

Agustin Reyna

# What Place for Fairness in Digital Content Contracts?

An Assessment of the Interplay between  
EU Copyright and Consumer Law



**Nomos**

Schriftenreihe des  
ZENTRUMS FÜR EUROPÄISCHE RECHTSPOLITIK  
der Universität Bremen (ZERP)

Band 80

Agustin Reyna

# What Place for Fairness in Digital Content Contracts?

An Assessment of the Interplay between  
EU Copyright and Consumer Law



**Nomos**

**The Deutsche Nationalbibliothek** lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

a.t.: Bremen, Univ., Diss., 2020

ISBN 978-3-8487-7814-0 (Print)  
978-3-7489-2217-9 (ePDF)

**British Library Cataloguing-in-Publication Data**

A catalogue record for this book is available from the British Library.

ISBN 978-3-8487-7814-0 (Print)  
978-3-7489-2217-9 (ePDF)

**Library of Congress Cataloging-in-Publication Data**

Reyna, Agustin

What Place for Fairness in Digital Content Contracts?

An Assessment of the Interplay between EU Copyright and Consumer Law

Agustin Reyna

242 pp.

Includes bibliographic references.

ISBN 978-3-8487-7814-0 (Print)  
978-3-7489-2217-9 (ePDF)



Onlineversion  
Nomos eLibrary

1st Edition 2020

© Nomos Verlagsgesellschaft, Baden-Baden, Germany 2020. Overall responsibility for manufacturing (printing and production) lies with Nomos Verlagsgesellschaft mbH & Co. KG.

This work is subject to copyright. All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or any information storage or retrieval system, without prior permission in writing from the publishers. Under § 54 of the German Copyright Law where copies are made for other than private use a fee is payable to "Verwertungsgesellschaft Wort", Munich.

No responsibility for loss caused to any individual or organization acting on or refraining from action as a result of the material in this publication can be accepted by Nomos or the author.

*In Memory of  
Prof. Norbert Reich*



## Acknowledgments

*This publication is the result of an exciting journey that would not have been possible without the support of many people. I would like to start by thanking my PhD. supervisors, Professors Norbert Reich and Josef Falke of the University of Bremen, for their generous advice and dedication. Even if Norbert is no longer with us, I hope that these pages modestly contribute to keep his academic legacy alive. I would like to also thank my colleagues at BEUC, The European Consumer Organisation and in the many national consumer groups, for their inspiring work in shaping and defending European consumers' rights. Special thanks to Ursula Pachl, who not only introduced me to the world of consumer law and policy but who has also mentored me over the years. This would not have been possible without the encouragement and support of my parents, Cecilia and Gustavo, my sisters, family, and friends on both sides of the Atlantic. To Marc and Patricia Vanderborght for always making me feel at home in Belgium. Finally, I would like to thank my husband Johan for his patience and unconditional support and to my feline companion, Porto, who didn't understand why I spent so many hours behind my desk but who nevertheless contributed to make this journey less lonely.*





## Table of Contents

Abbreviations	13
Introduction and research questions	15
Chapter I: Digital restrictions – A case of consumer detriment	23
Chapter II: Legal nature of digital content products	31
2.1 Classification of digital content products	31
2.1.1 Digital content according to the means of access	31
2.1.2 Digital content according to the counter-performance provided by the consumer	32
2.2 Legal status of digital content products	33
2.3 European legislation	35
2.4 National legislation	41
2.5 First conclusion	46
Chapter III: Legal regimes applicable to Business-to-Consumer digital contracts	47
3.1 Introduction: Consumer law and copyright law – Two parallel universes?	48
3.2 EU copyright law	49
3.2.1 Introduction	49
3.2.2 The three-step test and exceptions and limitations protecting the consumer’s use of digital content products	54
3.2.3 Limitations on consumer uses emerging from the Copyright Directive	69
3.2.3.1 Digital exhaustion	69
3.2.3.2 Technical Protection Measures (TPM)	74

*Table of Contents*

3.2.4	Exercising control over copyrighted content: End-User License Agreements and Technical Protection Measures	79
3.2.5	The case of the private copy exception	85
3.2.6	The new Directive on Copyright in the Digital Single Market	97
3.3	EU consumer law	103
3.3.1	The Consumer Rights Directive	104
3.3.1.1	Pre-contractual information	107
3.3.1.1.1	Formal requirements and transparency obligations	109
3.3.1.1.2	Information concerning payment obligations	110
3.3.1.1.3	Information provided in limited space or time	110
3.3.1.1.4	Timing and framing	111
3.3.1.2	The right of withdrawal for digital content products	113
3.3.1.3	Digital content not supplied in exchange of a monetary price	114
3.3.2	The Unfair Contract Terms Directive (UCTD)	117
3.3.2.1	The UCTD unfairness test	118
3.3.2.1.1	Formal assessment	120
3.3.2.1.2	Substantive assessment	122
3.3.2.2	Indicative list of unfair contract terms	124
3.3.2.3	Relationship of the UCTD with copyright law	126
3.3.2.4	Application of the fairness test to EULAs	127
3.3.2.4.1	Imbalance of the parties' rights and obligations	127
3.3.2.4.2	Consumer detriment	132
3.3.2.4.3	Contrary to the requirement of good faith	133
3.3.3	The Unfair Commercial Practices Directive (UCPD)	137
3.3.3.1	Application of the UCPD fairness test to technical restrictions	138

