Online contracting and the supply of digital content to consumers

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Online Contracting and the Supply of Digital Content to Consumers

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Table of Abbreviations

A

AVMSD	Directive 2010/13/EU on the provision of audiovisual media services

B

B2B	Business-to-business
B2C	Business-to-consumer

C

CA	Companies Act 2006
CAPTCHA	Completely Automated Public Turing Test To Tell Computers and Humans Apart
CCA	Consumer Credit Act 1974
CCR	Consumer Contract (Information, Cancellations and Additional Charges) Regulations 2013
CDPA	Copyright, Designs and Patents Act 1988
CESL	Proposal for a Regulation on a Common European Sales Law
CJEU	Court of Justice of the European Union
CPUTR	Consumer Protection from Unfair Trading Practices 2008
CMA	Competition and Market Authority
CRA	Consumer Rights Act 2015
CRD	Directive on Consumer Rights 2011
CSP	Certification Service Provider

D

DLT	Distributed Ledger Technology
DMZ	Demilitarized zone
DRM	Digital rights management

DSD	Distance Selling Directive 1997
E	
EA	Enterprise Act 2002
ED(S)R	Electronic Documents (Scotland) Regulations 2014
EULA	End-user license agreement
H	
HTML	HyperText Markup Language
I	
ISP	Internet service provider
IT	Information technology
L	
LP(MP)A	Law of Property (Miscellaneous Provisions) Act 1989
LRA	Land Registration Act 2002
O	
OEM	Original Equipment Manufacturer
OFT	Office of Fair Trading
OS	Operating system
R	
RAM	Random access memory
S	
SGA	Sale of Goods Act 1979
SGSA	Supply of Goods and Services Act 1982
U	
UCPD	Unfair Commercial Practices Directive 2005
UCTA	Unfair Contract Terms Act 1977
URL	Uniform resource locator (also known as ‘web address’)
UTCCR	Unfair Terms in Consumer Contracts Regulations 1999
UTD	Unfair Terms Directive 1993
W	
W3C	World Wide Web Consortium

CHAPTER 1:

INTRODUCTION

Basis of the thesis

This thesis will examine the law in relation to contracts between a trader and a consumer for the supply of digital content in an electronic environment. The thesis is placed at the intersection of contract law, consumer protection and information technology law, areas which, together, have not been looked at in detail. However, with the digital economy flourishing globally[1] and the EU providing instruments designed to strengthen the digital single market,[2] it is time to examine how the UK, as a common law jurisdiction, accommodates technological development.

Basic contractual issues in the electronic environment have so far received limited attention but are, in fact, of major importance for businesses, and consumers alike, when it comes to making purchases. The position of consumers, particularly, deserves attention in this regard since they are generally the weaker party vis-á-vis the trader in respect of bargaining power but also the level of understanding as to the functioning of the product they are about to purchase. Online purchases have long become second nature, particularly since the number of digital products which are instantaneously available increases daily. New types of 'digital content' appear on the market and, in the past, there has been great uncertainty as to the laws that apply regarding their supply. In October 2015, the Consumer Rights Act 2015 introduced the concept of 'digital content' into the law for England and Wales, recognising it as another form of product supplied under a contract, distinct from contracts for the sale

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1 Sarah Green Carmichael, 'The Global Digital Economy' <https://hbr.org/2016/04/the-flash-report-the-global-digital-economy>.

2 European Commission, 'Digital Single Market' (9 March 2017) <https://ec.europa.eu/commission/priorities/digital-single-market_en> accessed 3 September 2017; European Commission, 'Digital Single Market for Business and Consumers' (9 March 2017) <https://ec.europa.eu/growth/single-market/digital_en> accessed 3 September 2017.

of goods and the supply of services. At the time of writing, this category of 'digital content' is only specified in relation to consumer contracts, to which this thesis is confined, but some reference to business contracts will be made where appropriate.

The analysis will reveal deficiencies in the law regarding contractual rules, and those for the protection of consumers, that do not perform satisfactorily. They may have unintended side effects or be unsuited to the electronic environment.

Framework

This part will provide the overarching aim of this thesis, and state more particular aims the three main areas the thesis will look into. These areas are contract law, the protection of consumers and the law and technology. Furthermore, it will set out the extent to which other influential areas, such as copyright law, will be considered.

The main question which this thesis aims to answer is whether the current law is sufficiently developed to address issues that arises in relation to consumer contracts for the supply of digital content in an electronic environment. In order to address this, it is necessary to consider basic issues of contract law, consumer protection and technology independently, before these can be linked into a bigger picture.

Contract law

With regard to contract law, one aim of this thesis is to evaluate whether contract law has developed to keep up with modern technology. On a general level, this will be approached by considering the typical methods by which electronic contracts are made, i.e. click-wrap and browse-wrap contracts, and probing what these methods need to afford to be accepted as legal contracts under English law. Even though the focus is on the law of England and Wales, when discussing online contracting, the far more extensive coverage of the US case law on this matter cannot entirely be ignored, and will often only serve as contrast to English Law, or to provide examples of problems which have not yet been seen before the English courts. An in-depth comparison between the law of the US and that of England and Wales is outside the scope of this thesis.

