

# Contracts on Digital Content in Europe: Balancing between Author-Protective Copyright Policies and Consumer Policies

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*The online distribution of digital content is generally based on a chain of contractual relationships that can frequently consist of an upstream relationship between an author and a supplier, and a downstream relationship between the supplier and the consumer. Protected digital content transactions are thus potentially subject to two distinct sets of rules, i.e. copyright and consumer protection rules. Consequently, it is important to ensure consistency between the legal instruments that apply to these different contractual relationships, to avoid a «clash of cultures». Against this background, this article discusses two recent EU proposals on the supply of digital content and on copyright in the Digital Single Market, respectively. It presents the proposed instruments and their interactions in the multi-component digital contractual ecosystem and argues that a holistic approach is necessary to ensure consistency between the relevant regulatory regimes and to avoid a*

*situation where suppliers are caught between two regimes that pursue different and partly conflicting policy goals (author-protective vs consumer-protective). In addition to devising a coherent system of substantive norms, a holistic approach also requires procedural devices that support the effective resolution of disputes that may arise in the chain of digital content transactions. In this respect, this article argues that the best approach to solving disputes regarding digital content contracts may well be one that favors the use of alternative dispute resolution mechanisms, rather than actions before national courts (although such actions should remain available), as court proceedings arguably fail to meet the needs of parties to the digital content transactions. Such alternative dispute resolution mechanisms too would require proper coordination to avoid conflicting decisions and parallel proceedings.*

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## I. Introduction

Digital technologies and digitization have fundamentally changed the way creative works and products are created, produced, used, distributed and exploited.<sup>1</sup> They have also led to the emergence of digital content markets.<sup>2</sup>

The access to, and use of, digital content in digital content markets naturally involves digital content transactions between suppliers and consumers. Where the digital content is protected by intellectual property law, and specifically by copyright law<sup>3</sup> (which is generally the case of digital content in the form of creative works, such as software, digital music, e-books,

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<sup>1</sup> European Commission Press release, «State of the Union 2016: Commission proposes modern EU copyright rules for European culture to flourish and circulate», 14 September 2016, <[http://europa.eu/rapid/press-release\\_IP-16-3010\\_en.htm](http://europa.eu/rapid/press-release_IP-16-3010_en.htm)>; all links to websites were last accessed on 29 November 2016.

<sup>2</sup> Natali Helberger/Marco Loos/Lucie Guibault/Chantal Mak/Lodewijk Pessers, Digital Content Contracts for Consumers, 2012, 37–57, 38 ff, <<http://link.springer.com/article/10.1007/s10603-012-9201-1>>.

<sup>3</sup> *Ibid.*, 44. This paper will focus on the protection afforded by copyright, although there may also be other sources of protection available, specifically the protection for neighboring rights.

games, etc.), its exploitation also presupposes a prior agreement (typically, a license agreement) by which the use of the protected content is authorized by the right holder (as licensor).<sup>4</sup>

Accordingly, in digital content markets, contracts regarding the supply of copyright-protected digital content transactions are potentially governed by two distinct sets of rules, i.e. copyright and consumer protection rules.<sup>5</sup> This implies a chain of contractual relationships, namely (i) the *upstream* relationship between the author or the initial owner of the copyright and the supplier to whom the author has generally licensed or transferred one or several of the rights in his or her work,<sup>6</sup> and (ii) the *downstream* relationship between the supplier and the consumer or the end-user (in business-to-consumer [B2C] transactions), to whom the supplier has supplied the work.

Under these circumstances, it is important to ensure that the rules that apply to these different contractual relationships are coherent and consistent. This requires placing copyright law in the broader context of digital content markets so as to consider its interactions and interplay with other areas of law, including consumer law.<sup>7</sup> This is no easy task in light notably of the conflicting yet closely related interests at stake. The interest of the content owner (right holder) is in particular to fully exploit the value of the digital content, to preserve his or her rights to the greatest extent, and to increase infringement detection possibilities.<sup>8</sup> By contrast, the interest of the content user/consumer is to make the most extensive use of the digital content at a minimum cost.<sup>9</sup>

Contract law has always played a critical role in the copyright law system because contracts are the customary vehicle by which copyrighted works have been put to use<sup>10</sup> and contracts regarding digital content are no exception as they too typically involve copyright law issues. Accordingly, the various interactions between copyright, contract and consumer protection law and policy are increasingly subject to on-going discussions.<sup>11</sup>

As part of its Digital Single Market Strategy, the EU has recently unveiled two new proposed directives concerning (i) digital content transactions and (ii) selected aspects of copyright. Despite being both part of the same overall strategy, the proposed directives are not explicitly linked to each other.<sup>12</sup> On a fundamental level, the question thus arises as to whether these proposals, which relate to fields which have inherent interactions and which are meant to exist in parallel, are consistent with each other.<sup>13</sup> Even if it may seem somewhat premature to discuss the policy impact of proposed directives that have not yet been adopted, the issues that they raise are sufficiently important to warrant a discussion already at this stage, if only because such issues are likely to remain on the agenda even if the proposed directives would not be adopted and because these issues are of relevance also for non-EU countries (specifically for Switzerland).

On this basis, this article first briefly describes the policy context of both proposed directives (Part II). It goes on to provide an overview of selected aspects of both proposals (Part III and IV). Part V of this article examines selected areas of interaction between the proposed directives and Part VI draws some conclusions.

<sup>4</sup> Natali Helberger/Lucie Guibault, Clash of cultures – integrating copyright and consumer law, Vol. 14 Iss. 6, 2012, 23–24, <<http://dx.doi.org/10.1108/14636691211271208>>.

<sup>5</sup> *Ibid.*, 24.

<sup>6</sup> Jacques de Werra, Moving beyond the conflict between freedom of contract and copyright policies: in search of a new global policy for information licensing transactions, Columbia Journal of Law & the Arts, Vol. 25, 2003, 239–378, 246, <<http://archive-ouverte.unige.ch/unige:31503>>.

<sup>7</sup> Helberger/Guibault (fn 4), 24; for an analysis under Swiss law, see Yaniv Benhamou/Laurent Tran, Circulation des biens numériques : de la commercialisation à la portabilité, sic ! 2016, p. 571, p. 576.

<sup>8</sup> EU study on the Legal analysis of a Single Market for the Information Society, New rules for a new age?, November 2009, 2, <[http://ec.europa.eu/information\\_society/newsroom/cf/document.cfm?doc\\_id=834](http://ec.europa.eu/information_society/newsroom/cf/document.cfm?doc_id=834)>.

