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What Digital Content Consumers (Should) Want

Concretising the Conformity Requirements in the Digital Content Directive — A Tentative Suggestion

Simon Geiregat[*]

A. Introduction

Consumers' expectations are an increasingly important benchmark for determining compliance with consumer protection law in the European Union (EU).[1] The Product Liability Directive[2] and the Consumer Rights Directive[3] for example, all refer to what a consumer considers 'appropriate' or may 'reasonably expect' to assess traders' liability. In particular, expectations take centre stage in the Directives on liability for non-conformity. Indeed, much like its 1999 predecessor[4], the 2019 Consumer Sales Directive (CSD) dictates that sellers shall deliver goods that are 'fit for the purposes for which goods of the same type would *normally* be used' and 'of the quantity and possess the qualities and other features … *normal* for goods of the same type'.[5]

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1 For a critical voice, see *Straetmans*, Trade Practices and Consumer Disinformation, in: Siebert/von Rimscha/Grubenmann (eds.), Commercial communication in the digital age, Munich 2017, p. 89.

2 Art. 6(1)(b) Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member states concerning liability for defective products (Product Liability Directive) [1985] OJ L210/29.

3 Arts 5(1)(a) and 6(1)(a) Directive 2011/83/EU on consumer rights (Consumer Rights Directive) [2011] OJ L304/64.

4 See Arts 2(1), 2(2)(c) and 2(2)(d) Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (Consumer Sales and Guarantees Directive) [1999] OJ L171/12.

5 Art. 7(1) Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods (CSD) [2019] OJ L136/28.

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Mimicking the structure of the CSD[6], the simultaneously adopted Digital Content Directive (DCD)[7] lays down subjective and objective conformity requirements and corresponding liability rules for digital content and digital services supplied by a professional trader to a consumer in exchange for a price or personal data.[8] The objective conformity requirements entail that content and services be 'fit for purpose for which digital content or digital services of the same type would *normally* be used, taking into account … technical standards or … applicable sector-specific industry codes of conduct' and be 'of the quantity and possess the qualities and performance features … *normal* for digital content or digital services of the same type and which the consumer may *reasonably expect*', given the nature of the content or services.[9] In addition, they require the trader to supply 'any accessories and instructions which the consumer may *reasonably expect* to receive', as well as all updates necessary to keep the content or service in conformity, for a period of time 'that the consumer may *reasonably expect*'.[10] These provisions are of a mandatory nature[11], albeit that professional traders can override them by contract insofar as the consumer is informed and expressly and separately accepts the deviation[12].

Some principal 'norms' and 'reasonable expectations' may be easy to determine when a consumer purchases digital content or digital services that are supplied online (hereafter: digital products). When acquiring 'an e-book', 'a social media account', 'a streaming subscription' or 'an app', or when opening 'a videogame account', consumers all share the expectation that they will actually be able to use these products, for instance. By analogy, a consumer purchasing, say, a car or a novel, has more or less a basic idea of what to expect: the car should have four wheels and drive people around safely and the novel should be readable and actually contain work by the author on the cover.

Beyond these basic expectations, there is a great deal of uncertainty about the implications of the DCD's manifold references to the 'norms'

6 *Faber*, Bereitstellungspflicht, Mangelbegriff und Beweislast im Richtlinienvorschlag zur Bereitstellung digitaler Inhalte, in: Wendehorst/Zöchling-Jud (eds.), Ein neues Vertragsrecht für den digitalen Binnenmarkt?, Vienna, MANZ 2016, p. 89 (109–110).

7 Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services (DCD) [2019] OJ L136/1.

8 See Art. 3(1) DCD read jointly with Arts 2(1), 2(2), 2(5), 2(6), 2(7) and 2(8).

9 Arts 8(1)(a) and 8(1)(b) DCD [emphases added].

10 Arts 8(1)(c) and 8(2)(b) DCD [emphases added].

11 Art. 22(1) DCD.

12 Art. 8(5) DCD.

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and to 'reasonable expectations'.[13] Just like discussions could arise as to whether one could additionally expect the car to have specific safety features or the book's paper to be of a certain quality and so on, consumer opinions can be very dispersed when it comes to further characteristics of digital products. Can one expect to be able to download, print or edit certain content on an online platform for literary works, to be able to combine two videogame accounts into one, or a streaming service never to be temporarily unavailable, for example?[14]

For digital products, difficulties in concretising reasonable expectations are further aggravated by the fact that those products are a recent phenomenon subject to constant evolution. Consumers do not (and cannot) always have a fixed model concept of a product in mind[15]. In addition, the shape and properties of digital products are, essentially, limited only by the creativity of their developers. Within the digital ambit, the possibilities of a product's design are indeed less predetermined than those of a tangible product, which cannot escape the laws of physics. The corollary of this freedom is that developers can unilaterally determine which operations end-users can and cannot perform on a product through code/

13 *Druschel/Engert*, Vertragsrecht und Urheberrecht im Konflikt? – Eine Bestandsaufnahme, ZUM 2018, 97 (102); *Oprysk/Sein*, Limitations in End-User Licensing Agreements: Is There a Lack of Conformity Under the New Digital Content Directive?, IIC 2020, 594 (597–598); *Spindler*, Digital Content Directive And Copyright-related Aspects, JIPITEC 2021, 111 (paras 25–26); *Vanherpe*, White Smoke, but Smoke Nonetheless: Some (Burning) Questions Regarding the Directives on Sale of Goods and Supply of Digital Content, ERPL 2020, 251 (para. 14).

14 Cf. *Al Salman/Claassen*, Frow Ownership to Access. A Philosophical Perspective on the Rise of Access-Based Consumption, Ars Aequi 2018, 566 (572); *Geiregat*, Supplying and Reselling Digital Content: Digital Exhaustion in EU Copyright and Neighbouring Rights Law, Cheltenham, Elgar 2022, p. 178–119; *Graber*, QMJIP 2015, 389 (398–399, 405); *Oprysk/Sein*, IIC 2020, 594 (609); *Perzanowski/Hoofnagle/Kesari*, Geo Wash L Rev 2019, p. 809–836; *Thomas*, Can You Play? an Analysis of Video Game User-Generated Content Policies, CREATe Working Paper, 2022, No. 2022/6.

15 Similarly, *Claeys/De Weerdt*, De conformiteit van digitale inhoud en digitale diensten, in: Claeys/Terryn (eds.), Nieuw recht inzake koop & digitale inhoud en diensten, Antwerp, Intersentia 2020, p. 119 (para. 42); *Riehm/Abold*, Mängelgewährleistungspflichten des Anbieters digitaler Inhalte, ZUM 2018, 82 (86); Schulze/*Staudenmayer*, EU Digital Law, 2020, Art. 8 DCD paras 20, 45 and 97; *Straetmans* (n 1), p. 99; cf. OLG (DE) Hamm, judgment of 15.05.2014 – 22 U 60/13, para. II.3.