The focus will then be narrowed, and an examination of how the law deals with contracts for the supply of digital content will ensue. The aim is to identify the need

for developing specific rules applicable to 'digital content' and to evaluate the approach that is taken in this regard under the Consumer Rights Act 2015.

Consumer protection

The second area of the thesis is the law on consumer protection where the goal must be to determine the effectiveness of the protection of the consumer in relation to contracts for the supply of digital content. These rules come from a variety of sources, such as through the Consumer Protection from Unfair Trading Regulations 2008,[3] the Consumer Rights Directive[4] and the Unfair Terms Directive[5], which is implemented by the Consumer Rights Act 2015. The ways in which these instruments are intended to assist consumers will be looked at (such as the provision of mandatory information) and, since not all of them were designed with 'digital content' in mind, put in context with electronic transactions for the supply of digital content, for instance, whether, and how, consumers can benefit from a cooling-off period when purchasing digital content.

Law and technology

The third area that will be considered concerns the development of the law, and of technology. Under the law of England and Wales, rules on electronic contracting have been developed based on existing rules. What might work well in the paper world, or in theory, can easily turn out to be dysfunctional, or to produce side effects, when actually applied to the electronic environment. Rules are needed which are functionally equivalent to their offline counterparts and this requires considering rules not just from a legal perspective, but with an understanding of information technology. This holds true in the context of formal requirements, consumer protection laws, such as those on unfair terms, and remedies for breach of contract under the Consumer Rights Act 2015. With particular focus on those aspects, the application of, for example, a 'cooling off' period, or reliance on an indicative list of terms which may be regarded as unfair, will be scrutinised in the context of contracts for the supply of digital content. Here, particularly the use of Digital Rights Management software, designed to protect copyright holders, poses new challenges

[3] Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277).
[4] Directive 2011/83/EU on consumer rights 2011 (OJ L 304/64).
[5] Directive on unfair contract terms in consumer contracts 1993 (93/13/EEC).

which are unlikely to be addressed sufficiently by current laws and need to be considered.

Other influences

In the context of digital content, copyrights play an important role when it comes to the protection of content producers and artists. This is generally regulated by copyrights law and the use of licences. The focus in this thesis is on aspects of contract law between traders and consumers and general issues on copyright law will not be considered here. However, licences must form part of the discussion to the extent that they are used by producers and traders attempting to create contractual relations with consumers and, to that end, the contractual effect of such licensing terms on consumers must be addressed.

Aspects of contract, consumer, e-commerce and information technology law are currently dependent on Directives and Regulations from the European Union which, as long as the United Kingdom is Member of the European Union, remain binding, at least until the 29th March 2019 when it is currently intended that the UK will leave the European Union. Some rules which currently come from the EU will be copied into UK law, and remain, others might be disposed of, or changed. However, at the time of writing, it can only be indicated, at appropriate locations, that the law might be subject to change the extent of which, at this point, cannot be specified.

Outline of chapters

Generally, this examination is divided into six chapters. Chapters 1 – 3 will address the basics of consumer protection, online contracting and conflicts of law. They inform the debate in the subsequent two chapters on 'Digital Content' and 'Consumer Protections and Digital Content' which will touch more essential questions in relation to contracts for the supply of digital content and put, what has been discussed before into perspective. Last, Chapter 6 will provide an overall conclusion.

Chapter 1

In this current chapter, in addition to outlining the basic purpose, structure and coverage of the thesis, the rationales for the protection of consumers will be explored as preliminary to the ensuing chapters. It will examine how consumer protection fits

into the economic system. The ideal market structure would not require regulation, as market competition would sufficiently regulate the behaviour of participants. However, the model of 'perfect competition' relies on unrealistic expectations in relation to the number of participants, the flow and availability of information on the market, and the abilities of buyers, especially consumers, to act rationally. 'Market failures' are present, which place consumers in a weak position vis-á-vis traders and upset the functioning of the market. Restoring balance can be seen as the purpose of consumer protection, and the 'rationales' for interference with the contractual freedom of the parties can be identified. Where consumer contracts are considered, the important factors are an imbalance of bargaining power, imbalance of information and, associated with the latter, the bounded rational economic behaviour of consumers. These three strands will be analysed in turn, before very brief mention will be made of the final problem, and inequality, facing consumer of access to justice.

Chapter 2

Chapter 2 will consider basic aspects of online contracting. First, two types of contract, i.e. click-wrap and browse-wrap contracts, will be looked at. These are the commonest types of electronic contract that consumers will encounter and, as such, the methods, in general, as well as the problems they pose must be considered. An initial 'offer and acceptance' analysis will show the similarities, and dissimilarities, which 'click-wrap' contracts exhibit to traditional, offline, contracts. More impactful will be the question of how terms can be incorporated into electronic contracts, and incorporation 'by signature' and 'by notice' are considered here. Particular attention will be given to the presentation of terms under the rule of 'reasonably sufficient notice' and the 'red hand rule'. There are a number of commonly found ways by which terms are presented to consumers online which must be looked at because even subtle changes might result in 'insufficient notice' for terms to be incorporated. The discussion will be important in relation to questions of the quality of digital content addressed in Chapter 4, as well as considerations of unfair terms under the Consumer Rights Act 2015 in Chapter 5.