<sup>9</sup> *Idem.*

<sup>10</sup> De Werra (fn 6), 246.

<sup>11</sup> Helberger/Guibault (fn 4), 24.

<sup>12</sup> To the contrary, since according to its explanatory memorandum and one of its Recital, the proposal concerning digital content contracts is meant to refrain from addressing copyright issues.

<sup>13</sup> Martin Schmidt-Kessel/Katharina Erler/Anna Grimm/Malte Kramme, Die Richtlinienentwürfe der Kommission zu Digitalen Inhalten und Online-Handel – Teil 1, GPR 1/2016, 2.

## II. Policy context

On 6 May 2015, the EU Commission announced its Digital Single Market Strategy (DSM).<sup>14</sup> This announcement was followed on 9 December 2015 by the submission by the EU Commission of the first three legislative proposals for the implementation of the DSM. These proposals include a proposal on the cross-border portability of online content services,<sup>15</sup> which is part of the EU Commission's first action plan to modernize EU copyright rules,<sup>16</sup> and a key element of the DSM's objectives.<sup>17</sup> Other, purportedly (very) contentious copyright-related topics and related legislative proposals<sup>18</sup> were deferred to 2016.<sup>19</sup>

The second and third legislative proposals unveiled in December 2015 relate to contract law. Specifically, the proposals aim at modernizing and harmonizing rules for the supply of digital content and online sales of goods in order to resolve the issue created by the lack of a dedicated legal instrument on EU level that exclusively deals with online purchase contracts. Thus, the second proposed directive deals with online and other distance contracts for the delivery of goods in a B2C context.<sup>20</sup> As to the third proposal, it concerns the B2C supply of digital content (Proposal for a Directive on certain aspects concern-

ing contracts for the supply of digital content: «**Digital Content Proposal**»<sup>21</sup>).

On 14 September 2016, the EU Commission released its new copyright reform package that included four additional legislative proposals, amongst which the Proposal for a Directive on copyright in the Digital Single Market («**Digital Copyright Proposal**»<sup>22</sup>). The Digital Copyright Proposal regulates several topics, particularly new related rights for press publishers, new duties on service providers, and, most interesting for our purposes, new «transparency obligations» and provisions on remuneration in contracts of authors and performers.

The Digital Content Proposal and the Digital Copyright Proposal will now be submitted to the European Parliament and the Council for debate and adoption. While some anticipate the Digital Content Proposal to be adopted relatively quickly and without too much opposition,<sup>23</sup> the situation is different for the Digital Copyright Proposal, which has already triggered a fair amount of criticism<sup>24</sup> and is likely to

<sup>14</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, COM(2015) 192 final, 6 May 2015, <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1447773803386&uri=CELEX:52015DC0192>> (hereinafter «EU Commission Communication DSM»).

<sup>15</sup> This proposal will not be discussed any further here.

<sup>16</sup> EU Commission Communication, Towards a modern, more European copyright framework, COM(2015) 626 final, 9 December 2015, <[http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc\\_id=12526](http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=12526)>.

<sup>17</sup> EU Commission Communication DSM (fn 14).

<sup>18</sup> Gerald Spindler, Die Modernisierung des europäischen Urheberrechts, Der Vorschlag zur Portabilitäts-VO und die Planungen der EU-Kommission, CR 2016, 73–81, 74.

<sup>19</sup> Initially, the EU Commission had indicated that such proposals would be submitted «before the end of 2015», see the EU Commission Communication DSM (fn 14), 8.

<sup>20</sup> This proposal too will not be discussed any further here.

<sup>21</sup> Proposal for a Directive of the European Parliament and the Council on Certain Aspects Concerning Contracts for the Supply of Digital Content, 2015, COM/2015/0634 final – 2015/0287 (COD), 9 December 2015, <<https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-634-EN-F1-1.PDF>>.

<sup>22</sup> Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, COM(2016) 593 final – 2016/0280(COD), 14 September 2016, <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0593>>.

<sup>23</sup> Marco Loos, European Harmonization of Online and Distance Selling of Goods and the Supply of Digital Content, Centre for the Study of European Contract Law Working Paper Series No. 2016-08, 31 May 2016, 34, <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2789398](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2789398)> (stating that «overall the industry, consumer organisations, scholars and Member States seem to have welcomed the proposal and to approach its provisions fairly favourably»).

<sup>24</sup> Amidst the plethora of reactions, see in particular the following: <<https://techcrunch.com/2016/09/14/eu-digital-copyright-reform-proposals-slammed-as-regressive/>; <https://www.techdirt.com/articles/20160914/11513635518/eu-announces-absolutely-ridiculous-copyright-proposal-that-will-chill-innovation-harm-creativity.shtml>>; <<http://www.vzbv.de/pressemitteilung/grosse-enttauschung-ueber-die-vorschlaege-zum-europaeischen-urheberrecht>>; <<https://creativecommons.org/2016/09/14/european-commission-copyright-proposal-leaves-users-dark/>>.

undergo major revisions throughout the legislative process over the next couple of years.<sup>25</sup>

### III. The Digital Copyright Proposal

#### 1. Objective, subject-matter and scope

The Digital Copyright Proposal's main objective is to address the specific issues identified in the December 2015 communication of the EU Commission «Towards a modern, more European copyright framework».<sup>26</sup>

The proposal provides for a set of specific rules aimed at harmonizing EU law applicable to copyright and related rights (Art. 1). It is broken into five titles and structured as follows: Title I (General provisions), Title II (Measures to adapt exceptions and limitations to the digital and cross-border environment),<sup>27</sup> Title III (Measures on licensing practices and wider access to content), Title IV (Measures to achieve a well-functioning market place for copyright, including measures related to the fair remuneration of authors and performers). Title V contains the (standard) final provisions on amendments to other directives, the application in time, transitional provisions, the protection of personal data, the transposition, the review and the entry into force. The focus will be here on Title III and Title IV.

#### 2. Measures on licensing practices and wider access to content

The third title of the Digital Copyright Proposal bears the broad title «Measures to improve licensing practices and ensure wider access to content». This title, which comprises four provisions, art. 7 to 10, is divided into two chapters: Chapter 1 («Out-of-commerce works»), which focuses on the licensing of out-of-

commerce works and covers Art. 7 to 9, and Chapter 2 («Access to and availability of audiovisual works on video-on-demand platforms»), which is anchored in Art. 10.