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design[16]. Thus, there is a risk that consumer expectations are shaped entirely by those developers' will. Moreover, digital products usually maintain practical-technical and/or legal ties with their developers or with intermediaries in the distribution chain[17]. Indeed, consumers frequently need to adhere to unilaterally drafted service agreements[18] or end-user licence agreements (EULAs)[19] to use a digital product. In addition, technical ties allow developers to change a product's characteristics even after purchase. All this makes it challenging to determine what consumers want. And more importantly still, it makes it extra hard to find out what the *normal* functionalities of a digital product are, or in other words: what a consumer *should* want[20].

The average and reasonably informed consumer's[21] reasonable expectations about concrete digital products have received little attention in literature to date.[22] Granted, assessing conformity largely amounts to an analysis of facts, so that it is incumbent upon the judiciary to determine expectations on a case-by-case basis. Nonetheless, it would be detrimental to legal certainty if only judges' personal experiences would determine what properties an e-book, a streaming subscription or a social media account should possess. This raises the question what other sources of reasonable consumer expectations can be found.

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16 See, famously, *Lessig*, Code. Version 2.0, New York, Basic Books 2006; and later also *Perzanowski/Hoofnagle/Kesari*, Geo Wash L Rev. 2019, 783 (789–792); *Rott*, J Consum Policy, 2008, 441 (443).

17 *Graber*, Tethered Technologies, Cloud Strategies and the Future of the First Sale/Exhaustion Defence in Copyright Law, QMJIP 2015, 389 (390 f.); *Perzanowski/Hoofnagle/Kesari*, The Tethered Economy, Geo Wash L Rev 2019, 783 (785 f.); *Zittrain*, The Future of the Internet and How to Stop It, New Haven, Yale University Press 2008, p. 101 f. and 106 f..

18 *Rott*, Download of Copyright-Protected Internet Content and the Role of (Consumer) Contract Law, J Consum Policy 2008, 441 (443 f.).

19 *Spindler*, Contracts Law and Copyright – Regulatory Challenges and Gaps, in: Schulze/Staudenmayer/Lohsse (eds.), Contracts for the Supply of Digital Content: Regulatory Challenges and Gaps, Baden-Baden 2017, p. 211(220).

20 *Rott*, J Consum Policy, 2008, 441 (449).

21 It seems generally accepted that the objective conformity requirements are to be benchmarked against the 'average consumer' typical in the EU consumer *acquis*; see, *ex multis*, Schulze/*Staudenmayer* (n 15), Art. 8 DCD paras 8 and 45.

22 See, however, *Baier/Pampel/Schmidt-Kessel et al.*, Status Quo Digitaler Inhalte in Deutschland: Eine Untersuchung vor dem Hintergrund der Leistungsstörungen beim Online-Erwerb, 2017, p. 212; *Mezei/Harkai*, End-user flexibilities in digital copyright law: an empirical analysis of end-user license agreements, IELR 2022, 2; *Rott*, J Consum Policy, 2008, 441 (441 – 457); *Spindler*, JIPITEC 2021, 111; Schulze/*Staudenmayer* (n 15), Art. 8 DCD paras 131–168.

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The remainder of this chapter starts with a section where it is argued that regular market practices should be discarded as the sole source of expectations. Instead, it is tentatively suggested that the law itself may contribute to shaping the exact meaning of the open norm of reasonable expectations (B). Subsequently, this is illustrated by the potential expectations to transfer digital products to third parties and to 'port' user data (C). Finally, this contribution is brought to a conclusion (D).

B. Sources of Consumer Expectations

In the quest for consumer expectations about the 'normal' properties of digital products, there are at least two sources worth considering: the Market and the Law. The following paragraphs subsequently address expectations based on experiences on the market and the risks that this approach entails (I), as well as the potential of the law itself (II) as a somewhat surprising source of inspiration in interpreting conformity requirements.

As a third possible source of objective expectations, it is tempting to argue that consumers expect digital products to have similar characteristics as their equivalent item in the analogue world.[23] E-book buyers would then expect more or less the same properties from an e-book as from a paper book, and so on. Such a reasoning, taken alone, is unjust and doomed to become obsolete, though. First, it seems hard to uphold that, generally speaking, a consumer of a digital product always expects the same characteristics of its offline equivalent: e-book buyers know that they will not feel paper and smell ink and Netflix subscribers do not have similar expectations as DVD buyers. In the end, the product is irrefutably different and it would go too far to find a violation of the DCD's objective conformity criteria in every aspect where a digital product differs from its analogue equivalent.[24] Hence, the analogy argument would only work in specific, case-dependent constellations.[25] Second, a lot of digital products

23 Cf. *Graber*, QMJIP 2015, 389 (405); *Oprysk/Sein*, IIC 2020, 594 (620–621); *Sein/Spindler*, The new Directive on Contracts for the Supply of Digital Content and Digital Services – Conformity Criteria, Remedies and Modifications – Part 2, ERCL 2019, 365 (373).

24 *Spindler*, JIPITEC 2021, 111 para 44; cf. *Hofmann*, Recht der digitalen Güter: Keine digitale Erschöpfung bei der Weitergabe von E-Books, ZUM 2020, 136 (138).

25 *Grünberger*, Die Entwicklung des Urheberrechts im Jahr 2019, ZUM 2020, 175 (190); *Oprysk*, Digital consumer contract law without prejudice to copyright: EU

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do not have an analogue equivalent, which excludes any form of comparison. Comparing to an analogue equivalent would be impossible for social media accounts and software, for instance. Third, digital products that had such an equivalent are increasingly subject to *convergence*: the trend of initially distinct technologies and/or markets gradually merging into one.[26] In sum, analogue equivalents must not be considered a generally viable source of consumer norms and standards.[27]

I. The Market

A logical reflex to determine the consumer's expectations about a digital product would be to look at what is common on the market of that given product. Pursuant to this reasoning, consumers purchasing an e-book or taking out a streaming subscription can reasonably expect that e-book or subscription to have the same features as that of all providers, most providers or the main providers of e-books or streaming services. On second thought, it is quite problematic to fill in expectations by mere reference to market practices or customs, though. Such an approach might well be justified for gradually developed markets in tangible goods characterised by healthy competition. However, on the young markets for digital products, competition is very limited. The standards in these markets are, in fact, principally set by a limited number of established market players that arrived on the market first.[28] Requiring other traders to meet those standards would therefore essentially amount to turning these big market players' business models into enforceable norms to which all other traders of the same product must adjust.[29] Such an approach risks hampering the creativity of digital developers. Moreover, it flatly contravenes the rationales behind other recent EU legal instruments, like the Digital Markets

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Digital Content Directive, Reasonable Consumer Expectations and Competition, GRUR Int 2021, 943 (951 f.); *Spindler*, JIPITEC 2021, 111, (paras 42–43).