The focus will then move to 'browse-wrap' contracts. This type of contracting was recognised only recently in Europe and there are still uncertainties. 'Browse-wrap' contracts are typically found on websites, where providers try to govern the extent to which the user is permitted to use the website and information contained on it, and

the 'simple act' of continued browsing might bring about the contract. They are inconspicuous and often consumers do not even realise that what they did was taken to amount to a binding act. The contractual status of 'browse-wrap' contracts is critically challenged and a way forward is suggested by requiring sufficient notice, not only of the terms governing the contract, but also of the contract itself. Such an approach is needed for it to be reasonable to assume that consumers understood that they were creating binding contracts.

The transposition of formal requirements into the electronic context is then addressed. Any requirement for a document to take a physical form is rarely found these days but, in fact, still exists. Documents of title occupy a special position in this regard as the holder of the physical document is deemed in possession of the goods it represents, and thus entitled to them. Any simple transposition of this to methods of electronic communication would be inconsistent with the uniqueness of the document, but it is put forward that by using distributed ledger technology, or blockchains, those issues could be circumvented.

We move on to examine the more traditional formal requirement of writing. Attention is paid to the underlying functions that writing has to fulfil and, once identified, they will be applied to electronic means of communication to see how they fare. Looking at the three elements (evidence, caution, and channelling) in turn will reveal the suitability of modern means of communication, whilst calling the relevance of, for example, 'channelling' generally into question.

As the last of the requirements that are addressed here, the different types of signature and their validity are discussed. The analysis must start by initially considering the key functions which a signature must perform. Most importantly, a signature must 'authenticate' and it is the level of authentication that is used to divide signatures into different groups. The groups are 'simple', 'advanced' and 'qualified'. Common types of signature are hand-written, typed or scanned names, marks and symbols, and even 'button-clicking' to submit an order online. These are all 'simple' signatures as there is little which links the signatory to the signature. Considering that all common types are 'simple', it is important to determine the implication of this classification. 'Advanced' and 'qualified' signatures, on the other hand, are algorithmic encryptions that offer protection against someone else using the signature. The benefits and necessity for those types and their imposition for certain transactions are then explored, before we move on to the final aspect regarding signatures.

What must finally be addressed here is the question of what can constitute a signature, in relation to the incorporation of terms, in the electronic environment. Consumers who buy products online will typically submit their order by clicking a button. What must be considered is whether there is an intention to sign under these circumstances. The discussion will contrast arguments for and against such view and existing case law is consulted to find an answer which offers the best way forward, taking into account the level of protection reasonably needed for consumers.

Chapter 3

Technological advance, and the internet in particular, made international trading significantly easier. Consumers might buy a product from amazon.com or amazon.de, instead of amazon.co.uk and not notice any difference. Visually the websites looks almost identical and, apart from an extended delivery period where the product is a good, the product would still arrive at the consumer's 'door step'. Where the product is digital, the geographic separation of trader and consumer becomes completely irrelevant – until a dispute arises. This chapter is concerned with, what can be labelled, the 'conflict of laws' and the regulatory framework that is in place to determine the jurisdiction in which a dispute is heard and which laws are applicable. Traders would prefer to rely on those rules with which they are familiar, or which offer the greatest advantage to them. Consumers can generally do little but accept what is set out by the trader. Thus, with regards to consumer contracts, both Rome I Regulation[6] and Brussels I Regulation[7] are fairly prescriptive as to the applicable rules which are intended to protect consumers' access to legal redress.

However, there are some uncertainties regarding the elements that determine the applicable rules under Rome I Regulation. Therefore, it is important to examine how these elements must be understood and, for the determination of the applicable law, the questions are what is meant by 'pursuing and directing activities' and the consumer's 'habitual residence'. While these have been explored in the 'offline world', it is necessary to consider how they have to be understood when traders and consumers contract online. Despite the rigidity of the Regulations, there is still the possibility to agree on a law other than the one identified under the Regulation and the conditions and limitations, in terms of mandatory and overriding rules must be considered here.

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6 Regulation (EC) No 593/2008 on the law applicable to contractual 2008 (OJ L177/6).

7 Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast) 2012 (OJ L351).

For the determination of jurisdiction, the Brussels I Regulation must be considered. There is a similarity between these rules and those of the Rome I Regulation, but different concepts are involved, for instance 'domicile' instead of 'habitual residence' is used, and consideration must be given to these differences, and why they might be desirable or necessary. Further, the exceptions under which the parties may deviate from those rules are dealt with.

Chapter 4

This chapter will focus on 'digital content' as subject matter in consumer contracts. As has been indicated, the distinct type of contracts for the supply of digital content was only introduced in 2015 by the Consumer Rights Act 2015 (CRA). The initial part will explore why this was seen as a necessary development. Classification of 'digital content' as 'goods' or 'services' was problematic, but desirable for the protection of buyers, particularly consumers. A number of characteristics particular to 'digital content' will be uncovered making plain the need to recognise a *sui generis* type of contract.

The supply of digital content in consumer contracts now falls under Chapter 3 of the Consumer Rights Act 2015, which includes requirements and remedies tailored to the special nature of digital content. An analysis of the basic requirements of a consumer contract for the supply of digital content under s.33 CRA ensues, and will consider the notions of 'consumer', 'supply of digital content' and 'price' with the aim to identify its scope and argue for the need to carefully extend it to provide a more coherent approach to the protection of consumers.