With respect to out-of-commerce works, Art. 7 requires the introduction of a legal mechanism that facilitates licensing agreements of out-of-commerce works (and other subject-matter) by cultural heritage institutions. Art. 8 guarantees the cross-border effect of such licensing agreements. Member States are required to put in place a stakeholder dialogue on issues relating to Art. 7 and 8 (Art. 9). Finally, Art. 10 creates an obligation for Member States to put in place a negotiation mechanism to facilitate negotiations about the online exploitation of audiovisual works by providing that «[m]ember States shall ensure that where parties wishing to conclude an agreement for the purpose of making available audiovisual works on video-on-demand platforms face difficulties relating to the licensing of rights, they may rely on the assistance of an impartial body with relevant experience. That body shall provide assistance with negotiation and help reach agreements», whereby Member States are invited to notify to the Commission the body referred to in paragraph 1, no later than the time when they shall transpose the Directive into their national law.

#### 3. Measures to achieve a well-functioning market place for copyright

Chapter 1 of the fourth title, devoted to «measures to achieve a well-functioning marketplace for copyright», deals with rights in publications, or «ancillary copyright»<sup>28</sup>. Art. 11 creates a related right (neighboring right) for press publishers to authorize the online use (i.e. the reproduction and making available<sup>29</sup>) of their press publications. To address the EU Court of Justice *Reprobel* judgment of 12 November 2015,<sup>30</sup> which precluded press publishers from receiving a share of the compensation accruing from private copy and reprography levies, Art. 12 allows Member States to

<sup>25</sup> *Ted Shapiro*, EU copyright will never be the same: a comment on the proposed Directive on copyright for the digital single market (DSM), European Intellectual Property Review, 2016, 38(12), 771–776, 771.

<sup>26</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, COM(2015) 192 final, 6 May 2015, <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1447773803386&uri=CELEX:52015DC0192>>.

<sup>27</sup> Title II will not be presented here as its content is not the focus of this paper.

<sup>28</sup> Blog post by *Eleonora Rosati*, «Here's draft Directive on copyright in the Digital Single Market», 31 August 2016, <<http://ipkitten.blogspot.ch/2016/08/super-kat-exclusive-heres-draft.html>>.

<sup>29</sup> *Idem*.

<sup>30</sup> C-572/13, *Hewlett-Packard Belgium SPRL v. Reprobel SCRL*.

provide publishers with the option to claim a share in the compensation for uses made under an exception.

Chapter 2 concerns the use of protected content by online services. Art. 13 attempts to tackle the so-called «value gap»<sup>31</sup> by introducing alternative obligations<sup>32</sup> upon certain intermediaries, which are unhelpfully<sup>33</sup> referred to as «information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users»<sup>34</sup>. Such intermediaries are to be understood as comprising user-generated/created content sites (such as YouTube, Dailymotion and Vimeo<sup>35</sup>). Under Art. 13, said intermediaries are required to take measures to (i) ensure the functioning of agreements concluded with right holders or to (ii) prevent the availability on their services of content identified by right holders, in cooperation with the service providers. The measures that are imposed upon the intermediaries under Art. 13 are to be «appropriate and proportionate» and include «the use of effective content recognition technologies». This has been largely criticized since such measures ultimately result in the imposition of filtering obligations, which may conflict with EU law.<sup>36</sup> In addition, filtering would presuppose the monitoring of all content, which is inconsistent with the EU E-commerce Directive,<sup>37</sup> since Art. 15 of such directive precisely prohibits the imposition of a general monitoring obligation («No general obligation to monitor»<sup>38</sup>).

Chapter 3 contains measures that aim at improving the contractual protection of authors and performers for the purpose of achieving a «fair remuneration in contracts of authors and performers» (which is the title of Chapter 3). The EU Commission plans to harmonize copyright contract law by protecting the authors/performers as weaker parties.<sup>39</sup> Chapter 3 contains three provisions that are interrelated: Art. 14 introduces an obligation of transparency, Art. 15 provides for a so-called «contract adjustment mechanism» and Art. 16 provides for a «dispute resolution mechanism».

Art. 14 first imposes upon Member States the obligation to ensure that publishers and producers shall be transparent and consequently inform authors or performers with whom they have contracted about the uses and revenues generated with the works and performances of the authors or performers. Art. 14 (1) thus provides that «Member States shall ensure that authors and performers receive on a regular basis and taking into account the specificities of each sector, timely, adequate and sufficient information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights, notably as regards modes of exploitation, revenues generated and remuneration due».

This obligation purports to remedy the frequent lack of transparency<sup>40</sup> faced by authors and performers in their contractual relationships with their publishers or their producers. This lack of transparency prevents authors and performers from properly monitoring the use, exploitation, and revenues generated by the use of their works or performances, and makes them dependent on the publishers/producers to whom they assign or license their rights.<sup>41</sup> The objective of Art. 14 is therefore for authors and performers to be better informed by their contractual partners on the exploitation of their works and on the generation

<sup>31</sup> Blog post by *Christina Angelopoulos*, «EU Copyright Reform: Outside the Safe Harbours, Intermediary Liability Capsizes into Incoherence», 6 October 2016, <<http://kluwercopyrightblog.com/2016/10/06/eu-copyright-reform-outside-safe-harbours-intermediary-liability-capsizes-incoherence/?print=print>>.

<sup>32</sup> The rationale of Art. 13 is set forth at Recital 37 of the EU Proposal Copyright.

<sup>33</sup> Blog post by *Angelopoulos* (fn 31).

<sup>34</sup> Digital Copyright Proposal, Art. 13(1).

<sup>35</sup> *Shapiro* (fn 25), 774; see also the blog post by *Angelopoulos* (fn 31).

<sup>36</sup> Blog post by *Angelopoulos* (fn 31); see also *Shapiro* (fn 25), 775.

<sup>37</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:en:HTML>>.

<sup>38</sup> Blog post by *Angelopoulos* (fn 31).

<sup>39</sup> *Spindler* (fn 18), 79.

<sup>40</sup> DSM News Post, «Commission gathers evidence on remuneration of authors and performers for the use of their works and the fixations of their performances», 24 July 2015, <<https://ec.europa.eu/digital-single-market/en/news/commission-gathers-evidence-remuneration-authors-and-performers-use-their-works-and-fixations>>.