26 *Perlmutter*, Convergence and the Future of Copyright, in: ALAI (ed.), Copyright, related rights and media convergence in the digital context, Sweden, Swedish copyright society 2001, p. 15 (15).

27 Cf. *Rott*, J Consum Policy, 2008, 441 (450).

28 See, e.g., CFI (EU), judgment of 17.09.2007 – T-201/04, para. 940 – *Microsoft*: "… it is difficult to speak of commercial usage in an industry that is 95 % controlled by Microsoft"; cf. *Iaia*, The remodelled intersection between copyright and antitrust law to straighten the bargaining power asymmetries in the digital platform, IJLIT 2021, 169 (170–172); *Rott*, J Consum Policy, 2008, 441 (449).

29 *Faber* (n 6), p. 110–111.

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Act (DMA)[30], a regulation adopted precisely to tackle and confine the economic power of some major tech companies[31].

As the digital design choices made by the largest product developers is not a solid criterion to fill in the DCD's objective requirements, it is equally undesirable that these requirements be concretised by reference to terms in EULAs and general conditions used in practice. As two scholars point out, EULAs *are* in fact basically the very product that the consumer is purchasing[32]. That is to say, they codetermine the boundaries of that product, together with its digital design or code.[33] Hence, first, assessing whether the digital design offered to a consumer is in conformity with the specific EULA to which a consumer agreed boils down to testing the DCD's *subjective* conformity requirements, which dictates that the product needs to possess all properties 'as required by the contract'. Second, if the conformity of a digital product would be tested against the *standard* design choices and the *standard* licence terms common on the market, then the benchmark of consumer expectations would be determined by the unilateral choices of the product developers of the major market players and the drafters of their EULAs.[34] Third, comprehensive analyses have shown that digital service providers rarely include positive and concrete descriptions of their service in their general terms. In fact, terms are often open-ended and tend to focus more on what service providers do *not* undertake to deliver and what users are *not* allowed to do.[35] Hence, if they were sources of normative expectations, then they would tell little about what consumers can expect.

As an inevitable consequence, consumer surveys can, likewise, not always serve as comprehensive sources of information about reasonable expectations. Arguably, surveys can reveal consumers' frustrations in relation to digital products, and thus what they *expected* but did not get.[36] Paradoxically, though, surveys are poorly equipped to determine what they *should*

30 Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector (DMA) [2022] OJ L265/1.

31 Recitals 1–7 and Art. 1 DMA; see *infra*.

32 *Kuschel/Rostam*, Urheberrechtliche Aspekte der Richtlinie 2019/770, CR 2020, 393 (para. 11).

33 See *Geiregat* (n 14), p. 175, and the sources listed there, in fn. 189.

34 Cf. *Spindler*, JIPITEC 2021, 111 para 28; for an analysis of EULAs from this perspective, see *Oprysk/Sein*, IIC 2020, 594 (599–611).

35 *Baier/Pampel et al.* (n 22), p. 114–117; *Mezei/Harkai*, IELR 2022, 2 (19).

36 See, e.g., *Baier/Pampel et al.* (n 22), p. 114–117; *Verbraucherzentrale Rheinland-Pfalz*, Video- und Musik-Streaming-Dienste aus Verbrauchersicht, Marktwächter Digitale Welt, 2017, tinyurl.com/486epxm4 (accessed 12.08.2022).

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expect.[37] Indeed, the fact remains that the consumer's idea of what, say, 'an e-book' or 'a streaming service' is able to do, is, again, dependent on what the market has offered them so far. Indeed, why would a consumer, for example, expect that they can transfer a video game to another account, if no major service provider offers such an option?[38] Against this background, it is regrettable to find that references to common practices have been used by the judiciary to decide against consumer expectations. As such, German courts have, for instance, excluded the ability to 'resell' digital products acquired online, supported by the argument that a consumer is perfectly aware from the outset '*dass er nur begrenzte Rechte erwirbt*'.[39]

II. The Law

Provided that the Market itself, taken alone, is not appropriate to determine what consumers *should* expect, other sources must be explored. Apart from confirming that expectations should be objectively ascertained, taken into account the circumstances of the case and the usages of the parties[40], the DCD does not concretise consumers' legitimate expectations in relation to specific digital content or services. Nonetheless, this does not mean that legislation and case law cannot make useful sources to set the standard of how consumer expectations could look like. Indeed, in the remainder of this contribution, it is argued that we already have at our disposal a number of legal instruments that courts could use to operationalise the objective conformity requirements[41], but also that these sources are scattered and incomplete.

The method consisting in interpreting open norms in consumer protection law by referring to other legislation is not new. Applying such a

37 *Rott*, J Consum Policy, 2008, 441 (449).

38 Cf. *Oprysk/Sein*, IIC 2020, 594 (611–612); see, however, also *Helm/Ligon/Stovall et al.*, Consumer interpretations of digital ownership in the book market, Electronic Markets 2018, 177 (182) and *Oprysk/Sein*, IIC 2020, 594 (613–615), in relation with the use of digital products on multiple devices.

39 OLG (DE) Hamm, judgment of 15.05.2014 – 22 U 60/13, para. II.3 ("that he is only acquiring limited rights"); concurring: LG (DE) Stuttgart, judgment of 14.04.2011 – 17 O 513/10; LG (DE) Hamburg, judgment of 20.09.2011 -312 O 414/10.

40 Recital 46 DCD.

41 Cf. *Koukal*, Digital Content Portability and its Relation to Conformity with the Contract, Masaryk University JLT 2021, 53 (78); Schulze/*Staudenmayer* (n 15), Art. 8 DCD paras 28–30.

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gesetzliches Leitbild (legislative example-based) reasoning is a well-established method in the unfair terms doctrine, both in German civil law[42] and in the Court of Justice of the EU (CJEU)'s interpretation of the Unfair Terms Directive[43]. Pursuant thereto, the more a particular term deviates from default law rules, the more it is considered 'suspicious' in light of the prohibition of unfair terms.[44] This *Leitbild* approach has great potential. A similar reasoning on normative expectations could be applied to the conformity of digital products.[45] As an initial impetus to this tentative theory, this argument is hereafter applied to three sets of norms that are intertwined with the digital context.

1. Copyright Legislation and Case Law

Copyright[46] is omnipresent in digital markets. Hence, the DCD would have been the perfect occasion to regulate EULAs, and thus the link between consumers and copyright holders.[47] Regrettably, the legislature did not touch upon that intersection, though. In fact, the DCD did not alter any existing intellectual property (IP) legislation at all.[48] The latter finding does not exclude, however, that consumers could still derive normative

42 §§ 307(2)(1) and 307(3) BGB.