First, the definition a 'consumer' will be considered. Since the CRA mostly follows the existing definitions from the Unfair Terms Directive, which were also adopted in the Unfair Terms in Consumer Contracts Regulations 1994, and 1999, some understanding as to how they should be interpreted. Consideration of the general definition of 'digital content' will then introduce a discussion on the other requirements of what is meant by 'supply' and 'price'. The breadth of Chapter 3 of the CRA depends on the understanding of these concepts and the effects of applying narrow and broad definitions will be explored. Reference will be made to the proposed Directive on Digital Content[8] and its aims to widen the scope of 'digital content' by broadening the definition of 'supply' and 'price'. Using 'cloud computing'

[8] Proposal for a Directive on certain aspects concerning contracts for the supply of digital content (2015/0287 (COD)).

products and social media platform as examples, possible benefits for consumers as well as potential risks this poses to particular groups of traders will be addressed.

Since one primary aim is to consider the protection that consumers receive when contracting for the supply of digital content, it is essential to look at the quality terms implied into such contracts and the remedial framework that the CRA provides in case of contractual breaches.

Due to the similarities of the terms implied into contracts for the supply of digital content to those implied into sales contracts (under the Consumer Rights Act 2015 as well as the Sale of Goods Act 1979), the terms on description, satisfactory quality and fitness for particular purpose will be examined, contrasting them with their counterparts under sales of goods. The intention is to look at how the application of these known concepts to digital content, affects the understanding of them. Where differences in wording exist, such as the requirement to 'match any description' rather than a 'sale by description', the reasons for this will be considered.

Special attention will be given to the term requiring digital content to be of satisfactory quality under s.34 CRA, as the aspects of determining the quality, even though very similar to those under s.11 CRA on satisfactory quality of goods, must be interpreted in a way that is in keeping with the nature of digital content. An aspect, such as 'freedom from minor defects', opens up a discussion on bugs and their significance to the contract.

The next part of this chapter will consider remedies for breaches in contracts for the supply of digital content. After a brief overview of the general remedies and the tiered structure that the Consumer Rights Act 2015 sets out, attention will be given to a remedy, specific to 'digital content', allowing consumers to recover for damage caused by digital content to hardware or other digital content. It is somehow independent from the other sections on digital content and provides its own conditions for its application. These conditions will be looked at in detail and, even though *prima facie* they seem to offer good protection to consumers, there are certain problems with its scope and enforcement.

As another aspect in relation to remedies for a breach of a consumer contract, this Chapter will also examine the possibility of compensation for the loss of enjoyment. The case of *Ruxley Electronics and Construction Ltd v Forsyth*[9] will be looked at as the basis for such a claim, and the idea will then be applied to contracts for the supply of digital content. Difficulties that might arise relating to remoteness of

[9] (1995) 3 All ER 268.

damage and mitigation, and both concepts will be explored to show where the problems lie and how they could be dealt with.

The final issue that will be considered is in relation to traders' liability for damage to digital content during transit. The general rule under s.39 CRA, which tries to address this issue, poses two fairly extreme positions and closer examination of the technical infrastructure reveals that neither is entirely satisfactory. Searching for alternative, different source, such as the Sale of Goods Act and the proposal for a Common European Sales Law, will be given consideration, and a means of balancing the parties' interests, in a fairer way, will be suggested. It will then be asked whether, if a transfer causes problems, traders might still be under an obligation to re-supply digital content and where the burden of proof of damage should sensibly lie.

Chapter 5

The discussion of consumer protections in relation to contracts for the supply of digital content is divided in three parts: distance selling, unfair contract terms and unfair trading practices. The general aim is to look at each of the topics and consider their effectiveness in relation to such contracts.

With regard to distance selling, the rights provided by the Consumer Rights Directive, and implemented in the UK by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations,[10] deserve particular attention. The Directive focusses on the provision of information to consumers, allowing consumers to make informed decisions, and reduce the information gap between the parties which places consumers at a detriment. This part will first examine the pre-contractual information (and its quality) which traders have to provide to consumers where contracts are made at a distance. The problems with provision of information, that are referred to in Chapter 1, are here contextualised and examined where such information is presented online. Due to the psychological limitations of the human mind, the ideal solution would involve reduced, but improved, information, and in the context of online contracts, a possible means of achieving this will be considered. It will also be asked whether the suggested method of reducing information would be beneficial to consumers.

The other right which the Consumer Right Directive provides is to allow consumers to withdraw from distance contracts within a 'cooling-off' period. Such a

[10] Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134).

right is desirable as it allows consumers to reflect on their purchase and if they are unhappy with the purchase decision or the product, they can unilaterally withdraw. With the benefits explained, it will be considered why, under normal circumstances, the Directive does not grant the right of withdrawal in relation to digital content. The reasons for this will be looked at and the approach will be compared to its implementation by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations. The regulations offer, theoretically, a somewhat preferable approach where supply of digital content can be delayed until the end of the 'cooling-off' period and consumers would, at least, have an option to reflect on their purchase decision, however, its impact is assumed to be very limited in practice.