<sup>41</sup> Commission Staff Working Document Impact Assessment on the modernisation of EU copyright rules, Part 1/3, 14 September 2016, 173, <<https://ec.europa.eu/digital-single-market/en/news/impact-assessment-modernisation-eu-copyright-rules>>.

of revenue, since such information ultimately affects their remuneration.<sup>42</sup> The transparency obligation is governed by the general principle of proportionality (it shall be «proportionate and effective» pursuant to art. 14 (2)). On this basis, the obligation shall be adjusted when the administrative costs it implies are disproportionate in view of the generated revenues.<sup>43</sup> Pursuant to Art. 14 (3), «Member States may further decide that the obligation in paragraph 1 does not apply when the contribution of the author or performer is not significant having regard to the overall work or performance». This also reflects the principle of proportionality, although it may be difficult to assess in practice in a specific case under what conditions the contribution of an author or performer shall or not be deemed significant «having regard to the overall work or performance».

Art. 15 provides for a so-called «contract adjustment mechanism» (which is the title of Art. 15). It provides that «Member States shall ensure that authors and performers are entitled to request additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation of the rights when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works or performances». This provision is closely connected to the obligation of transparency set forth at Art. 14 since it is on the basis of the information received pursuant to Art. 14 that authors and performers will be in a position to assess whether or not there is a potential disproportionality under Art. 15. This last provision, which can be viewed as a «bestseller clause»<sup>44</sup>, thus provides for an unspecified contract adjustment mechanism that can entitle authors and performers to amend their contracts with their contractual partners in the event their works and performances generate revenues to which they would not be entitled based on their pre-existing agreements.

Both the obligation of transparency as well as the contract adjustment mechanism may give rise to disputes between the contracting parties (i.e. between authors/performers and their contractual partners). However, national court litigation is not necessarily

the best approach to deal with such disputes (even if it of course remains available)<sup>45</sup> because «[a]uthors and performers are often reluctant to enforce their rights against their contractual partners before a court or tribunal»<sup>46</sup>. For this reason, Art. 16 provides that «Member States shall provide that disputes concerning the transparency obligation under Article 14 and the contract adjustment mechanism under Article 15 may be submitted to a voluntary, alternative dispute resolution procedure». As expressly reflected in Art. 16, the use of alternative dispute resolution (ADR) procedures is not imposed, but rather voluntary.

## IV. The Digital Content Proposal

### 1. Introduction

The Digital Content Proposal is a policy tool that aims at regulating contractual behaviors and at protecting the weaker party to a contract, i.e. consumers, against its contractual partner. In this respect, the policy goals of the Digital Content Proposal bear similarities with certain policy goals of the Digital Copyright Proposal that (as reflected above) also aim at protecting a weaker party, i.e. authors and performers. The Digital Content Proposal is aimed at being a full harmonisation instrument, so that, once in force, Member States shall not be able to deviate from the standards that it defines and thus shall not be in a position to keep or introduce more or less consumer-friendly rules within its scope (Art. 4).<sup>47</sup>

### 2. Objective and subject-matter

The Digital Content Proposal's main objectives are to eliminate contract law-related barriers that impede on cross-border trade and to reduce the uncertainty and costs faced by businesses and consumers due to the complex and fragmented legal framework that currently applies to digital content contracts within the EU.<sup>48</sup> The proposal's goal is thus to fill the identified legal gap in the *consumer acquis* at EU level re-

<sup>42</sup> Digital Copyright Proposal, Explanatory Memorandum, 3.

<sup>43</sup> See Art. 14 (2) second sentence; see also Digital Copyright Proposal, Explanatory Memorandum, 10.

<sup>44</sup> *Shapiro* (fn 25), 776.

<sup>45</sup> *Idem*.

<sup>46</sup> Recital 43.

<sup>47</sup> Digital Content Proposal, Explanatory Memorandum, 12; see also *Schmidt-Kessel et al.* (fn 13), 3.

<sup>48</sup> Digital Content Proposal, Explanatory Memorandum, 2.

garding selected aspects of digital content contracts «for which there are currently no rules».<sup>49</sup>

The Digital Content Proposal contains rules on certain specific contractual aspects of the relationship between suppliers and consumers of digital content (Art. 1). Specifically, it sets forth (i) rules on conformity of digital content with the contract, (ii) remedies available to consumers in cases of the lack of conformity of digital content with the contract and the modalities for the exercise of those remedies, and (iii) certain rules concerning the right to terminate long term contracts for the supply of digital content and the modification of digital content.<sup>50</sup>

### 3. Scope

The proposal regulates a new type of contract, i.e. a contract «for the supply of digital content», whereby «digital content» is defined very broadly.<sup>51</sup> Digital content particularly covers «data in digital form, which is produced and delivered in the form of video, audio, applications, games or other software» (Art. 2(1) (a)). It is noteworthy that, while the proposal creates said new specific contract category, it does not require Member States to do so, which may bear the risk of fragmentation.<sup>52</sup>

The scope of the Digital Content Proposal, laid down at Art. 3, is extremely broad and purports to cover contracts with very different characteristics. Contracts which would fall under the scope of the proposal include contracts for the supply of digital content *stricto sensu*. This covers the sale or rental of digital content, such as the supply of software, digital music, e-books, films, games, etc. Further, and this constitutes an innovation, the proposal also covers contracts for the supply of digital *services*, which are defined broadly so as to capture all sorts of services

that may be relevant in regard to digital content, such as cloud computing or social media.<sup>53</sup>

The Digital Content Proposal focuses on B2C transactions, i.e. transactions that are entered into between a professional supplier<sup>54</sup> and a consumer<sup>55</sup>. It explicitly mentions that the consideration paid by the consumer for the supply of digital content can be either a price in «money»<sup>56</sup> or another counter-performance by the consumer («other than money»), in the form of a provision of data, such as personal data or «any other data», by the consumer (Art. 3(1)).<sup>57</sup>

Despite its broad scope, the Digital Content Proposal also (voluntarily) excludes from its scope a number of important areas, including intellectual property law, and particularly copyright law. This is expressly reflected in Recital 21 which provides that «[t]his Directive should not deal with copyright and other intellectual property related aspects of the supply of digital content. Therefore it should be without prejudice to any rights and obligations according to copyright law and other intellectual property laws». As will be discussed later in further detail (see Part V below), it follows that the interactions between the Digital Content Proposal and other EU acts, especially the Digital Copyright Proposal, are not dealt with in the proposal. It may be noted in passing that the

<sup>49</sup> Digital Content Proposal, Explanatory Memorandum, 3.

