Central European University
Legal Studies
LL.M. in International Business Law

Reconceptualising E-Consumer Protection:
How to ensure end-user license agreements do not prejudice legitimate interests under EU law

by

Katalin Novák

LL.M. Short Thesis
Course: International and Comparative Intellectual Property Law
Professor: Caterina Sganga

Central European University
1051 Budapest, Nádor utca 9
Hungary

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ABSTRACT

This research seeks to investigate the protection offered by existing EU consumer protection law to e-consumers against end-user license agreements. It finds that despite the passage of numerous consumer protection directives, there remains a lack of regulation focused specifically on the addressing the consumer-related problems caused by restrictive end-user license agreements. This has meant that e-consumers do not have effective legal remedies against rightsholders who seek to circumscribe the rights that would normally be available to them under copyright law.

As a solution to this problem, this research proposes a two-part solution. The first recommendation is the reconceptualisation of the definition of 'consumer' currently employed by EU law in order to better represent the dynamic relationship that many e-consumers have with digital works, as well as to take into account the complex interaction of laws that e-consumers are subject to. The second recommendation is the reconceptualisation of the existing system of digital consumer protection along the lines of a fundamental rights-based approach, which would provide e-consumers with inalienable rights that would be able to override restrictive contractual provisions.

INTRODUCTION

There is no doubt that creativity is the most important human resource of all. Without creativity, there would be no progress, and we would be forever repeating the same patterns. – Edward de Bono[1]

Creativity is a highly valued asset in our society: it allows us to innovate, to think outside the box and to develop as a society. The manifestation of new ideas, however, is a lengthy and laborious process and not every one of us is a gifted visionary. In recognition of this fact, the law seeks to protect the creator by granting him certain rights and privileges that effectively provide him with a monopoly on the creation. This is believed to act as a financial incentive for such labour and thus promote future investment in intellectual creation.[2] However, two recent trends are challenging this assumption.

The first development is the increased availability of a wide variety of works in digital form. Initially this meant mostly images and music, but recently the repertoire of e-products has expanded to include downloadable movies, TV shows, books, art, and apps. In such a form, a work is not only easily sharable, but also re-usable and adaptable, meaning that existing works can easily serve as a basis for the creation of new works.[3] Therefore, the same technological advances which made digitalisation possible also allow us to interact with works in a more dynamic way. Widespread access to creative programmes such as Photoshop, GarageBand and Premier has launched a new 'remix' culture in our society, especially among our youth, who have grown up with digital technology and take many of its features for granted. As such, many of us are no longer passive consumers, but active creators of digital content.[4]

[1] 'Creativity and Innovation: European Year 2009'. De Bono Foundation. Available online at <http://www.debonofoundation.co.uk/2009.html> Accessed 18 Feb. 2012.
[2] See for example, the EC Green Paper on 'Copyright in the Knowledge Economy', Brussels, COM(2008) 466/3. Available online at <http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/greenpaper_en.pdf> Accessed 05 Feb. 2012.
[3] For example, many amateur music videos on YouTube are created by setting a slideshow of meaningful photographs or images to music.
[4] For a detailed examination of the history and effects of the remix culture, see Lessig, Lawrence. Remix: Making Art and Commerce Thrive in the Hybrid Economy. (Penguin Books: New York, 2008).

The second development is that of increased access to computing devices. The widespread use of laptops,[5] tablets[6] and mobile devices[7] with their ability to connect to the internet wherever we are has meant that more and more people have instantaneous access to digital material. Such advances (which were almost unimaginable 20 years ago) have also had a tangible effect on the media market. The growing ease of access to digital media has forced companies to shift their focus from the sale of physical goods, such as CDs and DVDs, to the provision of digital content,[8] creating a feedback loop whereby even more digital content is made available for use.

As fascinating as these developments may be from a sociological perspective, from a legal perspective, they have solicited mixed responses. On one hand, such unprecedented use of content frequently clashes with the interests of the copyright holders who own the legal rights to a work which has been remixed. In fact, there is a shared view among rightsholders that creative re-using of copyrighted works amounts to 'theft' on the basis that the remixer frequently ask for no permission, gives no credit, and pays no royalties for the works used. From the perspective of the users, however, the property rights-based approached of the rightsholders is outmoded and restrictive, constraining the 'sharing-economy' propagated by the remix culture. Evidently, there is a clash of cultures between users and rightsholders, one which the law has yet to satisfactorily address.

Copyright law – meant to govern access to and use of intellectual and creative works – has been unable to cope with the fast pace of technological progress and the social changes it has wrought. As a result, the traditional 'golden triangle' of copyright law (composed of the author,

[5] In 2011, PC sales reached 370 million. 'PC sales will top 370m units in 2011', Computer Industry Almanac. Available online at <http://c-i-a.com/pr072011.htm> Accessed 04 Feb. 2012.
[6] In 2011, tablet and other 'mobile PC' sales reached 227 million. *Ibid.*
[7] In the US alone, 84.4 million people are expected to own a smart phone by 2012, a 15.1% growth from 2011. 'The Future of Smart Mobile Devices', 10 Feb. 2011, eMarketer.com. Available online at <http://www.emarketer.com/Article.aspx?R=1008228> Accessed 09 Oct. 2011.
[8] In the field of music, for example, digital sales revenue grew by 6% in the US in 2010, accounting for 29% of the record companies' total trade for that year. 'IFPI publishes Digital Music Report 2011', 20 Jan. 2011, International Federation of Phonographic Industry. Available online at <http://www.ifpi.com/content/section_resources/dmr2011.html> Accessed 09 Oct. 2011.

the rightsholder and the user)[9] is being governed more and more through the private law mechanism of contract. Unable to validate their interests through the traditional mechanisms of copyright law, rightsholders are increasingly relying on contractual tools known as 'end-user license agreements' (EULAs) in order to circumscribe the ways in which their works may be used. While the main aim of EULAs is to prevent authorised use of copyrighted material, their reach is typically much broader and they frequently prevent consumers from being able to make full use of their legally purchased digital media, as well as interfering with the privacy and rights.[10] In addition, rather than curtailing the recourse to EULAs on consumer protection grounds, the law actually encourages their use on the basis that they "give effect to the principles and guarantees laid down in [intellectual property] law."[11] This lack of regulation has "enable[d] rightholders to exercise unprecedented control over the use of copies after purchase,"[12] raising important questions about the scope of copyright law and the rights of users and consumers in relation to intellectual works.

This paper seeks answer one of these questions, namely, how to ensure that end-user license agreements do not prejudice consumer interests under EU law. The solution is presented in two parts, one being theoretical, and the other being practical. With regards to theory, the current definition of 'consumer' under EU law needs to be reconceptualised in order to take into account the interactive relationship that many consumers have with their digital media. To this end, a new term needs to be formulated that takes into account the different types of interactions (i.e. active vs. passive) that digital consumers have with online media. With regards to practice, the protection of digital consumer interests needs to be accomplished in a way that takes into account the complex interaction of laws that digital consumers are subject to, namely copyright,

[9] Willem Grosheide, F. 'Copyright law from a user's perspective: access rights for user', E.I.P.R. 2001, 23(7), pg. 321
[10] Elkin-Koren, Niva. 'Making Room for Consumers under the DMCA', Berkley Technology Law Journal, Vol. 22, No. 3, 2007. Available online at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1024566> Accessed 09 Oct. 2011. pg. 1.
[11] Recital 13 of EC Directive 2001/29 of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (the InfoSoc Directive). Available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF> Accessed 09 Oct. 2011.
[12] Elkin-Koren, Niva, *Op. cit.* pg. 1.

consumer protection and contract law. This paper proposes that the best candidate for this task is the fundamental rights approach as it is able to provide 'inalienable' protection due to the supremacy of constitutional law.

The paper is divided into three chapters. Chapter 1 provides an overview of end-user license agreements and how they impact digital consumers. It also highlights the inadequacies of existing consumer protection legislation at the EU level for addressing digital consumer concerns. Chapter 2 focuses on the theoretical issue of the reconceptualisation of 'consumers' in the field of e-commerce by explaining why the current definition of 'consumer' is insufficient and what considerations need to be taken into account when choosing a more appropriate term. It also examines possible implications of such a reconceptualisation for rightsholders who make use of restrictive licence terms. Finally, Chapter 3 turns to the more practical matter of the need to reconceptualise the scheme of protection afforded to digital consumers by examining why consumer protection, by itself, is not enough to safeguard e-consumer interests. To this end, the chapter highlights the benefits of a fundamental rights based approach and examines the implications of such an approach for e-consumers.