Another means of consumer protection is provided by the unfair terms regime. Initially, the general structure of Part 2 of the Consumer Rights Act 2015, which deals with unfair terms, will be looked at. The basic test under s.62 CRA, will be analysed and, with it, notions of terms and 'consumer notices'. For further clarification of how the test works and how it relates to the indicative list of 'potentially unfair terms' under sch.2 CRA and the core exemption under s.64 CRA, the Unfair Terms Directive and recent case law will be considered. The operation of the test will be scrutinised in relation to its two elements of 'significant imbalance' and 'the requirement of good faith'.

The application of the fairness test to certain terms, that are particular to contracts for the supply of digital content, can then be addressed. Initially, there is a general problem in relation to the parties to the contract which needs to be overcome. Even though, the product is sold by a trader, its producer might try to create a legal relationship between him- or herself and the consumer. Once this issue is explored, terms which are commonly found in relation to digital content, such as terms granting traders the right to alter terms, or the right to alter the subject matter, unilaterally, will be the main concern. It will be necessary to balance the trader's, or producer's, need to have such a term against the risk it poses to consumers where it is phrased unnecessarily widely. With regard to the right to alter the subject matter, it will be shown that the question of providing a 'valid reason', for the change, might be a general issue, increasing the risk of such a term being 'unfair'.

Recent changes to the laws on unfair trading practices under the Consumer Protection from Unfair Trading Regulations 2008,[11] made by the CRA and the

[11] Consumer Protection from Unfair Trading Regulations (n 3).

Consumer Protection (Amendment) Regulations 2014,[12] warrant consideration of the rules on unfair trading practices. The general scope will be considered, and special attention is given to unfair practices in relation to personal information, the use of social media and the promotion of 'free' products to influence decision-making. In which situations they might be acceptable, or fair, and what can be done to enforce the prohibition of certain practices, publicly and privately, will be the underlying questions that are examined.

Personal information can easily be collected online, and is done so frequently. Such information is then often sold or used to show personalised advertisements to consumers. What is considered is whether this might be unfair as consumers will not usually have consented to their information being used for such purposes and the context may mean that their resistance to such temptations is lowered.

Influence of a different kind is often exercised on social media, such as facebook or youtube, where individuals, seemingly unconnected to traders, 'review' products or indicate trends. In some situations, however, these individuals are employed or, at least, somehow connected to and reimbursed by traders whose product they review – a fact that is not always disclosed. Again, this practice merits consideration of its fairness.

The last practice to be looked at, relates to traders offering 'free' products which entail hidden costs that will only become apparent at a time when the consumer is already invested in the product, and therefore likely to spend further, in relation to it.

Once these problems are explained, an analysis on the enforcement structure will ensue. In 2014, the Consumer Protection (Amendment) Regulations 2014 added a new Part 4A to the Unfair Trading Regulations 2008 which introduced a mechanism of direct private remedies for consumers, in relation to misleading and aggressive actions by traders. The rights that are granted to consumers, i.e. the right to unwind, the right to a discount and the right to damages, will be looked at and compared to similar rights from other instruments (the right to unwind, for example, will be compared to right to withdrawal which will be seen to be problematic under the Consumer Rights Directive).

While the rules of public enforcement remain unchanged, the Consumer Rights Act 2015 has made some changes to the powers of enforcement authorities. Crucially, the Competition and Market Authority, as domestic enforcer, can apply for

[12] Consumer Protection (Amendment) Regulations 2014 (SI 2014/870).

the new Enhanced Consumer Measures, and a detailed analysis of what these measures are, and whether they do enhance the protection of consumer will be asked.

Finally, issues in relation to the provision of information, unfair contract terms and unfair trading practices, all of which have been discussed in this chapter, will arise where producers use Digital Rights Management (DRM) components to protect their products. It will be explained what DRM is, and the ways it is typically employed. It will be argued that the protection these components provide may be seen as unnecessarily strong in favour of the producer, and that they generally pose a risk for consumers, due to a lack of understanding about their existence and how they operate. A possible means of providing adequate protection against components, which 'over-enforce' the producer's rights, will be considered, in relation to the argument of whether their use might be assessed as a contractual term which could be unfair or, alternatively, as an unfair trading practice. There are two examples where DRM components were used to actively remove digital content which consumers had bought from their private devices. These will be discussed from the perspective of the legitimacy of such intrusion, and it is suggested that might be the case where unforeseeable circumstances arise, but before that, it will be necessary to consider whether the event might warrant the parties being released from their obligations under the doctrine of frustration.

Chapter 6

The last chapter will offer comprehensive conclusions, and will, therefore, not be considered here, before the discussion, and arguments, on which it draws, have taken place.

Consumer protection

The general idea of consumer protection is a wide legal concept which includes '*all laws and regulations affecting consumption and the structuring of consumer markets*'.[13] It stretches into many different areas of law, such as consumer credit and food law, but here, attention is focussed on consumer contracts and the basic need for regulation in consumer markets. In this regard, it must be considered the extent to which Government should, or can, interfere and the possible methods. There are a

[13] See Iain Ramsay, *Consumer Law and Policy* (3rd edn, Hart Publishing Ltd 2012).

number of factors that should be taken into account in relation to attempts to achieve an outcome that re-balances the market, rather than distort it adversely.