43 Directive 93/13/EEC on unfair terms in consumer contracts (Unfair Terms Directive) [1993] OJ L95/29.

44 See, *inter alia*, CJEU, judgment of 14.03.2013 – C-415/11 – *Aziz*; CJEU, judgment of 21.03.2013 – C-92/11 – *RWE Vertrieb*; CJEU, judgment of 20.09.2017 – C-186/16 – *Andriciuc et al.*; CJEU, judgment of 03.10.2019 – C-260/18 – *Dziubak*; CJEU, judgment of 09.07.2020 – C-81/19 – *Banca Transilvania*; CJEU, judgment of 03.09.2020 – C-84/19 – *Profi Credit Polska*; Hau/Poseck/*Schmidt*, BeckOK, 62th edn. 2022, § 307 BGB paras 30 f., 53–57; cf., in the Netherlands, *Sieburgh*, Algemeen overeenkomstenrecht, Deventer, Wolters Kluwer 2018, para. 484.

45 Cf. Schulze/*Staudenmayer* (n 15), Art. 8 DCD, para. 28.

46 For conciseness, reference is only made to copyright, although findings may apply to neighbouring rights and the database *sui generis* right, *mutatis mutandis*.

47 Cf. *Metzger/Efroni/Mischau et al.*, Data-Related Aspects of the Digital Content Directive, JIPITEC 2018, 90 (para. 49); *Oprysk*, GRUR Int 2021, 943 (956).

48 Recital 36, last sentence, and Art. 3(9) DCD; *Druschel/Engert*, ZUM 2018, 97 (98); *Grünberger*, Verträge über digitale Güter, AcP 2018, 213 (228); *Kuschel/Rostam*, CR 2020, 393 (para. 2); *Sattler*, Urheber- und datenschutzrechtliche Konflikte im neuen Vertragsrecht für digitale Produkte, NJW 2020, 3623 (para. 18); *Spindler*, JIPITEC 2021, 111 paras 2 and 21.

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expectations from existing copyright law and that these expectations could be enforceable via the objective conformity requirements.[49]

Copyright law is construed to offer protection to authors, not to protect consumers.[50] Nonetheless, the interests of third parties like consumers and other *users* of digital products are often taken into account in situations where the author's interests need to be balanced. Although the copyright exceptions and limitations constitute the most prominent examples of this[51], it should not be overlooked that consumer interests are also inherently weighted in other components of copyright law.[52] Users are, for instance, entitled to expect that they are free to perform acts of communication that fall outside the scope of the right of communication to the public by lack of either a 'public', a 'new' public or a 'new technical means' pursuant to CJEU case law[53].

Turning to exceptions and limitations, there is a good point in arguing that some of the optionally harmonised exceptions in Article 5 InfoSoc Directive, as interpreted by the CJEU, must be considered as laying down the bare minimum of protected normative expectations that a user may have of digital products.[54] Based on those exceptions, users could, for instance, expect that they can make private copies[55], either on a personal device or on a cloud server[56], from digital files that they lawfully acquired[57], but not that they can make permanent copies from content made available

49 See *European Law Institute*, Statement on the European Commission's Proposed Directive on the Supply of Digital Content to Consumers, 2016, tinyurl.com/5hbscfby (accessed 12.08.2022), p. 24–25; *Grünberger*, ZUM 2020, 175 (190); *Kuschel/Rostam*, CR 2020, 393 paras 11, 19–21; *Oprysk*, GRUR Int 2021, 943 (949–953); *Schmidt-Kessel*, Stellungnahme zu den Richtlinienvorschlägen der Kommission zum Online-Handel und zu Digitalen Inhalten, 2016, tinyurl.com/ybp6b9wc (accessed 12.08.2022), p. 16 f.; *Sein/Spindler*, ERCL 2019, 365 (372–373); *Spindler*, JIPITEC 2021, 111 paras 42–44.

50 *Oprysk/Sein*, IIC 2020, 594 (597); see Recital 4 Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive) [2001] OJ L167/10.

51 See Recital 31 InfoSoc Directive.

52 *Mezei/Harkai*, IELR 2022, 2 (2–5).

53 See, *ex multis*, CJEU, judgment of 22.06.2021 – C-682/18 – *YouTube*.

54 Similarly, see Erman/*Bernzen/Specht-Riemenschneider*, BGB § 327g para. 8; *Oprysk*, GRUR Int 2021, 943 (956).

55 Art. 5(2)(b) InfoSoc Directive.

56 CJEU, judgment of 24.03.2022 – C-433/20, paras 23, 33 – *Austro-Mechana*.

57 CJEU, judgment of 10.04.2014 – C-435/12, paras 37, 58 – *ACI Adam*; CJEU, judgment of 05.03.2015 -C-463/12, para. 74 – *Copydan Båndkopi*; CJEU, judgment of 13.11.2015 – C-572/13, paras 57–58 – *Hewlett-Packard Belgium*.

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via streaming[58]. Likewise, they could expect to be able to make back-up copies[59] of downloaded software.[60]

Linking this with the *Leitbild* function of copyright, it is arguable that consumers have a legitimate normative expectation of being able to pursue all these operations as far as they are exempted.[61] Whereas copyright (case) law has already shown that these expectations are protectable, it seems fair to conclude that a failure to guarantee these expectations could entail liability for the DCD's conformity requirements. In line therewith, it is interesting to point at a rejected amendment, tabled during the DCD negotiations at the European Parliament, aimed at prohibiting professionals from requiring consumers to conclude agreements whereby the usability of a digital product is limited when a consumer goes offline or whereby consumers are deprived from the effective use of a copyright exception.[62]

The CJEU case law on the exceptions for lawful use in Article 5(1) InfoSoc Directive and Article 5(1) Software Directive could serve a similar exemplary purpose as that of the private use exception above. Purposely construed to reflect a balancing of interests between rightholders and users parallel to that between rightholders and hardcopy owners[63], both exceptions had great potential to serve as anchors to warrant user freedoms in the digital realm.[64] Unfortunately, the one in the InfoSoc Directive is granted a rather restrictive interpretation by the CJEU, though.[65] From its case law, it is nonetheless clear that users have a protected interest in making

58 CJEU, judgment of 29.11.2017 -C-265/16, paras 37–39, 52 – *VCAST*.

59 Art. 5(2) Directive 2009/24/EC on the legal protection of computer programs (Software Directive) [2009] OJ L111/16.

60 *Spindler*, JIPITEC 2021, 111 paras 46–48, 54 (rightfully pointing at the diminishing relevance of this exception).

61 Cf. *Rott*, J Consum Policy, 2008, 441 (450).

62 See *Gebhardt/Voss*, report for the EP Committee on the Internal Market Consumer Protection and Committee on Legal Affairs of 27.11.2017 – A8–0375/2017 – PE592.444v02–00, p. 85–86, amendment 121, at points 1(qb), (qd) and (qe).

63 EC, explanatory memorandum to a Proposal for a Council Directive on the legal protection of computer programs – COM(88)816 final [1989] OJ C91/4, 9 (11–12); Council (EU), report from the Presidency to the Permanent Representatives Committee on the amended proposal for a Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society of 28.03.2000 – 7179/00, para. 12.