3.3.3.2	Misleading actions and omissions on the application of TPM as an unfair practice	139
3.3.4	The Commission's proposal for a Common European Sales Law	142
3.3.4.1	The politics of EU contract law	144
3.3.4.2	Guarantee rights for digital content products	146
3.3.4.3	Unfair contract terms for the supply of digital content under the CESL proposal	151
3.3.4.4	The fairness test under the CESL proposal	152
3.4	The Directive on Digital Content and Digital Services (DCDSD)	154
3.4.1	Scope of application	159
3.4.2	Conformity of the digital content and digital services	162
3.4.3	Liability of the trader and consumer remedies	167
3.4.4	Relationship of the DCDSD with copyright law	168
Chapter IV:	A Balancing Test of Conflicting Interests	171
4.1	The EU principle of 'balancing'	171
4.2	The EU principle of protection of the weaker party	181
4.3	Fairness benchmarks to assess user restrictions	189
4.3.1	Consumers' legitimate expectations	189
4.3.1.1	The "quid" in the protection of the consumers' expectations	190
4.3.1.2	How to define what the consumers' legitimate expectations in a digital content contract are?	191
4.3.2	Justification used for the restriction	198
4.4	Second conclusion	202

*Table of Contents*

Chapter V: Proposal for an integrative approach	206
5.1 Interpretative approach	206
5.1.1 The role of Copyright law	208
5.1.2 The role of Consumer law	209
5.2 Regulatory approach	213
5.2.1 Regulatory approach within EU copyright law	213
5.2.2 Regulatory approach within EU consumer law	216
5.3 Final conclusions	218
EU Legal Acts	220
Proposals for EU Legal Acts	223
Case law of the CJEU	224
Advocate Generals' opinions	228
Bibliography	229

## Abbreviations

AVMSD	Audiovisual Media Services Directive
B2C	Business to Consumer
B2SME	Business to Small and Medium Enterprise (SME)
B.C.L. Rev.	Boston College Law Review
BEUC	Bureau Européen des Unions de Consommateurs
BGB	Bürgerliches Gesetzbuch – German Civil Code
BGH	Bundesgerichtshof – German Federal Supreme Court
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen
BVerfG	Bundesverfassungsgericht – German Federal Constitutional Court
CESL	European Commission’s proposal for a Common European Sales Law
CJEU	Court of Justice of the European Union
CML Rev.	Common Market Law Review
CPC-net	Consumer Protection Cooperation Network
CR	Computer und Recht
CRD	Consumer Rights Directive
CSD	Consumer Sales Directive
CSS	Content Scrambling System
pDCD	European Commission’s proposal for a Digital Content Directive
DCDSD	Digital Content and Digital Services Directive
DCFR	Draft Common Frame of Reference
DMCA	Digital Millennium Copyright Act
DRM	Digital Rights Management
ECD	e-Commerce Directive
ECFR	European Charter of Fundamental Rights
EDR	European Digital Rights
EIPR	European Intellectual Property Review
EJCL	European Journal of Consumer Law
ERCL	European Review of Contract Law
ERPL	European Review of Private Law

*Abbreviations*

EULA	End-User Licensing Agreement
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
EWS	Europäisches Wirtschafts- und Steuerrecht
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
GRUR Int.	Gewerblicher Rechtsschutz und Urheberrecht – International
IP	Internet Protocol
IPR	Intellectual Property Rights
IPTV	International Protocol Television
ITU	International Telecommunications Union
JCP	Journal of Consumer Policy
JHA	Justice and Home Affairs
JIPITEC	Journal of Intellectual Property, Information Technology and E-Commerce Law
MEP	Member of the European Parliament
NJW	Neue Juristische Wochenschrift
OJ	Official Journal of the European Union
OLG	Oberlandesgericht
REDC	Revue européenne de droit de la consommation
TFEU	Treaty on the Functioning of the European Union
TPM	Technical Protection Measures
TRIPS	WTO Agreement on Trade-Related Aspects of Intellectual Property Rights
TST	Three-Step Test
UCPD	Unfair Commercial Practices Directive
UCTD	Unfair Contract Terms Directive
UrhG	Urheberrechtsgesetz – German Copyright Act
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty
ZUM	Zeitschrift für Urheber- und Medienrecht