<sup>50</sup> Digital Content Proposal, Explanatory Memorandum, 11.

<sup>51</sup> Digital Content Proposal, Explanatory Memorandum, 11 («[T]he definition of digital content is deliberately broad and encompasses all types of digital content»).

<sup>52</sup> Rafał Mańko, Contracts for the supply of digital content, A legal analysis of the Commission's proposal for a new directive, EPRS, May 2016, 11.

<sup>53</sup> Mańko (fn 52), 9; Martin Schmidt-Kessel, Stellungnahme zu den Richtlinienvorschlägen der Kommission zum Online-Handel und zu Digitalen Inhalten, 3, <[https://www.bundestag.de/blob/422258/c3ecca9b7286f38bda7e060f7b420c06/schmidt\\_kessel-data.pdf](https://www.bundestag.de/blob/422258/c3ecca9b7286f38bda7e060f7b420c06/schmidt_kessel-data.pdf)>; Rolf H. Weber/Dominic Oertly, E-Commerce und Sharing Economy in der Europäischen Union, Ein vertragsrechtlicher Überblick, Jusletter IT, 22 September 2016, 12.

<sup>54</sup> Defined at Art. 2 (3) as «any natural or legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to that person's trade, business, craft, or profession».

<sup>55</sup> Defined at Art. 2 (4) as «any natural person who in contracts covered by this Directive, is acting for purposes which are outside that person's trade, business, craft, or profession».

<sup>56</sup> Digital Content Proposal, Art. 2(6).

<sup>57</sup> Loos (fn 23), 14; Vanessa Mak, The new proposal for harmonised rules on certain aspects concerning contracts for the supply of digital content, 10, <[http://www.epgencms.europarl.europa.eu/cmsdata/upload/a6bdaf0a-d4cf-4c30-a7e8-31f33c72c0a8/pe\\_536.494\\_en.pdf](http://www.epgencms.europarl.europa.eu/cmsdata/upload/a6bdaf0a-d4cf-4c30-a7e8-31f33c72c0a8/pe_536.494_en.pdf)>; Weber/Oertly (fn 53), 12.

general reference to the proposal as a *lex generalis*<sup>58</sup> does not clarify such interactions.

#### 4. Conformity of digital content

The Digital Content Proposal institutes a broad liability of the supplier of digital content towards the consumer for any defect regarding the supplied digital content. The supplier's liability, which would entitle the consumer to remedies, requires the finding of a lack of conformity with the contract.<sup>59</sup>

The proposal provides that conformity of the digital content with the contract is assessed first by reference to subjective standards (i.e. contractual definition; Art. 6(1)), and second by reference to objective standards (statutory definition; Art. (6)(2)). It is incidentally noteworthy in this respect that the consumer's legitimate expectations are not a conformity criterion. The language of Art. 6 implies (and the explanatory memorandum<sup>60</sup> as well as Recital 24 confirm), that the supplied digital content must primarily conform to the contractual standards contained in the contract itself.<sup>61</sup> It is only in the absence of contractual standards that the conformity of the digital content shall be determined by reference to objective conformity criteria («implied terms»<sup>62</sup>), which may include international technical standards, industry codes or good practices (Art. 6(2)(b)).<sup>63</sup>

The purpose of enabling the parties and, specifically the supplier, to define the conformity of the digital content in the contract themselves/itself, is notably to put the supplier in a position where it can make sure that it does not grant more rights of use of the digital content to its clients (i.e. the consumers) than the rights of use, derived from copyright law, that it has obtained from its own suppliers (potentially the authors or performers). The supplier must thus be given the opportunity to avoid conflicts between its contractual obligations resulting from different contracts (i.e. the contracts with its own suppliers of dig-

ital content and the contracts with its clients/the consumers).<sup>64</sup>

Related to this issue, Art. 8 addresses the risk of «third party rights» and sets up an «additional conformity requirement according to which the digital content must be cleared from any third-party rights, including those based on intellectual property»<sup>65</sup>. Art. 8 (2) provides, with respect to digital content supplied over a period of time, that «the supplier shall, for the duration of that period, keep the digital content supplied to the consumer free of any right of a third party, including that based on intellectual property, so that the digital content can be used in accordance with the contract». This is of key importance because many contracts for the online supply of digital content will be entered into for a period of time and because third party claims may be raised against the supplier (and also potentially against the consumers) during such period. Third parties may thus request the supplier to cease supplying the digital content because of an (alleged) infringement of their rights. As set forth in Recital 31, «[t]hird party rights might effectively bar the consumer from enjoying the digital content or some of its features in accordance with the contract if those third party rights are infringed, and if when the third party rightfully compels the supplier to stop infringing those rights and to discontinue offering the digital content in question»<sup>66</sup>.

Art. 8 is an important component of the Digital Content Proposal given that it (indirectly) affects the liability of the supplier.<sup>67</sup> This provision means that the supplier shall ensure that no third party rights shall block the use of the digital content by the consumer neither initially (at the time when the agreement is entered into) nor later (during the course of performance of the agreement). The supplier must consequently clear the rights of third parties in its *upstream* agreements with them, in order to be in a position to meet its obligations under Art. 8 in its *downstream* digital content agreements with consumers.

<sup>58</sup> Art. 3(7) provides that in the case of a conflict between any provision of the proposal and any other EU legal act «governing a specific sector or subject matter» (such as e.g. copyright), the provision of that other legal act «shall take precedence» over the directive. See also Mañiko (fn 52), 4.

<sup>59</sup> Mañiko (fn 52), 16.

<sup>60</sup> Digital Content Proposal, Explanatory Memorandum, 12.

<sup>61</sup> Mañiko (fn 52), 16; Weber/Oertly (fn 53), 13.

<sup>62</sup> Schmidt-Kessel (fn 53), 6.

<sup>63</sup> Mañiko (fn 52), 16.

<sup>64</sup> Dirk Staudenmayer, Die Richtlinien-vorschläge der Kommission zu Verträgen über digitalen Inhalt und Online Warenhandel, 2016, 3, <<https://www.bundestag.de/blob/422100/af6f72a64b501ba8124894b99e080975/staudenmayer-data.pdf>>; Weber/Oertly (fn 53), 12–13.

<sup>65</sup> Digital Content Proposal, Explanatory Memorandum, 12.

<sup>66</sup> Digital Content Proposal, Recital 31.

<sup>67</sup> Schmidt-Kessel (fn 53), 16.