1. Overview of End-User Licences Agreements

End-user license agreements (EULAs) are contracts that "allocate rights and obligations" of the end-user of a copyrighted work in such a way as to allow the rightsholder to retain a measure of control over how the product is used after purchase.[13] In other words, works are 'licensed', rather than 'sold' to consumers; the difference is that whereas a sale transfers ownership rights to the buyer, a license is a revocable permission that merely allows the buyer to "commit some act that would otherwise be unlawful".[14]

The aim of this chapter is to provide an overview of these 'end-user license agreements' (EULAs) by outlining how they work in practice (Section 1.1), how they affect consumers (Section 1.2), and to what extent they are regulated under EU law (Section 1.3).

1.1. EULAs in Practice

EULAs first became popular with the software industry in the early 1990s as a way of protecting unauthorised software copying through contractual means in the absence of other forms of protection.[15] Even though legislative intervention has since then afforded copyright protection,[16] EULAs have remained in use and have, in fact, spread to other industries on account of their versatility. The main reason for their attractiveness is that they allow rightsholders not only to circumscribe the terms under which their products can be used, but also to limit their liability in the event the product failure, thus providing a cheap and effective mechanism through which to enforce their rights and interests.[17] Furthermore, EULAs are a far more effective at protecting rightsholders' interests than copyright law: instead of having to abide by limitations on their rights imposed by the law, rightsholders can draft licenses virtually without constraints, thus allowing them to 'contract out' important consumer protection

[13] Marotta-Wurgler, Florencia. 'Will increased disclosure help? Evaluating the recommendations of the ALI's 'Principles of the law of software contracts", 78 U. Chi. L. Rev. pg. 165.
[14] 'License'. Black's Law Dictionary. (9th ed.) Garner, Bryan A. (edit.). (West: St. Paul, MN, 2009).
[15] Mazziotti, Giuseppe. . EU Digital Copyright Law and the End-User. (Springer: Heidelberg, 2008). pg. 58-9.
[16] Software was afforded international copyright protection by Article 10 of the World Trade Organisation's Trade-Related Aspects of Intellectual Property Rights (TRIPs) agreement of 1994. At the EU level, Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs provides the same protection.
[17] Marotta-Wurgler, Florencia. *Op. cit.* pg. 410.

safeguards. In this sense, what constitutes 'lawful use' is prescribed not by law, but by contract, which undermines the existence of exceptions and limitations built into the law of copyright.[18]

Most EULAs take one of three forms. The first, known as 'click-wrap', refers to those licenses that require the consumer to agree to a set of terms and conditions before he accesses a website, downloads a service, or buys a product online. This is done by clicking on an 'I agree' box, usually located at the bottom of the webpage. The text of these agreements is sometimes viewable on the same page as the 'I agree' box, but is oftentimes accessible only by clicking a link (this latter form being known as 'browser-warp'). Another type, known as 'shrink-wrap', is most commonly used by software distributors, and refers to those EULAs that come into effect when the consumer takes the product out of its box or wrapping, despite the fact that these terms were not agreed on at the time of the purchase.[19] The third type of EULA is one that becomes binding solely by virtue of the fact that the consumer has accessed a service. In other words, by making use of a service, the consumer has implicitly 'agreed' to the site's terms and conditions, a fact which the consumer is only made aware of if he decides to look at those terms and conditions.[20]

Despite their prevalence, however, most consumers are unaware of the existence and contents of EULAs.[21] While the understanding on the part of the rightsholders is that consumers will read the licenses, and if they are unhappy about the terms contained therein, they will return the unopened product, or choose not to make use of that particular service,[22] the reality is that most users will simply 'agree' to the terms and conditions without ever bothering to read them[23]. The reason for this is three-fold:

[18] Synodinou, Tatiana-Eleni. 'The lawful user and a balancing of interests in European copyright law', IIC 2010, 41(7), pg. 831.
[19] Morrow, Paul J. 'Cyberlaw: the unconscionability/unenforceability of contracts (shrink-wrap, clickwrap and browser-wrap) on the Internet: a multijurisdictional analysis showing the need for oversight'. 11 U. Pitt. J. Tech. L. & Pol'y 7, pg. 4.
[20] See for example, 'Terms of Use of BBC Online Services', BBC Online. Available online at <http://www.bbc.co.uk/terms/personal.shtml> Accessed 21 Jan. 2012.
[21] *Ibid.*
[22] Guibault, Lucie. Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright. (Kluwer Law Int.: London, 2002). pg. 201.
[23] Marotta-Wurgler, Florencia. *Op. cit.* pg. 410.

- EULAs tend to be long documents full of complicated legal jargon that most people would not be able to fully understand without the help of a qualified legal practitioner;[24]
- Consumers are not really interested in license conditions as they simply want the product or service[25] and assume that it will be available to them on the same terms as it would be on the analogue world (i.e. in the form of a sale);
- Since most online providers make use of virtually identical terms and conditions, consumers generally with no choice but to 'accept' EULAs if they want the product or service.[26]

The result of these three factors is consumer ignorance and apathy which allows rightsholders to insert into their agreements license terms that prejudice consumer interests. The most common types of terms seek to restrict the ability of consumers to fully enjoy their legally purchased goods and services, through the use of digital rights management (DRM) technology. At the same time, these terms work to maximise the licensor's rights in order to ensure a high level of post-purchase control over activities of consumer. Naturally, such terms have adverse effects on consumers, resulting in a lack of transparency, imbalance in bargaining power, restrictive terms of use, and lack of remedies, which are the subject of the following section.

1.2 The Effect of EULAs on Digital Consumers

With regards to the obstacles faced by consumers that bar their free enjoyment of legitimate purchases, lack of transparency is in some ways the most important because it is from it that the other issues flow. Lack of transparency covers two related concerns, both stemming from the way in which contract terms are presented and formulated. Specifically, it refers to instances when the supplier has failed to provide important information about its product or service, or when the supplier has provided inaccurate or misleading information. An example of

[24] In one study, it was found that EULAs tend to average between 11 and 41 pages; this did not include additional terms and conditions such as Terms of Use, Terms of Service, Privacy Policies and third party conditions. Grossklags, Jens and Good, Nathan. 'Empirical studies on software notices to inform policy makers and usability designers' 6 Feb. 2007. Available online at <http://www.usablesecurity.org/papers/grossklags.pdf> Accessed 15 Jan. 2012. pg 7.
[25] Morrow, Paul J. *Op. cit.* pg. 4.
[26] Goodman, Batya. 'Honey, I shrink-wrapped the computer: the shrink-wrap agreement as an adhesion contract'. 21 Cardozo L. Rev. 319, (October 1999) pg. 321.

the first instance is not informing consumers that a certain brand of mp3 player can only play music files downloaded from a specific provider.[27] With regards to the second instance, the practice of drafting long and complicated EULAs that prevents end-users from forming an accurate understanding of their rights and obligations serves as an example. In both cases, a lack of transparency bars the ability of the consumer to formulate a clear and objective assessment of the product or service s/he is contemplating on buying because the supplier has not provided the necessary information. This is important because without such information, the consumer can easily be misled about the true nature of the product/service that is being provided, and end up buying something other than what they actually want.

Lack of transparency, in turn, creates an imbalance in bargaining power between the supplier and the consumer. A seller-buyer relationship will naturally contain some inequality: a seller will always be more knowledgeable about his product/service than the consumer, and the buyer is reliant on the seller in order to acquire the desired product/service. However, this imbalance is magnified in the case of online contracting as a result of three factors:

- Unlike in the physical world, the consumer is unable to examine the goods prior to purchase, and thus assure himself that it meets his expectations, and that it is free from any defects;
- The lack of face-to-face contact between the consumer and the seller on the one hand, and the high volume of transactions on the other, necessitates reliance on pre-fabricated, standardised contracts which preclude the possibility on the part of the consumer to negotiate the individual terms in his favour;[28]
- Because sellers who provide products/services online tend to use virtually identical licensing terms, the ability of the consumer to 'walk away' from one deal and find a more suitable alternative[29] is greatly diminished.

