers from making any copy for time or place shifting purposes, gives rise to serious consumer protection issues (Guibault, 2008). In several cases brought before the French courts, the French consumer protection association argued successfully on the basis of consumer protection law that the sale of a digital support equipped with anti-copy devices without indication that the support may not be suited to play on certain equipment was misleading to the consumer. The fact that consumers of copyright protected works are unable to rely on existing copyright rules to defend their interests has triggered various, increasingly urgent, calls for ''consumer rights'' to improve their legal standing within the copyright regime (Mazziotti, 2008).

3.3 Different concepts of property

Consumer law and copyright law also diverge quite dramatically in their conception of property, divergence which is especially visible in relation to digital content. Content as music, movies, books, video games or software can be delivered either on a tangible medium such as a CD, DVD, USB stick etc. or through electronic means. It has been argued that the medium in which the digital content is embodied essentially contributes to the determination of the tangible or intangible nature of the content: a movie on a DVD would be tangible, whereas the same movie downloaded through the Internet would be intangible. While the distinction between goods and services can intuitively be made between a movie distributed on a CD and one made available through the Internet, it is quite a challenge to apply this distinction to a vast array of forms of online or off-line distribution of digital content that are neither true good nor pure service (Schmidt-Kessel, 2011, p. 5).

A basic tenet of European copyright law is that ownership of a physical copy of a work does not grant any ownership in the copyright on the work embodied in the physical object. For example, a purchaser of a book or videotape becomes the owner of the physical copy embodying the work, but only a licensee of the copyright in the work. Copyright owners enjoy under European copyright law the exclusive right of reproduction and of material and immaterial communication to the public. The right of material communication to the public is also known as the right of distribution and concerns the control of the distribution of the work incorporated in a tangible article. This right is exhausted by the first sale, or other transfer of ownership in the Community, of the original of a work or copies thereof by the rightholder or with his consent. The copyright holder has therefore the exclusive right to distribute his work on a CD, DVD or USB stick. Once the work is sold on such a tangible medium, the purchaser becomes the owner of the physical object and has a license to use the work embodied in it. In application of the exhaustion doctrine, the purchaser of this tangible embodiment of the work may resell it, destroy it or give it away.

The copyright rules differ entirely, however, when dealing with the immaterial communication to the public of digital content. In such a case, the work is not embodied in a tangible medium, and the distribution right is not applicable. According to the Information Society Directive, 'the question of exhaustion does not arise in the case of services and on-line services in particular (. . .). This also applies with regard to a material copy of a work or other subject matter made by a user of such a service with the consent of the rightholder. Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorization where the copyright or related right so provides.' One may therefore contend that on-line services would cover the making available of a movie, whether it is in an interactive way or not. Anytime a movie is provided online, including when the consumer makes a copy thereof, it can in principle not be resold or otherwise transferred to another consumer without the copyright holder's authorization. Some commentators strongly criticize this distinction and call for a reform of the copyright system, arguing that such unequal treatment between the physical and non-physical copies of works is unjustified either for technological or trade-related reasons. The Court of Justice of the European Union recently delivered a bold decision in the UsedSoft v. Oracle case[7], concluding that Oracle's making available of software on the Internet amounted to a ''sale'' because the license and downloading formed an inseparable whole. Customers paid one price for the right to use what they purchased for an unlimited period of time.

The diverging views on property also bare consequences for the supplier. In the case where digital content is provided on a tangible medium, the trader is normally obliged under consumer and contract law to transfer the ownership of the tangible medium. This obligation is typically performed when the physical medium is delivered to the consumer. In this case, the digital content is typically transferred to the consumer on a permanent basis for permanent use (Schmidt-Kessel, 2011). The trader is typically not required to transfer the ownership of the digital content itself, or more specifically, of the intellectual property rights associated with the digital content. The grant of a licence of use implies that the consumer is made aware of the existence of such intellectual property rights and, more importantly, that the trader cannot be held liable for the mere fact that a third party argues that its intellectual property rights are infringed. Nevertheless, the consumer may reasonably expect that she will be able to peacefully enjoy the use of the digital content in accordance with its ordinary use. Where the consumer is not informed of restrictions as to the normal use of the digital content and rights of third parties have not been cleared or stand in the way of the consumer's peaceful enjoyment of the digital content, this constitutes a non-conformity for which the trader is liable.

3.4 Different ideas about the internal market

The realization of a single consumer market for digital content is high on the European political agenda. ''Buy what you want, where you want'' also includes the ability of consumers to buy online irrespective of national borders, as evidenced by Art. 20 (2) of the Services Directive, ''[M]ember States shall ensure that the general conditions of access to a

service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria.'' In practice however, exclusive distribution agreements in the upstream relationship probably form a decisive factor for territorial differentiation in the digital service sector, and here particularly the practice of territorial licensing of copyright (e.g. in music or video content).