64 See *Synodinou*, The Lawful User and a Balancing of Interests in European Copyright Law, IIC 2010, 819 (819 – 843).

65 CJEU, judgment of 16.07.2009 – C-5/08, paras 56–58 – *Infopaq*; CJEU, judgment of 04.10.2011 – C-403/08, para. 162 – *FAPL*.

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temporary reproductions to cache, load and display content[66], in streaming and downloading paid-for content[67] and in decompiling software to correct errors or deactivate features[68]. Likewise, these interests merit to be protected through the DCD's conformity requirements.[69]

Apart from the ones above, some other exceptions could serve as interesting sources of protectable interests.[70] Especially since the reaffirmation of their digital importance in the DSM Directive[71], the exceptions for citation, for parody and pastiche and for online teaching[72] could be valuable in the future. In this respect, it must not be left unnoticed that using copyright as a *Leitbild* is without impact on the debate as to whether exceptions and limitations are or should be considered actual user *rights*.[73] Instead, the case law on these exceptions is merely used to deduct a bare minimum of legitimate interests that are already protected and could be further enforced as normative expectations through harmonised consumer contract law remedies. Consumers are entitled to expect even more than that bare legal minimum, though: it is perfectly justifiable that their expectations go beyond.[74]

The cases above are only some of the illustrations of how IP law could help to shape consumers' normative expectations. The legality of geoblocking, for one, is another instance, open for debate. In its current stance, EU internal market law seems to accept geoblocking to protect IP rights

66 CJEU, judgment of 02.05.2012 – C-406/10, paras 58 f. – *SAS Institute*; CJEU, judgment of 03.07.2012 – C-128/11, para. 76 – *UsedSoft*; CJEU, judgment of 05.06.2014 – C-360/13, paras 26 – 27 – *Public Relations Consultants*.

67 CJEU, judgment of 26.04.2017 – C-527/15 – *Wullems*.

68 CJEU, judgment of 06.10.2021 – C-13/20 – *Top System*.

69 See also *Synodinou*, Who Is a Lawful User in European Copyright Law? From a Variable Geometry to a Taxonomy of Lawful Use, in: Synodinou/Jougleux/Markou et al. (eds.), EU Internet Law in the Digital Era, Cham, Springer 2020.

70 See also *Spindler*, JIPITEC 2021, 111 paras 46–48, 54, where reference is made to the reverse engineering exception for software.

71 Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (DSM Directive) [2019] OJ L130/92.

72 See Arts 5(3)(b) and 5(3)(k) InfoSoc Directive; Arts 5 and 17(7) DSM Directive.

73 See, *ex multis*, *Geiger/Izyumenko*, The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, but Still Some Way to Go!, IIC 2020, 282 (296); *Spina Ali*, Intellectual Property and Human Rights: A Taxonomy of Their Interactions, IIC 2020, 411 (427); *Synodinou*, Lawfulness for Users in European Copyright Law. Acquis and Perspectives, JIPITEC 2019, 20 (para. 63).

74 Cf. *Baier/Pampel et al.* (n 22), p. 24–25, 41; *Oprysk*, GRUR Int 2021, 943 (956).

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subject to the principle of territoriality[75]. Yet, one may wonder whether existing legislation like the Cross-Border Portability Regulation and the Geoblocking Regulation[76] is apt to shape consumers' legitimate expectations to the extent that the presence of geoblocking design should be communicated to consumers in advance and expressly accepted by them in order to comply with Article 8(5) DCD.[77] Second, it has been argued that consumers have a legitimate interest in not having their content blocked or made unavailable by online content-sharing service providers beyond what Article 17 DSM Directive is dictating[78], and that a lack of conformity could arise from the excessive use of technical protection measures to prevent consumers from performing acts not protected by copyright[79].

As a last illustration, the CJEU's digital exhaustion case law could also influence consumer expectations, notably on the transferability of digital products. In IP, the principle of exhaustion entails that rightholders can no longer invoke certain distribution-related rights in an item after that item's first consented marketing in the EU.[80] Conceptually different from exceptions and limitations, that principle only lays down that the *rightholder* is *not* entitled to do something, and not that some beneficiary third party *is*. What happens next with the item depends on its legal status outside of IP law.[81] Because of this property, normative expectations in this regard are dealt with *infra*.

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75 See, critically, the chapter by *Brandt* elsewhere in this book; *Geiregat*, Herverkoop van digitale werken door gebruikers, Antwerp, Intersentia 2020, paras 709 f.; dissenting: *Claeys/De Weerdt* (n 15), para. 19.

76 Regulation (EU) 2017/1128 on cross-border portability of online content services in the internal market (Cross-Border Portability Regulation) [2017] OJ L168/1; Regulation (EU) 2018/302 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market (Geo-blocking Regulation) [2018] OJ LI60/1.

77 Cf. *Claeys/De Weerdt* (n 15), para. 19; *Koukal*, Masaryk University JLT 2021, 53 (70); *Synodinou*, Geoblocking in EU Copyright Law: Challenges and Perspectives, GRUR Int 2020, 136 (144–145).

78 *Spindler*, JIPITEC 2021, 111, paras 60–61.

79 *Baier/Pampel et al.* (n 22), p. 41; *Rott*, J Consum Policy, 2008, 441 (445).

80 See, e.g., Art. 4(2) InfoSoc Directive.

81 *Geiregat/Steennot*, Proposal for a Directive on Digital Content: Scope of Application and Liability for a Lack of Conformity, in: Terryn/Claeys (eds.), Digital Content & Distance Sales, Cambridge, Intersentia 2017, p. 95 (160); *Geiregat* (n 14), p. 25–26, 95; *Koehler*, Der Erschöpfungsgrundsatz des Urheberrechts im Online-Bereich, Munich 2000, p. 62; *Oprysk/Sein*, IIC 2020, 594 (618).

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2. Data Protection Law

Whereas the supply of digital services frequently brings about the processing of personal data, the General Data Protection Regulation (GDPR)[82] may well constitute another interesting source of normative consumer expectations. The GDPR provides 'data subjects' with a panoply of rights in relation to their personal data. These rights include the right to information, the right to be forgotten, the right to limit data processing, the right to object certain uses of personal data, as well as two data control rights: a data access right and a portability right.[83] The latter right is further elaborated on in s C.II. Based on their position as data subjects in data protection law, consumers could be considered to have a legitimate expectation to be able to invoke and enforce their GDPR rights. Admittedly, this may not add much to the substance of these rights. Deviously, this reasoning could give consumer's data rights more teeth, though, as it would entitle consumers to invoke the DCD remedies for non-conformity when their rights are not effectively warranted.