[27] TGI Nanterre, 15 décembre 2006, *Association UFC Que Choisir v. Société Sony France, Société Sony United Kingdom, Ltd*. Available online at <http://www.juriscom.net/documents/tginanterre20061215.pdf> Accessed 21 Jan. 2012.
[28] Guibault, Lucie. (2002). *Op. cit*. pg. 119-120.
[29] Simister, Paul. 'Buyer Power & Supplier Power – The Impact of Bargaining Power'. *Business Coaching*. Available online at <http://businesscoaching.typepad.com/the_business_coaching_blo/2008/05/industry-analysis-buyer-power-supplier-power.html> Accessed 29 Jan. 2012.

In short, by exploiting certain features inherent to online contracting, sellers are able to magnify their bargaining position to the detriment of that of the consumer.

The supplier is able to further take advantage of the lack of transparency by drafting restrictive license terms that greatly enhance his position, usually at the expense of the rights of the consumer. First, these license terms allow the seller to control the manner in which the consumer is able to use his product: in addition to restricting the legal uses within the contract itself,[30] sellers make use of DRM technology[31] which allows them to physically limit access to products and service. For instance, content may be made available for only certain classes of users (e.g. for paying ones only); certain functions may be limited (e.g. the number of copies that can be made), and certain uses may be prevented all together (e.g. printing, copying, or modifying the file format, thus preventing interoperability with other systems).[32] Second, license terms give the seller the right to monitor the buyer's use of the product, and intervene if any unauthorised acts are detected. This can include blocking access to content, deleting legally purchased files,[33] as well as terminating a user's account and precluding future access to services and content[34]. Not only can this monitoring impede the consumer's free use and enjoyment of the product or service, but it also raises important privacy considerations because data thus collected from the user's computer may be transmitted to third parties without the user's knowledge.[35] Finally, license terms allow the seller to take civil and/or criminal action against a consumer who violates any of the provisions of the contract, especially for copyright violations.[36]

[30] See for example, Microsoft – Information on Terms of Use. Available online at <http://www.microsoft.com/about/legal/en/us/IntellectualProperty/Copyright/Default.aspx#EEB> Accessed 04 Feb. 2012.
[31] DRM is a form of encoding that allows the rightsholder to control the use of a digital work after sale by limiting, for example, on what types of devices it can be played, or how many times it can be copied. 'Copy protection measures (DRM's)', Intellectual Property Office. Available online at <http://www.ipo.gov.uk/c-protect.htm> Accessed 14 Jan. 2012.
[32] Elkin-Koren, Niva. *Op. cit.* pg. 5.
[33] Brown, Peter. 'What is DRM? Digital Restrictions Management', DefectivebyDesign.org. Available online at <http://www.defectivebydesign.org/what_is_drm> Accessed 29 Jan. 2012.
[34] See, for instance, iTunes Terms and Conditions, available online at <http://www.apple.com/legal/itunes/us/terms.html> Accessed 29 Jan. 2012.
[35] See, for instance, Adobe Software License Agreement, available online at <http://www.adobe.com/products/eulas/pdfs/Gen_WWCombined-20110105_1512.pdf> Accessed 29 Jan. 2012.
[36] See, for instance, iTunes Terms and Conditions, *Op. cit.*

The same latitude of rights does not apply to consumers, however, who frequently find that they have a lack of sufficient remedies against the seller. License terms generally bar consumers from taking any type of legal action against the seller by granting sellers limited liability. This precludes any guarantees and warranties in relation to products, a fact which the consumer is deemed to have 'accepted' when he made his purchase.[37] Research carried out by the University of Amsterdam's Centre for the Study of Contract Law highlights that even when remedies are guaranteed under national law, clever contract drafting can take advantage of legal loopholes in order to minimise the effect of such provisions.[38] For instance, if an agreement purports to be a consumer sales contract, then an EU consumer has the right to withdraw from it within 7 working days[39] after the product was received, and also has recourse to a range of remedies. However, if the contract is styled as a service contract, then the consumer has no right of withdrawal once the service has commenced, and any available remedies may be limited.[40] While the passing of the new Consumer Rights Directive[41] aims to strengthen consumer protection in this field, it does not do much to redress this specific loophole: Recital 19 simply states that "contracts for digital content which is not supplied on a tangible medium should be classified […] neither as sales contracts nor as service contracts." This phrasing thus leaves the door open for further creative lawyering on the part of rightsholders that is potentially detrimental to the interests of consumers.

[37] See, for instance, iPod Software License Agreement, available online at <http://images.apple.com/legal/sla/docs/ipod.pdf> Accessed 29 Jan. 2012.

[38] 'Digital content services for consumers: Comparative analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content services' University of Amsterdam, Centre for the Study of European Contract Law and Institute of Information Law. Available online at <http://www.jur.uva.nl/template/downloadAsset.cfm?objectid=20DEB747-CAFC-4D01-A522455A61E02E74> Accessed 18 Feb. 2012. pg. 3.

[39] This cooling off period is to being increased to 14 days following the adoption of the new Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights (full citation at footnote 41), which is set for implementation in 2013.

[40] University of Amsterdam. *Op. cit.* pg. 3

[41] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council. [2011] OJ L304/64. Available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:0088:EN:PDF> Accessed 12 March 2012.

In sum, lack of transparency, and the additional problems that stem from it, significantly interferes with consumers' ability to use digital works that they have purchased. Not only do they frequently run into problems relating to a lack of interoperability between products and services of different providers, but they also face incursions into their privacy and oftentimes have few remedies against faulty products. Even though the issue of consumer protection in the context of digital content has received attention from both the courts and the legislature, as shown in the next section, the existing legal framework does not provide effective protection because it fails to take user interests into account in the same way that it does with rightsholders' interests.

1.3 The Regulation of EULAs

From a legal perspective, EULAs are tricky to categorise on account of the fact that they straddle the intersection between contract and copyright law. On one hand, they are private agreements entered into between the licensor (the person who grants permission for use the use of copyrighted works) and the licensee (the person who is the recipient of the permission), containing specific terms about the nature and scope of the license in question. On the other hand, the object of a EULA's focus is a creative or intellectual work, which also invokes copyright law's protections and limitations. Perhaps a result of this ambiguity, EULAs are not specifically regulated under EU law despite the fact that a high premium is placed on consumer protection.[42] Nevertheless, EULAs can be deemed to fall within the scope of four pieces of legislation,[43] namely the Distance Contracts Directive,[44] the E-Commerce Directive,[45] the Unfair

[42] See Article 12 of the Consolidated version of the Treaty on the Functioning of the European Union. [2008] OJ C115/47. Available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF> Accessed 18 Feb. 2012.
[43] Guibault, Lucie. (2002), *Op. cit.* pg. 206.
[44] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect to Distance Contracts. Available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1997:144:0019:0027:EN:PDF> Accessed 21 Jan. 2012.
[45] Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, particularly electronic commerce, in the Internal Market (Directive on electronic commerce). Available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:178:0001:0016:EN:PDF> Accessed 21 Jan. 2012.

Contract Terms Directive,[46] and the Unfair Commercial Practices Directive[47]. Together, these directives form the core of consumer protection law in relation to online contracting.

The Distance Contracts Directive and the E-Commerce Directive seek to provide specific protection for consumers in non-face-to-face contracting in order to safeguard them against information asymmetries.[48] For instance, the Distance Contracts Directive provides that for such contracts to be enforceable, the supplier must provide certain mandatory information to the consumer in order to allow him to make a proper appraisal of the goods in question[49] and to prevent the charging of any hidden costs[50]. Furthermore, the Directive allows a consumer to withdraw from any transaction within 7 working days "without penalty and without giving any reason" if he is unhappy with the product or service.[51] Since the Distance Contracts Directive was passed to deal primarily with teleshopping and catalogue ordering,[52] the E-Commerce Directive was enacted in 2000 to extend the information requirements contained therein to electronic contracts as well[53]. In addition, the newer Directive mandates that the contract terms

[46] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. [1993] OJ L95/29. Available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1993:095:0029:0034:EN:PDF> Accessed 18 Feb 2012.

[47] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'). [2005] OJ L149/22. Available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:EN:PDF> Accessed 18 Feb. 2012.

[48] According to Article 2(1) of the Directive, distance contract is "any contract concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier, who, for the purposes of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded."

[49] Article 4(1)(b) of the Distance Contracts Directive, *Op. cit.*.

[50] Article 4(1)(c) and (d) of *Ibid.*

[51] Article 6(1) of *Ibid.* Crucially, however, this right does not apply where the consumer has already unwrapped audio or video recordings or computer software supplied to him/her (Article 6(3)), thus creating a big gap in the scope of protection.

