

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

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