Art. 8 thus reveals the complex interaction between the different links in the chain of digital content contracts: (i) the upstream contract for the supply of digital content to the supplier (which is not covered by the Digital Content Proposal but is affected by the Digital Copyright Proposal) and (ii) the downstream contract for the supply of digital content which is regulated by the Digital Content Proposal.

In order to meet its obligations under Art. 8, the supplier must consequently identify the rights that could affect the use of the digital content by the consumer. Rights deriving from copyright (and neighbouring rights) are obviously of key importance here, as are other types of intellectual property rights (specifically, trademarks) and other non-intellectual property rights, such as personality rights (specifically, image rights). These rights may indeed be of high relevance for certain types of digital content, particularly video games that are covered by the Digital Content Proposal's definition of digital content (Art. 2 (1) (a))<sup>68</sup>.

The supplier must consequently ensure that no third party can claim rights on the digital content that could negatively affect the use of the digital content by the consumer. The fact that certain of these rights (such as moral rights and personality rights) cannot be assigned by their owners to the supplier is not a concern in itself as long as these rights are not infringed by the use of the digital content made by the consumers.<sup>69</sup> What counts is that such use shall be covered by an authorization of the relevant owner. In case of infringement of third party rights and of a breach of its obligation under Art. 8, the supplier would be liable for non-conformity of the digital content and consequently in breach of Art. 6. This, in turn, would trigger the liability of the supplier (Art. 10)

and entitle the consumer to the set of remedies set forth in the proposal (Art. 12).<sup>70</sup>

## 5. Remedies for non-supply and for non-conformity

Under Art. 11, the consumer may terminate the contract immediately if the supplier fails to supply the digital content altogether, as this constitutes a serious breach of the main contractual obligation of the supplier.<sup>71</sup>

In the event of a lack of conformity of the digital content, the consumer is entitled to the remedies listed at Art. 12. This provision introduces a hierarchy of remedies, i.e. consumers are not entirely free to choose what remedy to invoke.<sup>72</sup> The consumer is first entitled to have the digital content brought into conformity with the contract within a reasonable time period, and without having to incur any significant inconvenience or cost (Art. 12(1) and (2)).<sup>73</sup> It is only in a second step that the consumer is entitled to (i) obtain a proportionate price reduction, if the digital content was supplied against the payment of a price<sup>74</sup> (Art. 12(3)), or (ii) terminate the contract, provided the lack of conformity relates to main performance features of the digital content, such as its accessibility, continuity, and security (Art. 12(5)).<sup>75</sup>

The consequences of termination of the contract for lack of conformity are dealt with at Art. 13. Pursuant to this provision, after termination, the supplier must reimburse the price paid within 14 days or, if the counter-performance consisted of data, refrain from using these data and any other information which the consumer has provided in exchange for the digital content (Art. 13(2) (a) and (b)).<sup>76</sup>

An additional remedy is provided for at Art. 14 which foresees the supplier's liability for damages, deemed «an essential element of the contracts for supply of digital content»<sup>77</sup>.

<sup>68</sup> Disputes about the alleged infringement of trademarks and personality rights (image rights) in videogames are not infrequent, see for trademarks: *Mil-Spec Monkey, Inc. v. Activision Blizzard, Inc.*, No. 14-cv-02361-RS, 2014 U.S. Dist. LEXIS 165943 (N.D. Cal. Nov. 24, 2014) (use of a trademark in the videogame *Call of Duty: Ghosts*) and, for image rights of athletes, *Davis v. Elec. Arts Inc.*, 2015 U.S. App. LEXIS 154 (9<sup>th</sup> Cir. Jan. 6, 2015), *Electronic Arts v. Davis*, U.S. Supreme Court, 136 S.Ct. 1448 (2016) (certiorari denied); see also *Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013); *Keller v. Electronic Arts Inc.*, 724 F.3d 1268 (9<sup>th</sup> Cir. 2013).

<sup>69</sup> See, however, *Loos* (fn 23), 20–21.

<sup>70</sup> *Schmidt-Kessel* (fn 53), 60.

<sup>71</sup> Digital Content Proposal, Recital 35.

<sup>72</sup> *Mañiko* (fn 52), 22.

<sup>73</sup> Digital Content Proposal, Explanatory Memorandum, 12.

<sup>74</sup> Digital Content Proposal, Recital 42.

<sup>75</sup> Digital Content Proposal, Explanatory Memorandum, 13.

<sup>76</sup> Digital Content Proposal, Explanatory Memorandum, 13.

<sup>77</sup> Digital Content Proposal, Recital 44.

## V. Interactions between the Digital Copyright Proposal and the Digital Content Proposal

The potential interactions between the Digital Copyright Proposal and the Digital Content Proposal are indicative of the kind of complexities that can arise where copyright and consumer protection policies collide in the digital environment. Even if these interactions, which can culminate in a «clash of cultures»<sup>78</sup>, are of course not new as such,<sup>79</sup> they come into a new light and under new scrutiny if one considers the cumulative application of the Digital Copyright Proposal and the Digital Content Proposal in the digital environment.

This can be illustrated by the following working hypothesis: let us assume that an author (A) of digital works has entered into a license agreement with an online platform (P), by which such platform is authorized to supply the digital works online to its customers (C). Let us also assume that the Digital Copyright Proposal and the Digital Content Proposal apply.<sup>80</sup>

Let us further assume that A is unsatisfied with the royalty information and the level of royalties that it receives from P, and that the remuneration is indeed not proportionate to the revenues generated by P from A's works so that A would be entitled to a contract adjustment (leaving open here how this would be concretely achieved).

On the basis of the Digital Copyright Proposal, A could request «sufficient information on the exploitation» of her work from P, «notably as regards modes of exploitation, revenues generated and remuneration due» (art. 14 (1)). A could also «request additional, appropriate remuneration» from P on the basis that «the remuneration originally agreed is disproportionately low compared to the subsequent relevant reve-

nues and benefits derived from the exploitation of [her] works» (art. 15). Depending on the law governing the license agreement, which could be the contract law of a country which is not in the EU (for instance Swiss law), A could further terminate the license agreement for just cause on grounds that the relationship of trust between A and P would have been irremediably destroyed as a result of the lack of transparency and the disproportionately low level of remuneration. Despite terminating the contract, A would not waive her right to receive the additional remuneration after contract adjustment for the past use of her works.

Let us also assume that the contract that P enters into with C is a contract by which the digital content shall be supplied over a period of time, thereby triggering the requirement that «the digital content [...] be in conformity with the contract *throughout* the duration of that period»<sup>81</sup> (emphasis added).