[52] 'Distance Contracts', *Europa: Summaries of EU Legislation*. Available online at <http://europa.eu/legislation_summaries/consumers/protection_of_consumers/l32014_en.htm> Accessed 29 Jan. 2012.

[53] Vernadaki, Zabia. 'Consumer protection and the reform of the European consumer acquis', I.C.C.L.R. 2010, 21(9), pg. 318.

and any general conditions must be "easily, directly and permanently accessible,"[54] as well as storable and reproducible by the consumer[55].

Complimenting these two directives are the Unfair Contract Terms Directive and the Unfair Commercial Practices Directive which seek to discourage business from making use of contract terms and practices (respectively) that can cause detriment to,[56] or deceive[57] consumers in relation to products and services. Together, these two directives aim to impose "a negative obligation on the service provider from misleading consumers on the main characteristics of a good or service."[58] However, both fall short of providing unambiguous protection against unfair license terms. With regards to the Unfair Contract Terms Directive, for instance, Article 4(2) bars the application of the directive to "the main subject matter of the contract". Since 'main subject matter' is not defined, a question arises whether terms that limit copyright exceptions or otherwise seek to alter the balance between the consumer's and rightsholders rights as provided in other areas of law comprise 'the main subject matter of the contract' (in which case such terms are outside of the scope of consideration), or fall outside of it (in which case such terms fall within the scope of the legislation). Uncertainty about the scope of application also exists with regards to the Unfair Commercial Practices Directive, which prohibit misleading actions (Article 6) and misleading omissions (Article 7) in relation to "the main characteristics of a product".[59] While the Directive provides an indicative list of what constitutes a 'main characteristic', it is unclear whether information relating to interoperability, compatibility and playability of devices and files fall within the scope of the directives.[60] Arguably such functions

[54] Article 5(1) of the E-Commerce Directive, *Op. cit.*
[55] Article 10(3) of *Ibid.*
[56] See Article 3 of the Unfair Contract Terms Directive, *Op. cit.*
[57] See Article 5 of the Unfair Commercial Practices Directive, *Op. cit.*
[58] Guibault, Lucie. 'Accommodating the Needs of iConsumers: Making Sure They Get Their Money's Worth of Digital Entertainment', J Consum Policy (2008) 31. Available online at <http://www.ivir.nl/publications/guibault/Lucie_Guibault_Accommodating_the_Needs_of_iConsumers.pdf> Accessed 08 March 2012. pg. 413.
[59] See Article 6(1)(b) and Article 7(4)(a)
[60] *Ibid.*

could be interpreted as falling under Article 6(1)(b) reference to "results to be expected from [the product's] use", but such application remains unclear in lieu of specific case law.

While the aforementioned directives have been important in ensuring that consumer protection law extends into online contracting, none of them deal explicitly with the root of the problem facing consumers today. In the case of the Distance Contracts and E-Commerce Directive, the scope of regulation is limited merely to the *recognition* of distance and e-contracts, respectively, as valid contract forms.[61] While they do contain some provisions about mandatory content in order to increase consumers' appraisal ability, these simply require the provision of *technical* information (such as what steps need to be followed to conclude the contract and whether the contract is available in multiple languages),[62] as opposed to *material* information related to their product or service. The Unfair Commercial Practices Directive addresses this problem by requiring information to be provided about the 'main characteristics' of a product or service, but this requirement still does "not eliminate the risk that rights owners might abuse their economic and bargaining position by making systematic use of license terms that are unfavourable to consumers."[63] Additionally, the 'unfairness test' laid out in Article 3 of the Unfair Contract Terms Directive for determining whether a standard form contract unduly restricts consumers' rights has received a narrow interpretation by national courts which hold that while terms that prevent copying and restrict playability only to certain regions do fall under Article 3, they are not inherent 'unfair'.[64] (For a broader analysis of national court decisions on this issue, see the study on 'Digital content services for consumers' published by the University of Amsterdam Centre for the Study of European Contract Law and Institute of Information Law).

[61] See, for example Article 9 of the E-Commerce Directive, *Op. cit.*
[62] Article 10(1)(a) and (d) of *Ibid.*
[63] Guibault, Lucie. (2008) *Op. cit.* pg. 414.
[64] University of Amsterdam Centre for the Study of European Contract Law and Institute of Information Law. *Op. cit.* pg. 3

In light of these issues relating to interpretation and application, many commentators lament the missed opportunity of eliminating (or at least mitigating) the effect of EULAs on consumers via specific provisions in the Information Society Directive,[65] which could have been used to forbid the use of restrictive license terms that interfere with other legitimate rights.[66] However, this chance was not taken up by legislators who opted, instead, to give free reign to rightsholders to "shape consumer contracts and technological measures as they wish, regardless of whether these contractual and technical means end up restricting the exercise of copyright exceptions."[67] The Commission Proposal preceding the adoption of the new Consumer Protection Directive highlighted the fact that existing EU measures do not create an adequately regulatory framework for the protection of consumers in the digital environment[68]. As a result, the new Directive, set for implementation in 2013 aims to enhance the harmonisation of existing consumer protection law by opting for a "full harmonisation approach (i.e. Member States cannot maintain or adopt provisions diverging from those laid down in the Directive)."[69]

Notwithstanding this timely review, many of the problems highlighted in Section 1.2 are expected to persist on the basis that the main aim of the Directive is harmonisation of *existing* consumer legislation, as opposed to substantive revision. As a result, this Directive also fails to specifically address unfair EULAs: for instance, rather than barring terms that perpetuate a lack of interoperability between programmes and digital content, or one that permit the tracking of consumer behaviour through DRM tools, the Directive merely requires that consumer contracts specifically inform consumers of the existence of such facts.[70] As a result (as discussed in more

[65] EC Directive 2001/29 of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. Available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF> Accessed 09 Oct. 2011.
[66] Mazziotti, Giuseppe. *Op. cit.* pg. 121.
[67] *Ibid.*
[68] Commission Proposal (2008), Proposal for a Directive of the European Parliament and of the Council on consumer rights. COM (2008) 614/3. Available online at <http://ec.europa.eu/consumers/rights/docs/COMM_PDF_COM_2008_0614_F_EN_PROPOSITION_DE_DIRECTIVE.pdf> Accessed 08 March 2012. pg. 2
[69] *Ibid.* pg. 3
[70] Article 5 and 6 of the Consumer Rights Directive.

detail in the following chapter), EU consumer protection law in the field of digital copyright remains inadequate to address the concerns of digital consumers.

2. Reconceptualising Digital Consumers

As discussed in the previous chapter, the increasing reliance on EULAs by rightsholders is causing problems for the average person in relation to their enjoyment of their digital works. As demonstrated in Section 1.3, however, the current legal regime in place under EU law is inadequate to address these problems. This chapter will argue that part of the reason why the interests of consumers are not receiving sufficient attention is because of an outdated understanding of what being a consumer in the digital age entails. In order to inject the necessary impetus into the law, therefore, the current European understanding of 'consumer' should be reconceptualised in order to take into account the dynamic relationship that many people have with their legally purchased digital works.

This chapter is divided into three sections: the first section explains the reasons why a reliance on the term 'consumer' within the context of digital copyright law is inappropriate; the second section underscores certain important considerations that need to be taken into account in the process of reconceptualisation; and the third section highlights the main implications such a process would have for rightsholders relying on EULAs.

2.1. Why the Existing Concept of 'Consumer' is Inappropriate

Until now, we have been talking solely about consumers and how they are affected by EULAs. However, this section will highlight that the term 'consumer', as defined under EU law, is, in fact, unsuitable within the digital copyright discourse for three reasons: (a) the definition of 'consumer' under EU law is vague; (b) the term implies reliance on consumer protection law, which is inadequate in the context of EULAs; and (c) the term implies a passive participation within the copyright framework, which generally is not the case.