The classical economics view is that 'free choice' in a market, free from governmental, or other external, regulation, would advance consumer welfare.[14] In a market where there is 'perfect competition', regulation would not be necessary, and supply and demand would automatically balance at the right price, assuming the market meets all other conditions of the model.[15] The conditions for optimal operation are numerous buyers and sellers, free entry into and exit from the market, the commodity sold in the market must be homogeneous (i.e. without distinguishable features from products of other sellers), all participants have perfect information regarding product and value, and there are no externalities, products bear the product costs and the benefits accrue to the consumer.[16]

However, this model does not take into account factors such as product variation,[17] irrational decision-making of consumers and imbalances between parties, all of which are common in a 'consumer market'. In economic terms, there are 'market failures'[18] which cause deviation from 'perfect competition', and provide the underlying rationale for regulation of consumer markets. Consideration should be given to those 'market failures' and how they have been addressed by regulation.

In the past, problems in consumer markets were often addressed by focussing on the traders, and the inequality of bargaining power. This is still a valid reason for intervention, but Waterson reminds that attention must also be paid to the demand side of the market, i.e. the behaviour of consumers and its influences.[19] Some key problems in relation to consumer contracts had already been established in the 70s and, for example, Ziegel explained:

> 'I believe it will be found that every consumer problem exhibits one or more of the following characteristics. First, a disparity of bargaining power between the supplier of goods or services and the consumer to whom they are being offered; secondly, a growing and frequently total disparity of knowledge concerning the characteristics and technical components of the goods or services; and, thirdly, a no less striking disparity of resources between the two sides, whether that disparity reflects itself in a consumer's difficulty to obtain redress unaided for a legitimate grievance or in a supplier's ability to absorb the cost of a defective product as part of his general overhead as compared to the

[14] Lionel Robbins, *The Theory of Economic Policy in English Classical Political Economy* (1st edn, MacMillan 1952).
[15] Richard Whish and David Bailey, *Competition Law* (7th edn, Oxford University Press 2012) 4–5.
[16] Iain DC Ramsay, *Rationales for Intervention in the Consumer Marketplace* (Office of Fair Trading 1984) para 3.3; Whish and Bailey (n 15) 7.
[17] See Whish and Bailey (n 15) 7.
[18] Ramsay (n 13) 42.
[19] Michael Waterson, 'The Role of Consumers in Competition and Competition Policy' (2003) 21 IJIO 129.

> consumer to whom its malfunctioning may represent the loss of a considerable capital investment.'[20]

He identified some important issues, inequality of bargaining power, of information in relation to the characteristics of goods or services, and their technical components, and of the available resources to obtain redress. These issues were mostly attributed to problems in the markets and, thus, the approach to protect consumers was mainly by regulating markets and strengthening competition.

Bargaining power

One reason for an increasing demand for governmental regulation is an imbalance in power between the contracting parties which, particularly, comes to the fore in relation to consumer contracts. It often leads to the 'exploitation' of consumers against which they are unable to protect themselves.[21] Traders are in a more dominant position and can therefore impose not only their terms, but also dictate the process to which the parties have to adhere. From an economic view, the main cause of inequality of bargaining power is a lack of sellers (information failure being the other which is discussed below), so consumers do not have the opportunity to obtain the product from another trader or they might find that, although there are other trader, they will only deal on similar terms.

Inequality of bargaining power has been plainly identified as relevant in relation to tests of the 'reasonableness', or 'fairness', of terms in legislation. Of course, the Unfair Contract Terms Act 1977 meant that certain obligations could not be contracted out, such as those protected by ss.6 – 7 UCTA relating to certain, generally business, obligations to the consumer in relation to goods, and in relation to a business' duty to take due care not to cause death or personal injury (see. s.2(1) UCTA).[22] However, in relation to a business' attempts to exclude or restrict contractual obligations to consumers more generally, a balance was sought, under the Act, by requiring exemption clauses to satisfy the 'requirement of reasonableness', where the party, who would otherwise simply be subject to the clause, dealt as a consumer.[23] 'Inequality of bargaining power' is first of the factors specifically referred to in sch.2 of UCTA, as guidelines for the application of the requirement of

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[20] Jacob S Ziegel, 'The Future of Canadian Consumerism' (1973) 51 Can Bar Rev 191, 193.

[21] Ramsay (n 13) 298; Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 J. Law & Soc. 349, 351.

[22] Ramsay (n 13) 305; n.b. Section 2 UCTA also applies to non-contractual notices which disclaim negligence liability.