3. Digital Markets Act

Pursuant to the 2022 Digital Markets Act Regulation (DMA), the European Commission will have the power to designate undertakings as 'gatekeepers' if they have significant impact on the internal market and provide a 'core platform service' online. Once an undertaking has this status, it must adhere to listed obligations that the Commission may further specify.[84] Among many others, these obligations include duties to refrain from combining and cross-using certain personal data and from requiring certain identification services, web browser services or technical services, as well as duties to allow business users to use other channels to reach consumers.[85] Gatekeepers must also allow end users to access and use, through their platform services, content and other 'items', by using the software applications of a business user, even when these items were acquired outs-

82 Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (GDPR) [2016] OJ L119/1.
83 Arts 12–18 and 20–22 GDPR.
84 Arts 3–7 and 30–33 DMA.
85 Arts 5(2), 5(3), 5(4) and 5(7) DMA.

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ide the gatekeeper's platform.[86] They can also be compelled to 'allow and technically enable' end-users to easily uninstall software applications on its operation system, to easily change default settings, as well as to install and use third party software applications. They could also be compelled to enable switching between different software applications and services, and to facilitate the effective portability and continuous and real-time access of data by end users and designated third parties.[87]

In 2021, the insertion of § 19a into the German Competition Act (GWB) had already created a similar regime for large groups of undertakings that operate on the digital market.[88] Omitting further details, it is an open secret that both the DMA and § 19a GWB aim to tackle the market power of the *big tech* companies referred to as GAFAM – Alphabet (Google), Apple, Meta (formerly Facebook), Amazon and Microsoft.[89] Duties to refrain from certain listed practices are thus limited to large undertakings. Interestingly, the exact same 'gatekeepers' will be determining consumers' expectations as to what is 'normal' or 'common' on a given market, as highlighted (s B.I). As a result, it seems fair to argue that the DMA lays down minimal normative expectations that consumers may have pursuant to the objective conformity requirements in the DCD. Hence, although the DMA was not designed to provide remedies of private enforcement[90], it does have the potential of becoming the future *Leitbild* (exemplary) normative instrument as to what consumers can expect from core platform services operated by gatekeepers, which include social media services, video-sharing platform services, cloud computing services[91] etc.

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86 Art. 5(5) DMA.

87 Arts 6(3), 6(4), 6(6) and 6(9) DMA, respectively.

88 Act (*Gesetz*) (DE) of 18.01.2021, OJ *(BGBl.)* I, p. 2; see *Grünwald*, Gekommen, um zu bleiben? – § 19a GWB im Lichte des DMA-Entwurfs, NZKart 2021, 496 (496); Gersdorf/*Paal*, BeckOK Informations- und Medienrecht, 36th edn. 2022, § 19a GWB; *Podszun*, Empfiehlt sich eine stärkere Regulierung von Online-Plattformen und anderen Digitalunternehmen?, NJW-Beil 2022, 56 (59); *Schnelle/Wyrembek*, Die moderne Missbrauchsaufsicht – volle Kraft voraus mit § 19a GWB?, GRUR-Prax 2021, 432.

89 *Haus/Rundel*, Neue Missbrauchsaufsicht für digitale Ökosysteme, RDi 2022, 125 (para. 2); *Iaia*, IJLIT 2021, 169 (194–195); *Leistner*, The Commission's vision for Europe's digital future: proposals for the Data Governance Act, the Digital Markets Act and the Digital Services Act – a critical primer, JIPLP 2021, 778 (779); *Podszun,* NJW-Beil 2022, 56 (59); see BKartA (DE), decision of 30.12.2021 – B7–61/21 – *Alphabet*; BKartA (DE), decision of 02.05.2022 – B6–27/21 – *Meta*; BKartA (DE), decision of 05.06.2022 – B2–55/21 – *Amazon.com*.

90 See *infra*.

91 See Art. 2(2) DMA.

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Last, the *Leitbild* function of the DMA for consumer contracts should not necessarily be limited to contracts with gatekeepers. Going beyond the actual scope of the DMA, it is indeed questionable whether the consumer's expectations on a certain type of digital product truly depends on whether the product is supplied by a *big tech* company or by another undertaking.[92] In sum, there seems good reason to argue that, by the list of unfair practices in the DMA, the European lawmaker has considered it reasonable for consumers of digital products to expect, for instance, that they be able to easily uninstall pre-installed application software, install interoperable applications and change default settings, and that they be able to easily switch to different software applications.

C. *Two use cases*

To demonstrate potential uses of the (admittedly tentative) argumentation on normative expectations above, this subchapter addresses two cases of specific expectations that consumers could possibly have in relation to digital products. First, it focusses on the expectation to transfer ('resell') acquired digital content or an acquired digital service to a third party – a topic that gained fame as the debate on digital copyright exhaustion. Second, it focusses on the expectation of consumers to transfer, or 'port' data provided to, or generated in or through, the use of a digital product. To some extent, both instances touch the delicate topic of what it psychologically[93] means to 'own', 'possess' and 'hold on to' something in the digital world.

I. *Transferability of Digital Products*

In previous publications, I have argued that there is an increasing economic interest in being able to transfer ('resell') acquired digital content and digital services to third parties, but that harmonised EU law does not protect that interest[94], save in the case of download-supplied computer programmes accompanied by a EULA granted for at least the full term of

92 Cf. *Podszun*, NJW-Beil 2022, 56 (56–60).
93 See *Helm/Ligon et al.*, Electronic Markets 2018, 177 (187).
94 *Geiregat* (n 14), p. 179–181.

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copyright protection of the programme[95], because, there, the CJEU ruled that the principle of copyright exhaustion applied[96]. By contrast, it follows from case law that downloaded e-books are not transferable[97] and that the same is probably true for other copyright-protected digital products supplied via download[98]. Referring to the *Leitbild* function of copyright law, *Spindler* rightfully concluded from that finding that it would be hard to maintain that a consumer's normative expectations about digital products are that they be able to transfer those products to third parties.[99] Likewise, recent legislative interventions do not suggest that the EU lawmaker wanted to turn transferability into the general norm for digital products.

Download supplies are largely *passé*. Digital products are increasingly marketed as time-bound *access* rights and via *accounts* bound to individual consumers. Consumers do not reasonably expect that they can 'resell' tracks or titles in their music or video streaming subscriptions. However, can they expect to be able to transfer their access right or account? Technically, it is feasible to enable such transfers with little risk of content staying behind on the consumer's system.[100] Elsewhere, I have submitted that transferability is not so much a copyright matter: transferring a subscription or account does not – or not necessarily – require users to perform operations covered by copyright. Instead, transferability is rather a matter of contract law. Building on arguments by *Oprysk* and *Sein*, I therefore argued that making a time-bound digital product non-transferable may contravene the DCD's objective conformity requirements, depending on

95 See *Geiregat* (n 14), p.37–38.

96 CJEU, judgment of 03.07.2012 – C-128/11 – *UsedSoft*; CJEU, judgment of 12.10.2016 – C-166/15 – *Ranks*.

97 CJEU, judgment of 19.12.2019 – C-263/18 – *Tom Kabinet*.

98 *Ewert*, judgment in Tom Kabinet, C-263/18, EU:C:2019:1111, EuZW 2020, 384 (385); *Kaiser*, Exhaustion, Distribution and Communication to the Public – The CJEU's Decision C-263/18 – Tom Kabinet on E-Books and Beyond, GRUR Int 2020, 489 (492); *Ohly*, judgment in Tom Kabinet, C-263/18, EU:C:2019:1111, GRUR 2020, 184 (para. 9); *Rizzuto*, The European Court of Justice rules in Tom Kabinet that the exhaustion of rights in copyright has little place in the age of online digital formats, CTLR 2020, 108 (114); dissenting: *Schneider*, Perspektiven der Software-Lizenz – nach EuGH zu E-Books – Ende der Online-Erschöpfung?, WRP 2021, 293 (paras 43–50); *Stamatoudi/Torremans/Karapapa*, The Information Society Directive, in: Stamatoudi/Torremans (eds.), EU Copyright Law A Commentary, 2th edn., Glos, Edward Elgar 2021, p. 279–380 (paras 11.47 – 49).