EU law defines 'consumer' as a "natural person who is acting for purposes which are outside his or her trade, business or profession."[71] The first problem with this definition resides in its vagueness, which has two consequences. The first is that while the definition specifically

[71] See Article 2(1) of the Consumer Rights Directive, *Op. cit.*

contemplates a 'natural person' (i.e. not a corporation) who is acting in his or her capacity as a private person (i.e. not as a representative for an entity) the term provides no indication of what 'acting' may entail. On one hand, the term could be interpreted in a subject-specific manner, which means that anyone who *acts* as a consumer is a consumer (subject to the limitation that he is a natural person). On the other hand, the term could also be interpreted in an action-specific manner, which means that consumption-related *actions* are the ones that receive protection, rather than consumers are subjects. Traditionally, it is the former interpretation that has been preferred within the EU; however, the problem with this approach is that it tends to treat consumers in a "general and abstract" sense, thus preventing the recognition of consumers as specific individuals whose specific interests may not be met by reference to the needs of the 'general public'.[72] Recasting the definition of 'consumer' to focus on actions rather than subjects could help alleviate this problem by ensuring that the law recognises that consumers have the same interest in securing concrete and actionable rights in relation to intellectual works that rightsholders do.

The other consequence of this vagueness (as highlighted in the previous chapter) is that creates uncertainty in the scope of consumer protection law because it is unclear whether such protection is granted solely at the pre-contractual phase in the form of information obligations on the part of the seller, or whether it extends to the contractual phase as well to provide protection against restrictive terms. With regards to the pre-contractual phase, we know that online sellers and service providers are under an obligation to provide certain mandatory information about their products and services in order to allow the consumer to make an informed choice about whether or not to buy. In this regard, the law imposes positive obligations on sellers in order to balance out the enhanced inequalities in bargaining power that exist in the field of e-commerce. However, it is unclear whether consumer protection law is also endowed with a negative aspect, which would allow it to invalidate (or at least restrict) clauses

[72] Synodinou, Tatiana-Eleni. *Op. cit.* pg. 819

that allow rightsholder to restrict certain post-purchase actions (such as making private copies and modifying the file in order to allow for compatibility with other devices) on the basis that such actions are permitted under copyright law. In other words, it is uncertain whether consumer protection law works to make certain consumption-related *actions* that are guaranteed by copyright exceptions and limitations 'inalienable' by contract and thus protect the fair use interests of consumers.[73]

Second, the term invokes the auspices of consumer protection law which, in its current form, is fragmented and ineffective at protecting consumer interests in the digital environment (see Section 3.1 for a more detailed discussion of this topic).[74] While it may be argued that the use of licenses by rightsholders to govern post-purchase actions by consumers clearly invokes contract and consumer protection law, as opposed to copyright law, the reality is that neither of these branches of law is deals specifically with the unique problems faced by digital consumers in relation to EULAs.[75]

Finally, and perhaps most importantly, the use of the term 'consumer' is inappropriate within the copyright discourse as it falls outside of the scope of that field of law.[76] As Niva Elkin-Koren explains, the simple "consumer-as-shopper" paradigm traditionally endorsed by consumer protection law has no role within the intellectual property framework except to refer to "the ultimate market for information goods".[77] In this way, the term 'consumer' envisages a *passive consumption* of intellectual property that is not in line with the *active use* that many consumers make of their digital products. A recent study by the European Parliament has also recognised this discrepancy by stating that "[c]urrent consumer protection rules do not account

[73] Mazziotti, Giuseppe. *Op. cit.* pg. 130.
[74] Commission Proposal (2008), *Op. cit.* pg. 2.
[75] Hugenholtz, Brent, *et al.* 'The Recasting of Copyright & Related Rights for the Knowledge Economy', report to the European Commission, DG Internal Market, November 2006. Available online at <http://www.ivir.nl/publications/other/IViR_Recast_Final_Report_2006.pdf> Accessed 13 March 2012. pg. 67-8
[76] Elkin-Koren, Niva. *Op. cit.* pg. 14.
[77] *Ibid.* pg. 15.

for 'prosumers"'[78] (i.e. people who act as both consumers and producers of digital content) for the reason that "[c]onsumer protection laws are based on the idea that there is a power imbalance between the business and the consumer,"[79] which is not necessarily the case in the digital environment.

In light of these findings, many commentators have moved away from the use of 'consumer' in favour of a term that better captures the dynamic relationship that many people have with digital media. Some authors, like Niva Elkin-Koren[80] and Lucie Guibault,[81] have preferred to reconceptualise the term by adapting it into 'consumer-as-participant', or iConsumer, respectively. Others, such as Giuseppe Mazziotti[82] and Tatiana-Eleni Synodinou,[83] have opted to avoid the word 'consumer' altogether and instead use the term 'user' or 'end-user'. Despite the lack of agreement as to what the new term should be, it is evident that a reconceptualisation of consumers within the digital environment is already under way in academia, highlighting the fact that it is also needed in practice.

2.2. Considerations relating to Reconceptualisation

Despite the general consensus among scholars that the term 'consumer' in the context of digital copyright needs to be abandoned, as the European Parliament report notes, EU law has yet to take into account the significant shift in consumer behaviour that has prompted this scholarly re-assessment.[84] Since there is still a debate about what the exact term should be for this new generation of consumers, it is important to keep in mind three important considerations before settling on the ultimate choice.

[78] Directorate-General for Internal Policies. 'Consumer behaviour in a digital environment'. Policy Department A: Economic and Scientific Policy. Internal Market and Consumer Protection. (August 2011). IP/A/IMCO/ST/2010-08. Available online at <http://www.europarl.europa.eu/document/activities/cont/201108/20110825ATT25258/20110825ATT25258EN.pdf> Accessed 07 March 2012. pg. 11.
[79] *Ibid.* pg. 23.
[80] See Elkin-Koren, Niva. *Op. cit.*
[81] See Guibault, Lucie. (2008) *Op. cit.*
[82] See Mazziotti, Giuseppe. *Op. cit.*
[83] See Synodinou, Tatiana-Eleni. *Op. cit.*
[84] *Ibid.* pg. 17.

First, consumers of digital works (henceforth 'e-consumers') exist at a complicated crossroad of three areas of law. On one hand, they are part of the intellectual property system on the basis that they interact with works of intellectual property and, therefore, must abide by the rules and limitations impose by copyright law on their ability to use the work. On the other hand, the use of EULAs by rightsholders as a way of governing access to their intellectual property invokes contract law, which, in turn, invokes consumer protection law to regulate the imbalance in bargaining power between buyers and sellers. For these reasons, simple, unqualified terms such as 'consumers' and 'users' are inappropriate because they do not reflect this complex interaction of laws. As such, any newly proposed term needs to be specific enough that it bears in mind this complex legal interaction, but general enough so that it is able to incorporate into its meaning future developments in consumer behaviour.

Second, the new term needs to take into account the various types of relationship that different types of e-consumers have with digital works. As previously discussed, the term 'consumer' is considered inappropriate because it contemplates an "economic representation of an individual whose main interest is maximum consumption at the cheapest possible price",[85] thus envisaging only a *passive* engagement with digital works. As a result, some commentators have preferred the term 'user', or 'end-user' for the reason that this term envisages a more *active* engagement with digital material. This term too, however, is inappropriate because it does not necessarily envision a *legal* engagement on the basis that users' "interests are predominantly creative and non-economic in nature."[86] In other words, the term merely contemplates active use without being concerned about how the user acquired the material in question, which could lead to an endorsement of online piracy. Accordingly, some commentators have chosen to qualify the term with 'legal' or 'lawful' in order to "[differentiate] from the general concept of the end-user of the work or from the abstract concept of the public" for the reason that "not all users are

[85] Helberger, Natali. 'Making Place for the iConsumer in Consumer Law'. J Consum Policy (2008) 31:385–391. Available online at <http://www.ivir.nl/publications/helberger/Making_place_for_the_iConsumer.pdf> Accessed 08 March 2012. pg. 386.
[86] *Ibid.*

lawful users."[87] However, one problem with the concept of 'lawful use', as highlighted by Tatiana-Eleni Synodinou, is that there is a danger that the lawfulness of the use may be determined solely by reference to the relevant EULA (rather than with regard to copyright law), which would perpetuate absolute control of works by rightsholders.[88] The combined effect of these considerations may be that reliance solely on one term is insufficient because one term by itself is unable to cover the whole spectrum of use that different people engage in. For instance, the needs and interests of a person who lawfully acquires a work for passive use are different from those of someone who lawfully acquires a work for active re-use. These needs and interests should also be distinguished from those held by people who acquire works illegally, but again there is variation between different classes.[89] Thus, any new term(s) need to be mindful of the different types of acquisition and use that e-consumers engage in.