What impact would the termination by A of the upstream license, previously granted by A to P, have on P's downstream contractual obligation to C under their digital content contract (governed by the Digital Content Proposal)?

Based on Art. 8 of the Digital Content Proposal, P would be liable towards C for non-conformity of the digital content because C would not be able to use the works of A anymore as a result of A's termination of the license agreement. There is no exception which would protect P against such liability for non-conformity unless P would have the right to modify the digital content to be supplied to C (which presupposes that P have complied with the restrictive conditions of Art. 15)<sup>82</sup>. Subject to this exceptional scenario, P would be liable towards C because the subsequent non-usability of A's works conflicts with P's continuing obligation to «keep the digital content supplied to the consumer free of any right of a third party, including that based on intellectual property, so that the digital content can be used in accordance with the contract» (Art. 8 (2)).

<sup>78</sup> Helberger/Guibault (fn 4), 28.

<sup>79</sup> See e.g. *Séverine Dusollier*, The relations between copyright law and consumers' rights from a European perspective, 2010, 9, <[https://christianengstrom.files.wordpress.com/2010/12/consumers-rights-and-copyright-by-prof-s-dusollier-namur\\_en\\_november-2010.pdf](https://christianengstrom.files.wordpress.com/2010/12/consumers-rights-and-copyright-by-prof-s-dusollier-namur_en_november-2010.pdf)>.

<sup>80</sup> It should be noted that the conflict of laws aspects of the proposed directives, specifically the Digital Copyright Proposal, are likely to be complex. However, these aspects are not addressed in the respective proposals. Even so, it can be assumed that the Digital Copyright Proposal will apply as soon as the use of the relevant content is made in the territory of the European Union.

<sup>81</sup> Digital Content Proposal, Art. 6 (3).

<sup>82</sup> It is uncertain whether P could avoid its obligation and liability for non-conformity under the strict rule of Art. 8 which does not provide for any exception and does not refer to Art. 15 also because Art. 15 relates to certain features of the digital content, i.e. «functionality, interoperability and other main performance features of the digital content such as its accessibility, continuity and security».

Further, another question that arises in the above scenario is whether P could pass on to C the additional remuneration to be paid to A as a result of the transparency reporting and the contact adjustment mechanism of the Digital Copyright Proposal?<sup>83</sup>

These questions tend to show that the improvement of the protection of authors and performers in their upstream contractual agreements can significantly impact the downstream agreements between suppliers of digital content and their customers. The suppliers are indeed caught between two different and potentially conflicting regimes. In this respect, Art. 17 of the Digital Content Proposal provides that «[w]here the supplier is liable to the consumer because of any failure to supply the digital content or a lack of conformity with the contract resulting from an act or omission by a person in earlier links of the chain of transactions, the supplier shall be entitled to pursue remedies against the person or persons liable in the chain of transactions», whereby the «person in earlier links» can potentially be the author/performer whose rights were licensed to the supplier. It further provides that «[t]he person against whom the supplier may pursue remedies and the relevant actions and conditions of exercise, shall be determined by national law». This provision consequently reflects the reality of chains of contracts in the digital content contractual ecosystem. As explained at Recital 47: “[t]he lack of conformity with the contract of the final digital content as supplied to the consumer is often due to one of the transactions in a chain, from the original designer<sup>84</sup> to the final supplier. While the final supplier should be liable towards the consumer in case of lack of conformity with the contract between these two parties, it is important to ensure that the supplier has appropriate rights vis-a-vis different members of the chain of transactions in order to be

able to cover his liability towards the consumer”<sup>85</sup>. In this respect, it should be emphasized that the supplier may not have remedies against the author based on the relevant «national law» (pursuant to Art. 17 – which can be the law of a non-EU country as the law governing the license agreement) if the termination of the license agreement by the author was legitimate. In any event, it would make sense to ensure that the dispute resolution mechanisms shall be coordinated so that the supplier shall have the opportunity to solve the dispute in a single proceeding. On this basis, it is of crucial importance that due attention be paid to these interactions between author-protective and consumer-protective tools in order to develop a coherent framework, bearing in mind that these issues are likely to lead to complex disputes in the chain of digital content transactions.<sup>86</sup>

## VI. Conclusion and outlook

An analysis of the interplay between the Digital Copyright Proposal and the Digital Content Proposal shows that these proposed regulatory instruments have a clearly different focus.

Even so, these instruments must be consistent in order to reflect the reality of digital content distribution, which is frequently characterized by a chain of contracts providing for the distribution of digital content.

At the top of the chain, the Digital Copyright Proposal institutes an «author-friendly» framework which grants certain minimal rights to authors and performers that can be exercised against their contracting parties. At the bottom of the chain, the Digital Content Proposal creates an «end-user-friendly» system which protects the consumer as the end-user of the digital content against the supplier of such content and provides him or her with a set of remedies in case of non-conformity of the supplied digital content.

As a result, the supplier may end up being stuck in the – uncomfortable – position of an intermediary who is expected to comply with two distinct sets of regulatory frameworks, each of which provides for the protection of its contracting party, which it con-

<sup>83</sup> In particular, if the contract between P and C contains a price adjustment clause that foresees such passing on, such adjustment clause, given that it will generally not be individually negotiated (standard contract term), could potentially fall within the scope of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, specifically it could qualify as terms which may be regarded as unfair as per annex (k) or (l).

<sup>84</sup> This wording is not optimal to the extent that «designer» could have been replaced by «creator» (in the sense of the author or the performer) in order to identify the person who created the digital content at issue.

<sup>85</sup> Digital Content Proposal, Recital 47.

<sup>86</sup> For a very recent example, see the US case *Smith v. Barnesandnoble.com, LLC*, Case No. 15-3508 (2d Cir., Oct. 6, 2016).

siders a weaker party, i.e. authors/performers under the Digital Copyright Proposal and consumers under the Digital Content Proposal.

The point here is that in such a system, the suppliers of digital content are put under regulatory pressure. This matters because such pressure can constitute an obstacle to the suppliers, which are online intermediaries/platforms thanks to which digital content is distributed and exchanged, being able to effectively play their key role in the digital content distribution ecosystem.<sup>87</sup> To avoid this situation, it is necessary to adopt a «holistic approach»<sup>88</sup>: the digital contractual ecosystem is characterized by the existence of multiple chains of contracts thanks to which digital content is made available by content owners for the final benefit of end-consumers. Thus, the regulatory framework must duly reflect this multi-component ecosystem and cannot separately or independently treat each single link of the chain of contracts. A fragmented and «link-by-link» approach is undesirable but also risky because each link of the chain of contracts could potentially reflect different values and policy goals (author-protective vs consumer-protective).