A core principle of copyright is its territorial nature. The rightholder's exclusive rights are strictly limited to the territorial boundaries of the Member State where the right is granted. Works are, accordingly, protected in Europe by a bundle of 27 parallel (sets of) exclusive rights. For each right, the national copyright laws determine its existence and scope (Hugenholtz *et al.*, 2006, p. 238). The territoriality of intellectual property rights flows from international copyright law, and here in particular the Berne Convention, and has been confirmed in European Community law[8].

Arguably, Art. 20 (2) of the Services Directive could put an end to the use of territorial licensing, contractual conditions that restrict usage of digital content in particular countries or the outright refusal to serve consumers in certain countries for which rights have not been cleared. However, this provision confirms the exceptional status that copyright law related considerations occupy, also in consumer law. The makers of the Directive saw the need to specify that the non-provision of a service to a consumer for lack of the required intellectual property rights in a particular territory does not constitute unlawful discrimination, leaving the practice of territorial licensing undisputed. This approach found initial support in the case law of the European Court of Justice, in its Coditel I decision[9]. Since then, however, the attitude of the Court towards territorial licensing seems to have changed. In the recent Premier League decision the Court explicitly stated that territorial exclusivity is ''irreconcilable with the fundamental aim of the Treaty, which is completion of the internal market''[10]. The decision came at a time when the principle of territoriality in copyright law is under high political pressure, exactly for the reason that it sits at odds with the European single market policy and consumers' right to choice and non-discrimination. In response to the publication of the second report on the implementation of the Conditional Access Directive, the European Commission ''bemoans the sluggish growth of cross-border conditional-access services on offer'' and intends to investigate that matter further. Since then, the European Commission has steered steadily towards ending the practice of territorial fragmentation as a result of restrictive licensing practices. In this context, the European Commission also announced its intention to pay special attention to the implementation of Article 20 of the Services Directive.

4. Conclusion

As this paper has shown, dealing with the growing number of copyright law-related concerns of consumers within the framework of consumer law encounters a number of obstacles. This is particularly true in situations where consumers rely on consumer law to invoke ''privileges'' granted to them under copyright law, such as the private copying exception and the exhaustion doctrine. The difficulty lies in the fundamental conceptual differences between consumer law and copyright law regarding the objectives and beneficiaries of each regime, as well as diverging conceptions of ''property'', ''user rights'' and ''internal market''. Such discrepancies undeniably follow from the fact that each regime traditionally never had to deal with each other's concerns: consumers never played a role in copyright law, whereas copyright protected works were not seen as consumer goods.

Digital reality has changed the public's perception of copyright protected works for good: since digital content can be accessed and used by everyone in the comfort of her own home, it has become a consumer product. Based on their experience with analogue goods, consumers have developed specific expectations towards digital content that they want to see met. Consequently the rules of both areas of the law will have to grow towards each other, be it as a result of judicial interpretation or as a direct legislative amendment. Knowing how generating trust, creating a functioning legal framework for digital content markets and

accommodating the interests and concerns of digital consumers has become a top priority on the European Digital Agenda, it is to be expected that both set of rules will eventually be made to bend so as to take account of the consumers' reasonable expectations. This article has sought to make a step towards better understanding the conceptual issues that first need to be overcome before a truly functioning and effective body of ''digital consumer law'' can start to form.

Notes

1. Directive 2011/83/EU on consumer rights, OJ 2011, L 304/64, Arts. 5 (1)(g) and (h), 6 (1)(r) and (s).
2. Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final, proposal of 11 October 2011.
3. European Court of Justice, Case C-403/08 en C-429/08), Premier League, 4 October 2011.
4. European Court of Justice, Case C-70/10, Scarlet/Sabam, 24 November 2011; European Court of Justice, Case C-360/10, Sabam/Netlog, 16 February 2012, see also European Court of Justice, 29 January 2008, Case C-275/06, Promusicae.
5. European Court of Justice, Case C-210/96, *Gut Springheide GmbH and Rudolf Tusky* v. *Oberkreisdirektor des Kreises Steinfurt – Amt fuer Lebensmittelueberwachung*, 1998 ECR I-04657, para. 55; Case C-470/93, *Verein gegen Unwesen in Handel und Gewerbe Koeln* v. *V.v. Mars GmbH*, 1995 ECR I-01923, para. 24.
6. *Leitner* v *TUI Deutschland GmbH & Co KG* (C168/00) [2002] 2 CMLR 6; Case C-178/94, *Dillenkofer* et al. v. *Germany* [1996] ECR I-4845.
7. Case C-128/11, Court of Justice of the European Union, 3 July 2012.
8. See, e.g. European Court of Justice, Lagardère Active Broadcast, Case C-192/04, ECR 2005, p. 7199.
9. European Court of Justice, Case 62/79, *Coditel I*, ECR 1980 Page 881, para. 15, 16.
10. European Court of Justice, Case C-403/08 en C-429/08, 4 October 2011, Football Association Premier League, para. 115.

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