The final consideration that needs to be taken into account is that the new term needs to contemplate the provision of sufficient rights so that e-consumers will to be able to assert their legitimate interests against rightsholders. In this regard, a term based on the concept of 'consumer' may be better suited to this task for than one based on the concept of 'user' for three reasons. For one, the tripartite interaction of laws, discussed above, could be taken advantage of in order to compel the recognition of the 'consumer' within copyright law, on the basis that rightsholders seem to prefer to regulate access to works through EULAs, rather than through copyright law. For another, consumer protection law already provides specific protection to lawful consumers (as opposed to general users), which can be utilised in order to build a body of jurisprudence specifically aimed at digital consumers. Finally, the 'constitutionalisation' of contract law appears to be emerging as a general trend within the EU (see Section 3.2 for a more

[87] Synodinou, Tatiana-Eleni. *Op. cit*. pg. 829.
[88] *Ibid.* 831.
[89] Consider, for instance, the difference between commercial counterfeiter, and those who make use of peer-to-peer sharing networks: while both engage in unpermitted reproduction of copyrighted works that is deemed 'illegal' by the current regulatory system, most people would not group the two types of activities together on the basis that the mind-set of the two groups are different (the former is motivated by monetary gain, while the latter isn't).

detailed discussion), with the effect that certain consumer rights are being interpreted as being fundamental, and thus inalienable by contract.[90]

Based on these considerations, therefore, it seems that a term (or terms) based on the concept of 'consumer', would be more appropriate than one based on the concept of 'users'. This is because a consumer-based term not only captures the dual stage interaction that many people have with digital works – namely acquisition and use – but also allows us to take into consideration the two aspects of each of these interactions. Specifically, 'acquisition' can refer to both monetary purchases (representing a traditional seller-purchaser relationship), and free sharing (representing a peer-to-peer relationship commonly found online). Contrary to certain assumptions, both of these forms of acquisition can be legal; this reformulation of legal vs. illegal acquisition thus enables us to distinguish between legal consumers and illegal profiteers (i.e. 'pirates'). Meanwhile, the term 'use' can refer to passive acts (i.e. simply listening to a downloaded mp3 or watching a streamed movie) or active acts (i.e. remixing a song to create a new one, or compiling a digital collage from many pieces of stock photography). In this way, a term such as 'iConsumer' or 'prosumer' allows us to better incorporate into legal and economic analysis the various types of interactions that people have with digital media today.

2.3. Implications for EULAs

Should the definition of 'consumer' under EU digital copyright law be reconceptualised, many of the problems faced by e-consumers in relation to unfair terms in EULAs will hopefully be resolved. Specifically, there are three main implications of this paradigm shift for the law currently governing EULAs.

First, the reconceptualisation of 'consumers' would allow the law to empower (rather than merely protect) e-consumers by placing them on a more level playing field with rightsholders. As the European Parliament study on *Consumer behaviour in a digital environment* explains, "consumers

[90] Mak, Chantal. 'Fundamental Rights and the European Regulation of iConsumer Contracts'. J Consum Policy (2008) 31:425–439. Available online at <http://dare.uva.nl/document/155112> Accessed 08 March 2012. pg. 432

are often both consumers and producers of content online that is consumed by other consumers."[91] Notwithstanding this 're-consumption' of content, e-consumers should be distinguished from commercial sellers because they do not necessarily expect payment in return for digital content provision.[92] Even though the exact type of protection required is still under debate,[93] the EU legislature has recognised that current consumer protection law does not adequately address the needs of e-consumers[94]. Depending on how these needs are addressed, implications for rightsholders could be that they would no longer be permitted to limit access to legally purchased content in the same way that they do now, and that certain user freedoms would be made "imperative"[95] and thus unable to be contracted out by EULAs.

Second, as active consumers and producers of digital material, e-consumers would win a place in the framework of copyright law, from which they have hitherto been excluded (see Section 3.2). This development could help revive the use of inherent exceptions and limitations on copyright as a way to check excessive control of rightsholders over their works. In this way, the question of what constitutes 'permitted use' of content could be answered by reference to copyright law, rather than the governing EULA, which would help ease the restraining effect of restrictive license terms. While this could result in increased litigation, it would help clarify the standing of the exceptions and limitations under European law, and whether or not they can be excluded by contract.

Third, the reconceptualisation of 'consumers' would require the establishment of a new form of contractual relationship between e-consumers and rightsholders. The recognition of e-consumers as active participant in the copyright framework would necessitate the drafting of 'next generation' EULAs specifically formulated to take into account interests, such as reasonable access to copyrighted material and the right to fair use, that have hitherto been

[91] Directorate-General for Internal Policies. *Op. cit.* pg. 24.
[92] *Ibid.* pg. 34.
[93] *Ibid.* pg. 24.
[94] Commission Proposal (2008), *Op. cit.* pg. 2.
[95] Guibault, Lucie. (2008). *Op. cit.* pg. 421.

excluded or severely restricted. This could be accomplished by rightsholders making available two types of licenses: one intended for passive users, and one for active users. In exchange for greater freedoms, holders of the second type of license may be required to pay more for such a privilege so as to ensure that rightsholders are not unduly prejudiced either. Ideally, this would be accomplished through self-regulation following negotiations between prosumer and rightsholder interest groups in order to "reduce the need to introduce a legislative measure to the same effect."[96]

In sum, the reconceptualisation of 'consumers' would help ensure that EULAs would no longer be able unduly restrict the average person's use of their legally purchased digital works. However, for the full effects of this reconceptualisation to be felt, it needs to take place in the field of copyright and consumer protection law. With regards to the first, e-consumers need to be given their due recognition within the copyright framework so that they are treated as more than an abstract idea. This development would allow them to rely on the inherent exceptions and limitations of the copyright system, and thus actively combat any excessive control over works by rightsholders without necessarily having to rely on consumer protection. With regards to the second, the reconceptualisation of consumers within the consumer protection framework would force rightsholders to think differently about the end-users of their products and services, thus paving the way towards a more balanced contractual relationship between the two. Additionally, as discussed in more detail in the following chapter, recasting consumers as active participants within the e-commerce framework, who have exercisable rights and remedies, would help in empowering this sector of the economy and make them feel more confident about online purchases.

[96] *Ibid.* pg. 422.

3. Reconceptualising Digital Consumer Protection

As discussed in the previous chapter, the currently maintained paradigm about consumers is ineffective at addressing the real issues faced by e-consumers today. Parallel to this problem is the fact that the EU legislature has, until now, sought to tackle these issues solely in the field of consumer protection law. The present chapter highlights the fact that this approach is ineffectual because it does not provide operative safeguards against restrictive EULAs, nor does it empower e-consumers by giving them exercisable rights. As a result, the existing consumer protection system also needs to be reconceptualised in order to take into account these needs.

This chapter is divided into three parts. Section 3.1 highlights how dependence solely on consumer protection law in order to secure the interests of e-consumers is inadequate. Section 3.2 then proposes that the best way to protect e-consumers is to adopt a fundamental rights-based approach so that their legitimate interests in relation to their legally purchased works cannot be alienated by contract. Finally, Section 3.3 looks at the implications that a fundamental rights approach would have for e-consumers in relation to EULAs.

3.1 Why Consumer Protection is Inadequate

EU law has adopted a consumer protection-based approach to e-consumer concerns for two reasons. First, European copyright law adopts a "predominantly author-oriented approach" which is characterised by a marked absence of the 'user'.[97] While the concept has recently begun to emerge, first in the Software[98] and Database Directives,[99] and more recently in the Information Society Directive, it still remains marginal[100]. As a result, there is not enough legal jurisprudence to rely on in order to build a solid doctrine of protection within the copyright system itself, which necessitates reliance on consumer protection law. Second, the primary thrust

[97] Synodinou, Tatiana-Eleni, *Op. cit.* pg. 819.
[98] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs. [1991] OJ L122/42. Available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1991:122:0042:0046:EN:PDF> Accessed 07 March 2012.
[99] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20. Available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1996:077:0020:0028:EN:PDF> Accessed 07 March 2012.
[100] Synodinou, Tatiana-Eleni, *Op. cit.* pg. 843.

of EU legislation is the harmonisation of the internal market, into which a consumer protection approach fits better, than does a copyright approach (which has not been harmonised to the same degree).[101] Notwithstanding this inclination towards consumer protection law, however, the EU approach may not actually be the best route to take to ensure that prosumer interests are safeguarded for three reasons.