Adopting a holistic approach entails crafting a coherent system of substantive norms. It also entails designing procedural devices that facilitate transactions and reduce (potentially huge) contract-law related transaction costs, and that support the efficient settlement of disputes.

What is striking in this respect is that the Digital Copyright Proposal offers different and mutually independent extra-judicial tools for facilitating pre-contractual negotiations and for solving extra-contractual or contractual disputes, i.e. the negotiation mecha-

nism to be provided by a neutral body for parties wishing to conclude an agreement for the purpose of making available audiovisual works on video-on-demand platforms (Art. 10), the «complaints and redress mechanisms» that service providers are to put in place for their users (Art. 13 (2)), the voluntary alternative dispute resolution mechanism to be set up under Art. 16 for the transparency obligation (Art. 14), and the contract adjustment mechanism (Art. 15).<sup>89</sup>

In this regard, it is critical to ensure that these various procedural systems are properly coordinated and form part of an overall coherent system. Voluntary ADR mechanisms must be set up in a way that avoids conflicting decisions and parallel proceedings. The goal here would be to have European or even global mechanisms, although this is not envisioned in the proposal. The need for coordination specifically relates to the interaction between ADR mechanisms and court proceedings.<sup>90</sup> It seems adequate to consider that ADR mechanisms should not preclude the initiation of court proceedings. ADR may however be conceived as the privileged method to solve disputes in the digital age of pervasive online transac-

<sup>87</sup> See Anupam Chander, *Internet Intermediaries as Platforms for Expression and Innovation*, GCIG Paper No 42, 16 November 2016, <<https://www.cigionline.org/publications/internet-intermediaries-platforms-expression-and-innovation>>.

<sup>88</sup> Digital Content Proposal, Explanatory Memorandum, 4; see also Digital Content Proposal, Explanatory Memorandum, 4 («The [DSM] intends to deal with all major obstacles to the development of cross-border e-commerce in the [DSM] in a holistic manner. The proposal should be seen in the context of this holistic approach.») and Recital 1 («The Digital Single Market Strategy for Europe tackles in a holistic manner the major obstacles to the development of cross-border e-commerce in the Union in order to unleash this potential»).

<sup>89</sup> While the Digital Content Proposal does not address ADR tools, reference can be made to the Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF>>, and the Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF>> apply. See <[http://ec.europa.eu/consumers/solving\\_consumer\\_disputes/non-judicial\\_redress/adr-odr/index\\_en.htm](http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/adr-odr/index_en.htm)>.

<sup>90</sup> One approach would be to provide that if no court proceedings are initiated within a given period of time after the decision of the ADR body, such decision is final for the parties. This is what is reflected under Dutch Copyright law (which already has a provision on ADR for certain copyright disputes), see Art. 25g para. 2: «If a court has not been seised of the dispute within three months of a copy of the dispute resolution committee's decision having been sent to the parties, then the parties are deemed to have agreed to the findings set out in this decision once that term has ended» (unofficial English translation, <<http://www.hendriks-james.nl/auteurswet/>>); for a commentary of Dutch Copyright Law in light of the Digital Copyright Proposal, see Maarten Rijks, *The Copyright Directive proposal from a Dutch perspective*, October 2016, <<https://deutschland.taylorwessing.com/download/article-the-copy-right-directive-proposal-from-a-dutch-perspective.html>>.

tions because litigation before national courts is unlikely to offer an adequate solution to the challenges of Massive Online Micro-Justice (MOMJ).<sup>91</sup> Rendering justice online in a multitude of micro-disputes, which, for our purposes, can notably concern disputes covered by the Digital Copyright Proposal and the Digital Content Proposal, requires developing global tools and solutions.<sup>92</sup>

As reflected in the Handbook on European law relating to access to justice, «ADR procedures can improve the efficiency of justice by reducing the courts' workload, and by offering individuals an opportunity to resolve disputes in a cost-effective manner. In addition to entailing lower costs, they can benefit individ-

uals by reducing the duration and stress of proceedings»<sup>93</sup>. ADR procedures do not threaten the right to access to justice but rather promote it.<sup>94</sup> Additionally, to counter any potential concerns of privatisation of justice, it is also important in this context that due consideration be given to the issue of transparency of the ADR mechanisms and tools.<sup>95</sup>

In any event, European policy-makers must pay attention to the need to achieve a fair balance between the conflicting interests resulting from author-protective copyright policies and consumer-protective policies and to develop appropriate and coherent mechanisms that efficiently solve disputes arising in the digital content distribution ecosystem.

<sup>91</sup> Jacques de Werra, ADR in Cyberspace: The Need to Adopt Global Alternative Dispute Resolution Mechanisms for Addressing the Challenges of Massive Online Micro-Justice, *Swiss Review of International & European Law* 2016, 289–306, <<https://ssrn.com/abstract=2783213>>.

<sup>92</sup> See the Geneva Internet Disputes Resolution Policies 1.0 (GIDRP 1.0) project, which proposes an ADR system for Internet-related disputes (topic 2), <[www.geneva-internet-disputes.ch](http://www.geneva-internet-disputes.ch)>.

<sup>93</sup> Handbook on European law relating to access to justice, European Union Agency for Fundamental Rights and Council of Europe, 2016, 50, <[http://fra.europa.eu/sites/default/files/fra\\_uploads/fra-ecthr-2016-handbook-on-access-to-justice\\_en.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2016-handbook-on-access-to-justice_en.pdf)>.

<sup>94</sup> The submission to mandatory mediation does not conflict with the principle of effective judicial protection, provided that certain conditions are met, see CJEU, Joined cases C-317/08 to C-320/08, *Rosalba Alassini v. Telecom Italia SpA, Filomena Califano v. Wind SpA, Lucia Anna Giorgia Iacono v. Telecom Italia SpA and Multiservice Srl v. Telecom Italia SpA*, 18 March 2010, para. 67.

<sup>95</sup> As regards this issue, see e.g. the Uniform Domain-Name Dispute-Resolution Policy (UDRP), specifically Art. 4 (j), which provides the principle that all decisions rendered under the UDRP shall be published, <<https://www.icann.org/resources/pages/policy-2012-02-25-en>>.