99 *Spindler*, JIPITEC 2021, 111 para 44.

100 *Baier/Pampel et al.* (n 22), p. 109–110.

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the circumstances.[101] Here, the *Leitbild* function of the default rules in the law of obligations must be brought to mind. Pursuant to the Civil Codes of various EU member states contractual rights are transferable (assignable) by their holder except where otherwise agreed on.[102] In these jurisdictions, therefore, one could develop the argument that consumers have a reasonable normative expectation to be able to transfer (cede) their subscription rights or accounts to a third party.[103]

The principle of transferability of contractual rights is not mandatory law but a default rule which parties can override. In business-to-consumer transactions, default rules can make important benchmarks, though.[104] The principled transferability of contractual obligations could thus serve as a source of normative expectations when concretising conformity requirements. Insofar as a contract with a consumer does not contain anything about transferability, a consumer should in fact be entitled to expect that their subscription or account is transferable. In those circumstances, it would thus run against the conformity requirements if the digital architecture of a product does not meet those expectations. Further to this reasoning, traders who do not want to allow consumers to transfer their rights to third parties would have to inform these consumers beforehand and require them to expressly and separately accept that deviation.[105] In sum, the combination of the DCD and the principle of transferability of obligations could be interpreted as entailing a requirement for traders to make the *non-transferable* nature of a digital product explicit before the conclusion of the contract.[106]

Despite all of the above, it should not be overlooked that, in case of a breach of the conformity requirements due to the inability to transfer, the applicable remedy could be of little comfort in practice. Indeed, if the trader is simultaneously the rightholder, then consumers could, theoretically, demand that they are actually enabled to effectively transfer their rights,

101 *Geiregat* (n 14), p. 181–183.

102 See Arts 3.41, 3.50 and 3.53 Burgerlijk Wetboek (BE); Art. 1321, 4th para. Code civil (FR), as re-introduced by Decree 2016–131 [2016] OJ 35, and the former reading of Art. 1689 Code civil (FR); §§ 398–399 BGB; Art. 83 Nieuw Burgerlijk Wetboek (NL); Cour de cassation (FR), judgment of 20.04.1982 – 80–15.828; Hoge Raad (NL), judgment of 17.01.2003 – C01/162HR – *Oryx*; Hof van Cassatie (BE), judgment of 20.11.2014 – C.13.0557.F.

103 Cf. *Spindler*, JIPITEC 2021, 111 para 44.

104 Cf. *Maier-Reimer*, AGB-Recht im unternehmerischen Rechtsverkehr – Der BGH überdreht die Schraube, NJW 2017, 1 (4).

105 Art. 8(5) DCD.

106 *Sattler*, NJW 2020, 3623 (para. 24).

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either pursuant to the DCD's primary remedy of having the product been 'brought into conformity'[107] or by reference to the (national) law of obligations. If the trader is only an intermediary and is unable to actually alter transferability, then consumers might need to content themselves with the less appealing secondary remedies, however: price reduction, damages or termination of the contract.[108]

II. Portability of Data

Data portability is the new digital exhaustion. Lately, scholarly attention has largely shifted from consumers' interests in being able to transfer their purchased digital products to their interest in 'porting' the content and user-generated data that they purchased or created, either in, by or through the use of digital products.[109] In the legal context, data portability can *grosso modo* be described as the ability to retrieve or claim back ('recover') certain data in a broadly usable data format, apt to be (re)used in another digital environment and/or to forward that data to a third party.[110] The concept gained fame because of the GDPR, which provides natural persons with a broad portability right in relation to their personal data, enforceable upon data controllers.[111]

Since the enactment of the GDPR, data portability rights are on the rise. Unlike the CSD, the DCD installed a new right of that sort to the benefit of consumers who are supplied with digital content or a digital service since its transposition. Pursuant to Article 16(4), professional traders have to provide consumers with any content other than personal data, which was provided or created by the latter 'when using the digital content or digital service supplied by the trader'. The 2019 Omnibus Directive provides for a similar right in relation to distance contracts and off-premises contracts.[112] These novel rights for consumers come with a substantive ca-

107 Art. 14(1) DCD.
108 Art. 14(4) DCD.
109 For an emblematic example, see *Helm/Ligon et al.*, Electronic Markets 2018, 177 (181); see also the statistics in *Baier/Pampel et al.* (n 22), p. 66.
110 See *Geiregat*, Copyright Meets Consumer Data Portability Rights: Inevitable Friction between IP and the Remedies in the Digital Content Directive, GRUR Int 2022, 495 (498) and the references there.
111 Art. 20(1) GDPR.
112 Art. 9(1) Consumer Rights Directive, read jointly with Arts 13(6) and 13(7), as created by Directive (EU) 2019/2161 amending Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU as regards the better enforcement

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veat, though: their scope is very limited. They only apply to the contested concept of non-personal data and can only be invoked by consumers in limited instances: in the few scenarios where a consumer can terminate the agreement for a digital product's lack of conformity and in cases where consumers exercise their 14-day right to withdraw. Elsewhere, I have argued that this limited scope is regrettable and that a broader recovery right for user data is desirable.[113]

Complementing the existing data portability rights for natural persons, the DMA now lays down that the European Commission can subject gatekeepers to an obligation to enhance the ability for end users to switch provider and to effectively exercise a right to data portability by offering free tools with a view to the provision of continuous and real-time data access.[114] Recital 59 teaches that this provision goes beyond confirming that existing portability rights should be warranted. Instead, the DMA installs new portability rights and a duty to effectively operationalise those rights to the benefit of all gatekeeper customers, including consumers.[115]

In February 2022, the Commission launched its proposal for a Data Act (DA)[116]. Among many other new rules, this proposed regulation would require providers of data processing services to make sure that private and business users of cloud services can easily switch to another provider. Users should be able to 'port [their] data, applications and other digital assets' to that other provider while maintaining 'functional equivalence of the service', as well as to retrieve their data on an on-premise system.[117] Hence, the DA is expected to create yet another data portability right. A peculiarity is that this right would not only be applicable to user-generated data, but also to 'applications' and 'digital assets'. Hence, it has the potential of becoming a legal base to enforce users' expectations[118] to be able to use or 'port' digital products, like e-books, on or to multiple devices[119].