First, despite increased legislation in the field of consumer protection, there is still a marked imbalance between the protections offered to consumers in comparison to those granted to producers.[102] The reason for this discrepancy is that the EU's market integration approach favours the passing of laws that protect producers (rather than consumers), which "does not bode well for the rapid development within the Community of a vibrant electronic marketplace".[103] Specifically, while the number of e-commerce transactions has been steadily increasing, many consumers feel that they do not receive the same level of protection online as they do offline, especially in the area of antifraud and data protection.[104] Unless this is corrected, it is unlikely the EU-wide e-commerce will flourish.

Second, given the fast pace of advancement of e-commerce, the lengthy process required to enact and implement Community legislation only allows for retroactive solutions. The main reason for this is the great diffusion of consumer interests, both at the national and EU level,[105] which is something that standardised consumer protection legislation is not equipped to take into account. Even though the new Consumer Rights Directive seeks to address the legal inconsistencies created by the current regulatory system, it does not offer anything novel in the way of e-consumer protection.[106]

[101] Directorate-General for Internal Policies. *Op. cit.* pg. 14.
[102] Akester, Patricia. 'The new challenges of striking the right balance between copyright protection and access to knowledge, information and culture', E.I.P.R. 2010, 32(8), 372-381. pg. 377.
[103] Dickie, John. Producers and Consumers in EU E-Commerce Law. (Hart Publishing: London, 2005), pg. 133.
[104] Directorate-General for Internal Policies. *Op. cit.* pg. 13.
[105] *Ibid.* pg. 43.
[106] See 'New EU consumer rights Directive nears adoption', EU Focus 2011, 286, 9-10 for an overview of the main changes to consumer protection law effected by the Consumer Rights Directive.

Third, and perhaps most important, is that it is unclear whether consumer protection law applies *at all* to restrictive terms in EULAs. As Lucie Guibault highlights, the only provision in any of the directives related to consumer protection in the digital environment that potentially relates to EULAs is Clause 1(i) of the Annex to the Unfair Contract Terms Directive. It states that contractual clauses that "irrevocably [bind] the consumer to terms with which he had no real opportunity to becoming acquainted before the conclusion of the contract" are unfair and therefore unenforceable. At present, however, there is no case law, either at the national or EU level, which deals specifically with this question, with the result that it is unclear whether Clause 1(i) applies to shrink-wrap, click-wrap, or browser-wrap licenses.[107]

In sum, therefore, the current system of EU consumer protection law is not able to specifically address the needs and interests of e-consumers due to a lack of specific and effective legislation.[108] In light of the deficiencies of EU consumer protection law, many scholars are proposing alternative methods of e-consumer protection. One suggestion, which has garnered significant support in the past couple of years – especially since the adoption of the Lisbon Treaty – is the fundamental rights approach for regulating e-consumer contracts, which is the topic of the followings section.

3.2. Introduction of Fundamental Rights

The concept of fundamental rights holds that all three members of the so-called 'golden triangle' of copyright law (i.e. authors, suppliers/publishers, and users/consumers)[109] can invoke certain 'fundamental rights' against each other that are guaranteed either by national constitutions or international human rights treaties[110]. In this way, the fundamental rights

[107] Guilbault, Lucie. (2008). *Op. cit*. pg. 416.
[108] Hugenholtz, Brent, *et al. Op. cit.* pg. 67-8.
[109] See Willem Grosheide, F. *Op. cit.*
[110] Mak, Chantal. *Op. cit*. pg. 426.

approach acts a bit like the American fair use doctrine by ensuring that users' rights are also represented within the copyright framework.[111]

There are three main reasons why fundamental rights has caught on as a potential solution for e-consumer problems. First, in light of the fact that "copyright is currently in turmoil"[112] (as a result of wide-spread technological developments that has facilitated the mass reproduction and distribution of copyrighted material) means that intellectual property law, by itself, is not able to afford effective protection to e-consumers (who, as discussed in Section 2.1, are currently outside of its scope of consideration). While the provision of such protection is not impossible, it is not presently viable on account of the fact that it would require a complete overhaul of the existing system in order to "reassess and adapt the underlying balances" between protection and access to copyrighted works in the digital environment.[113] This is not to say that a reconceptualisation of the copyright system is not needed (it is); instead, it is to say that the reworking of over 300 years[114] of established law requires a much longer process than is practicable given the need for protection now. As a result, reliance has to be made on a different set of legal tools (such as fundamental rights) in order to grant protection during the transitory phase where copyright law is reconceptualised.

[111] The American fair use doctrine is a statutory doctrine provided for by §107 of the Copyright Act of 1976 that allows for a case-by-case approach to exceptions and limitations to copyright. It provides an affirmative defence against allegations of copyright infringement on the basis that the use complained of is actually 'fair', provided that the four conditions of the test are met. Fair use is comparable to the fundamental rights approach because the defence is generally relied on by reference to right to free speech guaranteed by the First Amendment of the US Constitution, on the logic that copyright should not be allowed to unduly interfere with other legitimate rights. This user-based approach to copyright law thus has the advantage of being more flexible and adaptive than the traditional approach of the EU that is based on an exhaustive list of exceptions and limitations to copyright contained in Article 5 of the Information Society Directive. See Aufderheide, Patricia and Jaszi, Peter. Reclaiming Fair Use: How to Put Balance Back in Copyright. (University of Chicago Press, Ltd.: Chicago, 2011) for a more detailed examination of the fair use doctrine.

[112] Geiger, Christophe. 'The future of copyright in Europe: striking a fair balance between protection and access to information', I.P.Q. 2010, 1, pg. 1.

[113] *Ibid.* pg. 5

[114] The start of modern copyright law is commonly taken to 1709, when the English Statute of Anne was passed to regulate the book trade. Norman, Jeremy. 'The Statute of Anne: The First Copyright Law (1709)', Jeremy Norman's From Cave Paintings to the Internet: Chronological and Thematic Studies on the History of Information and Media. Available online at <http://www.historyofinformation.com/index.php?id=3389> Accessed 31 Oct. 2011.

Second, human rights protection at the EU level has been greatly enhanced due to the incorporation of the European Charter of Fundamental Rights[115] into primary EU law and the EU's accession to the European Convention on Human Rights. The effect of this development is that human rights are now protected as "concrete entitlements,"[116] rather than "through an intermediary concept of 'general principles of fundamental rights,'"[117] which means that human rights protection can now be relied on as an effective tool to protect individual interests. In fact, in the field of civil law litigation, a tendency is already emerging at the national level that "consider[s] disputes between private parties in light of fundamental rights" on the logic that "the rules of private law should comply with the values of the constitutional order."[118] According to Chantal Mak, a fundamental rights approach would thus be able to provide EC lawmakers with a solid "framework for making policy choices regarding the regulation of iConsumer contracts" specifically, based on growing jurisprudence in this area.[119]

Finally, an approach based on fundamental rights could help clarify the status of copyright exceptions and limitations in the field of copyright law by settling the question of whether or not they are overrideable by contract. Namely, if certain rights were declared to be 'fundamental', any contractual provision that seeks to curtail these rights would be automatically void on the basis that constitutional provisions supersede private agreements.[120] In the field of digital copyright, for instance, the Article 11 right to access information could be construed to guarantee a right to make private copies, regardless of the fact that such copying is prohibited by a EULA. While some Member States already have a private copyright exemptions,[121] such a development could

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115 Charter of Fundamental Rights of the European Union. [2000] OJ C364/1. Available online at <http://www.europarl.europa.eu/charter/pdf/text_en.pdf> Accessed 15 March 2012.
116 Leczykiewicz, Dorota. "'Effective judicial protection" of human rights after Lisbon: should national courts be empowered to review EU secondary law?', E.L. Rev. 2010, 35(3), pg. 330.
117 *Ibid.* pg. 328.
118 Mak, Chantal. *Op. cit.* pg. 432.
119 *Ibid.*
120 Akester, Patricia. *Op. cit.* pg. 378-9.
121 'European Commission outlines plans to revise IP frameworks', 21 Nov. 2011, Out-Law.com: Legal news and guidance from Pinsent Masons. Available online at <http://www.out-law.com/en/articles/2011/november/european-commission-outlines-plans-to-revise-ip-frameworks/> Accessed 07 March 2012.

not only help revive the efficacy of the natural limitations inherent in copyright law which, sadly, have been subject to curtailment in recent years,[122] but also help harmonise e-consumer rights within the copyright context at the EU level.