[23] UCTA, ss. 3 and 11.

reasonableness. Schedule 2 is only relevant by 'legislative prescription' in relation to the requirement of reasonableness when it is applied under ss.6 or 7 UCTA, but the courts have made it clear that the factors are likely to be factually relevant generally,[24] and the question of equality, or inequality of bargaining power, can be regarded as the most basic of factors, which is frequently referred to by the courts.[25]

The Consumer Rights Act 2015 (CRA) has now taken over the consumer aspects of UCTA, following basically the same approach of rendering certain exemption clauses automatically ineffective, but in relation to exemption clauses and terms more generally,[26] applying a 'fairness test',[27] rather than subjecting them to the 'requirement of reasonableness'. The 'fairness test' was initially introduced by the Unfair Terms Directive,[28] one of the aims of which is to address the inequality of bargaining power between traders and consumers.[29] For example, in the case of *Océano Grupo Editorial SA v Roció Murciano Quintero*,[30] the ECJ stated:

> [T]he system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms.[31]

Inequality between the parties is recognised as at the root of the unfair terms regime, and inequality of bargaining power is specifically identified as an element of this. Of course, the unfair terms regime is not the only method of addressing this. Government has, for example, chosen to deal with inequality of bargaining power in more specialised areas, particularly consumer credit by requiring traders to obtain a licence to enter into the market.[32] Strict control is effective in addressing the parties' inequality of bargaining power, but it would be undesirable for consumer contracts in general as too great an interference with freedom of contract. However, such

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24 *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* (1988) 2 Lloyd's Rep 164, 169; *Stewart Gill Ltd v Horatio Myer & Co Ltd* (1992) 2 All ER 257, 262; *Schenkers Ltd v Overland Shoes Ltd* (1998) 1 Lloyd's Rep 498, 505.

25 HG Beale, *Chitty on Contracts*, vol I (32nd edn, Sweet & Maxwell 2015) fn.508.

26 In fact, Part 2 of the Consumer Rights Act 2015 on 'unfair terms' also applies to 'consumer notices', as far as they relate to rights or obligations between the parties or purport to exempt a trader's liability (CRA, s.61(4)).

27 Fairness in consumer contracts will be looked at in Chapter 5, p.171.

28 Council Directive 93/13/EEC on unfair terms in consumer contracts 1993 (OJ L95/29).

29 The Consumer Rights Act 2015 is, of course, not the first instrument implementing the Unfair Terms Directive into national law.

30 C-240/98 to C-244/98 *Océano Grupo Editorial SA v Roció Murciano Quintero* [2000] ECR I-4941.

31 C-240/98 to C-244/98 *Océano Grupo Editorial SA v Roció Murciano Quintero* (n 30) [25].

32 Consumer Credit Act 1974, ss.21 – 25.

measures would be both highly impractical, and destructive of the basic free market economy.

Information

There are obvious problems in relation to consumers where the optimal operation of a market is based on 'perfect information'. Such an ideal requirement is very rarely met in reality. Consumers generally have significantly less information about the products and their value,[33] and traders are reluctant to share all of the information.[34] Further, the information that they do share with consumers typically attempts to make the product stand out from those of competitors by praising positive distinguishable features. Requiring the provision of information facilitating comparison by consumers is important.

Provision of information

Ramsay identifies information gaps as one important market failure affecting consumers,[35] as it is fundamentally important for the proper operation of the market that consumers should be able to make well-formed purchase decisions. Without sufficient information about trader and product, it is impossible for consumers to make informed decisions regarding the products they want to buy and, maybe equally important, those they do not want to buy.[36] In relation to general consumer contracts, the solution to inadequate information has been a framework which required traders to make available to consumers certain information about themselves and the product,[37] prior to the conclusion of a contract. In the UK, the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013,[38] implementing the Consumer Rights Directive,[39] obliges traders to make available certain information to consumers at the pre-contractual stage. Schedule 2 of the Regulations provides an extensive list of information. It contains basic

[33] Ramsay (n 16) 25–35; on information about contract terms, see also Margaret Jane Radin, *Boilerplate* (1st edn, Princeton University Press 2013) 24.
[34] Howells (n 21) 355.
[35] Ramsay (n 16) 3.9.
[36] Chris Willett, 'Autonomy and Fairness: The Case of Public Statements' in Geraint Howells, André Janssen and Reiner Schulze (eds), *Information Rights and Obligations* (1st edn, Ashgate Publishing 2005) 4; Chris Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (1st edn, Ashgate Publishing 2007) 20.
[37] Howells (n 21) 354.
[38] Consumer Contracts (Information, Cancellation and Additional Charges) Regulations (n 10) (CCR).
[39] Consumer Rights Directive (n 4).

information, for example, the trader's geographical location, contact details, product price and delivery. However, it also requires more detailed information depending on the product type. With regard to digital content, for instance, '*the functionality, including applicable technical protection measures*',[40] have to be provided as well, which could provide a better understanding of the technical components which Ziegel identified as of 'problematic character'.[41]

However, just because information is available to the consumer, this does not mean that he or she has taken it into consideration when making a decision.[42] It is not unusual for consumer contracts to contain terms, filling up multiple pages, all of which are, given the right circumstances, important for the transaction and, thus, should be taken into account when making decisions. Often, it is found that consumer do not read the 'Terms and Conditions' and blindly 'agree' to the terms. Besides sheer ignorance,[43] a more convincing reason for this might be psychological limitations to the amount of information that the human mind can take in and process, and anything beyond seven (give or take two) 'chunks' of information is unlikely to be handled by the human mind.[44] Consumers may often feel overwhelmed by the sheer amount of information in the form of terms and descriptions with which they are provided, when making a contract, and the volume of information may be all the greater when they are contracting online, where that volume does not add to the costs of the business, as it would in the 'paper world'.