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and modernisation of Union consumer protection rules (Omnibus Directive) [2019] OJ L328/7, Art. 4(10).

113 *Geiregat*, GRUR Int 2022, 495 (499–500).

114 Art. 6(9) DMA.

115 *Kerber*, Datenrechtliche Aspekte des Digital Markets Act, ZD 2021, 544 (546 – 547); *Leistner*, JIPLP 2021, 778 (780); *Lundqvist*, The Proposed Digital Markets Act and Access to Data: A Revolution, or Not?, IIC 2021, 239 (239 – 240).

116 European Commission, Proposal for an EP & Council Regulation on harmonized rules on fair access to and use of data (Data Act) of 23.02.2022 – COM(2022)68 final (DA Proposal).

117 Arts 23(1), 24(1)(a) and 26(4) DA Proposal.

118 See *Helm/Ligon et al.*, Electronic Markets 2018, 177 (182).

119 On this topic, see also *Oprysk/Sein*, IIC 2020, 594 (613–615).

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The scopes of all these existing and future data portability rights make one big patchwork with many overlaps and hiatuses.[120] Moreover, the portability rights in the DCD and the Omnibus Directive are genuine rights that consumers can enforce, albeit only as a secondary remedy in limited instances. By contrast, the DMA does not provide for private enforcement mechanisms at all.[121] The DA Proposal's text leaves much room for doubt in this respect[122], although it is arguable that the Commission indeed intended to construe a data portability right that end users can enforce themselves.[123] In spite of these differences, there is a clear trend towards the recognition of portability rights to the benefit of natural persons in their capacity as end users of digital products. Although a textual attribution of one general right for consumers to port user-generated data is absent in harmonised EU law, it thus seems fair to wonder whether today's proliferation of data portability rights is sufficient to argue that consumers have a legitimate, normative expectation to be able to transfer any data that they may create or supply while using a digital product. If such a *Leitbild* reasoning is accepted, this would entail that the absence of effective portability mechanisms in digital content and digital services can bring about liability for non-conformity pursuant to the DCD, unless if a trader had effectively informed consumers about non-portability and insofar as the consumer had explicitly and separately accepted this deviation.

D. Conclusions

In the DCD, liability for non-conformity is all about the consumer's legitimate expectations. In this chapter, it is put forward that we should look

120 See, e.g., *Drexl/Banda et al.*, Max Planck Institute for Innovation and Competition Position Statement on the Data Act, 25. May 2022, tinyurl.com/3dewrw3d (accessed 12.08.2022), paras 176–177, questioning the parallel application of the DCD and the DA Proposal; similarly, see *Graef/Husovec/Purtova*, Data Portability and Data Control: Lessons for an Emerging Concept in EU Law, GLJ 2018, 1359 (1395); *Graef/Husovec/van den Boom*, Spill-Overs in Data Governance: Uncovering the Uneasy Relationship Between the GDPR's Right to Data Portability and EU Sector-Specific Data Access Regimes, EuCML 2020, 3 (16).

121 See *Karbaum/Schulz*, "Antitrust Litigation 2.0" – Private Enforcement beim DMA?, NZKart 2022, 107; *Schweitzer*, ZEuP 2021, 503 (541 f.).

122 *Drexl/Banda et al.* (n 120), paras 8, 248–253.

123 See the wording of Arts 23(1) and 24(1)(a) DA Proposal, read jointly with Art. 31(1).

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beyond what digital consumers want. The challenge lays in determining what digital consumers *should* want. Quoting *Rott* over a decade ago,

> "[w]hat should be considered to be 'normal' is not a mere empirical test but rather a normative test that allows the consideration of various factors".[124]

Whereas contemporary consumer views are already coloured by the main market players, a tentative statement was developed, arguing that the law could *also* make an interesting source of consumer expectations, featuring copyright law as a prime example. In this respect, it should be stressed that the law might only sporadically offer guidance in determining consumer expectations, so that other sources should in any case also be taken into account.

Zooming in on what consumers could normatively be entitled to expect to 'take with them' when they no longer want to use a digital product in the future, the idea of the law as a *Leitbild* for objective conformity requirements was applied to two use cases. In relation to transferability of the product itself, the conclusion seems to be that there is some limited scope to argue in favour of an expectation of transferability of digital access rights and accounts. With regard to user-generated data, it was put forward that present-day consumers might indeed rightfully expect to be technically able to 'port' their data. In both cases, Article 8(5) DCD could substantially mitigate consumer protection, however, by turning the requirement of transferability or portability into a formality and a transparency obligation.

What is the next step in determining consumer expectations? Undoubtedly, it would be an impossible task to try drafting an exhaustive list of legitimate expectations that consumers may or may not have of digital content and digital services.[125] Expectations depend on a great variety of factors, including the manner in which a digital product is marketed, its one-off or time-bound nature, the remuneration paid by the consumer[126], etcetera. Moreover, digital products are subject to notoriously fast evolutions, so any list is bound to be outdated in a short term. Hence, it would

124 *Rott*, J Consum Policy, 2008, 441 (449); cf. Schulze/*Staudenmayer* (n 15), Art. 8 DCD, para. 58; *Staudenmayer*, The Directives on Digital Contracts: First Steps Towards the Private Law of the Digital Economy, ERPL 2020, 219 (239).

125 *Riehm/Abold*, ZUM 2018, 82 (para. 86); somewhat dissenting, see *Rott*, J Consum Policy, 2008, 441 (453–454).

126 Cf. Annex I, Art. 100(g) CESL Proposal.

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be useless to draft a legislative instrument listing all required features of all digital products in great detail.

Nonetheless, it is worthwhile to slow down and make the exercise of carefully considering what we should want digital products to perform. If we do not, then we basically risk leaving it up to the major market players themselves to set their own standards. To take one of the use cases as an example, one may wonder, in hindsight, when and why consumers have started to accept that digital products are generally 'just not transferrable', whereas transferability used to be such a hot topic in the early 2000s and the interests at stake are still the same.[127] Could it be that, because of years of experiences with non-transferable EULAs and ditto access rights, we as consumers and lawyers have simply become acquainted to some undertaking's narrative that there is just no way to trade our 'digital assets' for cash…?

127 Compare, e.g., *Gasser*, Copyright and Digital Media in a Post-Napster World: 2005 Update, 1 Feb. 2005, doi: 10.2139/ssrn.655393, p. 53–54, on the one hand, where a 2004 survey revealed that between 40 and 50 % of respondents still argued that they would be 'much' or 'somewhat' less likely to subscribe to an internet service that does not allow reselling; with the findings in *Helm/Ligon et al.*, Electronic Markets 2018, 177 (181 f.).

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