3.3. Aspects of Fundamental Rights that Need to be Clarified

Despite the positives thus far outlines, the fact that fundamental rights protection in the field of copyright and e-commerce is a novel concept means that there are some aspects of the doctrine that require clarification. Therefore, before a fundamental rights-based approach can be relied on to adequately protect e-consumers interests, two issues need to be addressed.

First is the matter of the horizontal application of these rights. Under European jurisprudence, fundamental rights are traditionally understood to act vertically (i.e. governing interactions between an individual and the state), rather than horizontally (i.e. governing interactions between individuals).[123] As a result, some commentators are ambivalent about the expansion of fundamental rights protection into the private sphere on the basis that there are alternative safeguards already in place.[124] This uncertainty relating to horizontal application is a major shortfall of a fundamental rights-based scheme of protection because the consumer-rightsholder relationship is necessarily a private one. As a result, the question of whether fundamental rights can be relied on outside of its traditional boundaries will need to be specifically addressed before it can be adopted as an effective means of protection in the field of digital consumer contracts. The EU's own tendency towards the 'constitutionalisation' of private contract law (see Section 2.2.) seems to indicate that a horizontal approach to human rights protection is already emerging at the national level, so there is hope that this development can be relied on to introduce similar jurisprudence in copyright law specifically.

[122] See, for example, Harms, L.T.C. 'Negative trends in the field of intellectual property law', E.I.P.R. 2009, 31(11), 540-548.
[123] See Article 51(1) of the Charter of Fundamental Rights of the European Union. [2000] OJ C364/1. Available online at <http://www.europarl.europa.eu/charter/pdf/text_en.pdf> Accessed 15 March 2012.
[124] See Barak, Aharon. 'Constitutional human rights and private law', in Friedmann, Daniel & Barak-Erez, Daphne (eds.). Human Rights in Private Law. (Hart Publishing: Oxford, 2001), pg. 13-42.

Second is the issue pertaining to the inherent uncertainty of the outcome of a judicial inquiry concerning the fundamental rights of e-consumers. Since each member of the 'golden triangle' has rights that are 'fundamental', it is up to the courts to strike a fair balance between divergent interests and decide whose rights should prevail in each situation. While this is by no means a simple matter, what makes the process even more complicated is that in addition to legal considerations, fundamental rights protection is invariably bound up in political concerns.[125] Consequently, jurisprudential progress may be slow and potentially contradictory as different courts will likely assess the impact of fundamental rights differently in light of the respective legal and cultural history of each Member State. Furthermore, there is a danger of varying standards of protection among jurisdictions as some national courts may opt for a wider application of the balancing of interests (i.e. the interest in question will always trump the competing interest in analogous situations), while other courts may choose to construe the ruling narrowly (i.e. the interest in question will only trump competing interests in specific situations, provided that certain conditions are met). As a result, in order to guarantee a consistent level of protection, law-makers will need to ensure that attention is paid to a uniform interpretation and application of rulings, which may be facilitated by the passing of decisions and recommendations at the EC level.

If these two concerns can be sufficiently addressed both at the national and EU level, then fundamental rights has a good chance of providing the type of protection for e-consumers that has hitherto been lacking, in the field of both copyright and consumer protection law.

3.4. Implications for E-consumers

Should a fundamental rights-based approach to consumer protection be adopted at the EU level, e-consumers would experience a two-fold change. On one hand, the scope of copyright protection would be enhanced and expanded to create a novel set of rights for e-consumers. On

[125] Mak, Chantal. *Op. cit.* pg. 429.

the other hand, fundamental rights would act directly on unfair license terms in EULAs, thus helping to strengthen consumer protection law as well.

With regards to the first change, the strengthening of human rights protection by the Lisbon Treaty implies that e-consumers would be entitled to a higher level of protection of such interests as privacy, freedom of expression, and access to information. While these rights have been phrased generally in the Charter, the courts are equipped to construe them in a manner that takes into account the specific requirements of the digital environment. For instance, the Article 11 right of access to information could be interpreted broadly to ensure that the inherent exceptions and limitations to copyright are defended against erosion by contract on the basis that these exceptions "are indispensable to safeguard public access to protected information."[126] In this way, fundamental rights may be used to fuse a circle of protection from the fields of copyright, consumer protection and contract law (which are currently fragmented and at odds with each other).

With regards to EULAs, the main effects of a fundamental rights approach would be two-fold. For one, it would work to trump unfair provisions that seek to contractually override consumer rights. The fact that constitutional provisions supersede private agreements means that even if consumers 'agree' to EULAs that prejudice their rights, many of the restrictive provisions would become inapplicable. This type of *ab initio* intervention is desperately needed in the field of e-commerce where consumers frequently 'agree' to long and complicated Terms and Conditions without necessarily reading them (see Section 1.1), thus signing away their rights unawares. For another, fundamental rights protection could be relied on to grant protection to e-consumers in areas not covered by the new Consumer Rights Directive. For instance, a right to access information may impose on rightsholders an obligation to provide important material

[126] Akester, Patricia. *Op. cit.* pg. 378.

information about their products and services, thus supplementing those obligations provided by the Directive.[127]

In sum, therefore, a scheme of protection founded on fundamental rights would help reconceptualise the current system of consumer protection in order to take into account the specific needs and interests of e-consumers. The fundamental rights approach has the benefit of not only providing negative protection (i.e. by automatically negating any unduly restrictive license terms), but of providing positive protection as well (i.e. by guaranteeing rights that are currently denied to consumers, such as the right to make private copies). In this way, fundamental rights work to empower e-consumers by equipping them with exercisable freedoms that are lacking from traditional consumer protection law.

[127] See Article 3 for a list of those contracts to which the Directive does not apply, and Article 6(1)(a) for the qualifications on the requirement relating to the disclosure of material information.

Conclusion

This research has sought to highlight the deficiencies in the law relating to the protection of digital consumers against unfair terms in EULAs. In the analysis of how such a deficiency could be improved, it has also revealed that devising a new system of protection is not as easy as we may think. Simply amending existing consumer protection legislation is not enough because the conceptualisation of 'consumer' currently relied upon does not account for the various different types of interaction that different people have with their digital media.

In light of these findings, this thesis has proposed the two-prong solution of a) reconceptualising the legal definition of 'consumers' in the digital sphere, and b) reconceptualising e-consumer protection by introducing a fundamental rights-based approach. Implementation of the first solution would allow lawmakers take into account a class of people that have, until now, gone largely unrecognised, thus paving the way for their specific needs and interests to be taken into account by rightsholders when they draft EULAs. Meanwhile, the implementation of the second solution would help empower e-consumers by giving them inalienable rights that can be used to trump unfair or restrictive provisions in EULAs (something which neither copyright, nor consumer protection law have been able to do).

While these solutions have their merits, this research has also shown that policymakers cannot simply adopt them without careful considerations of their future implications. This is especially important within the EU, where national law-making can be highly varied and EC-level harmonisation is usually retroactive. In the rapidly changing field of e-commerce, however, these approaches are inappropriate because they lead to varying levels of protection among Member States that are unable to provide adequate solutions for existing problems, nor anticipate future ones. As a result, careful deliberation will be required, both at the national and EU level, on the present and future effects of any scheme that is to be adopted with regards to digital consumers.

The present thesis has mainly focused on the reformation of consumer protection law in the field of digital copyright. However, it has also drawn attention to the fact that one of the

reasons why e-consumer protection is an issue today is because of the failure of copyright law to adequately enforce exceptions and limitations on rightsholders' rights, as well as to take into account the existence of consumers' interests. As a result, future legislation in the field of e-consumer protection will not only have to take into account how that area of law interacts with copyright law, but also (ideally) look at reforming copyright law as well, in order to bring it in line with 21st century developments. This is where fundamental rights offers the greatest benefits to digital consumers because it has the ability to bridge the gaps between different fields of law, thus guaranteeing adequate protection, even if such protection is not specifically granted either in copyright and consumer protection law.

All in all, recent developments within the EU, namely the incorporation of the Charter of Fundamental Rights into EU law following the passing of the Lisbon Treaty, and the findings of the recent European Parliament report on *Consumer behaviour in the digital environment* suggest that the status of digital consumers within the EU is set to change. Exactly what direction this change will take is still uncertain on account of the fact that the entire process is still very much in its infancy. However, the coming adoption of the new Consumer Rights Directive indicates that the EU legislature is once again taking an active interest in consumer needs, which will hopefully spell new developments in the field digital consumer protection.

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