Improved information, icons and diagrams

One way of limiting the impact of too much information, might be the provision of less, but improved, information. A reduced amount of information provided is a key-element to the solution to consumers' limited ability to deal with large amounts of information.[45] Nordhausen argues that too much information, maybe even delivered

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40 CCR, sch.2(v).

41 See text at fn.20.

42 In an empirical experiment only 25% of consumers who read nutrition labelling recall the sodium content on the label and only 40% of consumers read the ingredients listings at all (W Kip Viscusi, 'Individual Rationality, Hazard Warnings, and the Foundation of Tort Law' (1996) 48 Rutgers L. Rev. 625, 632).

43 Radin (n 33) 21.

44 George A Miller, 'The Magical Number Seven, Plus or Minus Two Some Limits on Our Capacity for Processing Information' (1955) 101 Psychological Rev. 343.

45 Bettina Wendlandt, 'EC Directives for Self-Employed Commercial Agents and on Time-Sharing - Apples, Oranges and the Core of the Information Overload Problem' in Geraint Howells, André Janssen and Reiner Schulze (eds), *Information Rights and Obligations* (1st edn, Ashgate Publishing 2005) 75–76.

in a non-transparent format, leads to a complete failure to deal with it.[46] It may well not be generally helpful when, alongside already unreasonably long 'Terms and Conditions' and the description of a product, traders are also obliged to include other prescribed information. She suggests that, by prioritisation of some pieces of information over others, '*[…] the consumer gets the most important information and will be able to take this information into account for his or her decision*'.[47] Unfortunately, it is not made entirely clear how this can be achieved.

A possible approach might be the use of graphics, icons and diagrams that could assist consumers understand processes and recognise important aspects. It is inspired by the approach that practitioners take to make contracts more accessible to their clients.[48] The concept might aid consumers in understanding what they are presented with, and might reduce the amount of literal information in a contract while making it easier for consumers to digest contents. However, certain issues must be acknowledged and would have to be addressed. If traders are required to use graphics and icons but are not given any guidance as to their appearance, they might have an adverse effect and distract from other, maybe equally important, parts of the contract. This might, for example, impact on the incorporation of terms into contracts under the rules of 'reasonably sufficient notice' and, particularly, the 'red hand rule'.[49] Furthermore, they could also be seen as an attempt to influence the consumer's decision-making which, as will be explained below, is heavily susceptible to graphical presentation and might, thus, be seen as an unfair trading practice. What would be needed is pre-designed icons, which can be included, and pre-determined concepts where traders can employ diagrams, so once consumers become familiar with the icons they would know, simply by seeing the icon, the contract contains a certain type of term, similarly to warning or certification symbols on goods. However, empirical studies would be needed to test the effectiveness of such an approach and, of course, the costs of implementation would need to be addressed. Further, it has become clear that the use of this type of approach to improve the information which is considered by the consumer, and their decision-making, is both difficult to use (in terms of determining what will amount to effective presentation) and controversial, even in relation to relatively simple facts,

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46 Annette Nordhausen, 'Information Requirements in the E-Commerce Directive and the Proposed Directive on Unfair Commercial Practices' in Geraint Howells, André Janssen and Reiner Schulze (eds), *Information Rights and Obligations* (1st edn, Ashgate Publishing 2005) 93.

47 Nordhausen (n 46) 93.

48 Andrew Hooles, 'Better Contracts' [2017] Computers and Law 10.

49 See Chapter 2, p.32.

such as the amount of fat in a particular food item. The difficulties would be exponentially greater in relation to conveying a worthwhile level of information in relation to contract terms.

Further, the problems of sufficient communication are heightened by piecemeal legislation, with each piece trying to make consumers aware of a particular slice of information. It is information in its entirety which hinders consumers' decision-making, and it is the whole which must be considered in relation to how the consumer's uptake and digestion of the significant information can be improved, even if this involves reducing the amount of information provided.

Active margin

Some academics have also suggested that a particular market mechanism might be capable of improving contractual terms via the informed choices of a marginal group.[50] The 'active margin' is a '*[small] section of consumers who have the time, resources and education to overcome the lack of transparency […]*'.[51] This group of consumers devotes their resources scrutinising traders' non-price terms and actively challenging them or avoiding those sellers. Trebilcock explains that '*if [traders are un]able to "term discriminate" between these consumers and other consumers in the market, there would be strong competitive pressures on each [trader] to adjust the terms*'.[52] For this approach to work, the 'active margin' must consist of a sufficient number of consumers to make an impact upon the business.[53] The workability of the approach must be challenged since it is questionable whether such body is large enough to affect market behaviour.[54] If too few consumers inform themselves about terms, there is, for example, a risk of a competitive equilibrium where traders experience difficulties to communicate their terms. Basically, traders who improve their non-price terms to stand out from other traders are unable to inform consumers about the better terms and '*may have a hard time recouping the extra costs of offering better non-price terms*'.[55]

If, however, the approach was found to be workable, it could improve the quality of contracts and the process of contracting via basic market mechanisms, i.e.

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50 William C Whitford, 'Contract Law and the Control of Standardised Terms in Consumer Contracts: An American Report' (1995) 3 E.R.P.L. 193, 195.

51 Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (n 36) 25.

52 Michael J Trebilcock, 'An Economic Approach to the Doctrine of Unconscienability', *Studies in Contract Law* (1st edn, Butterworth & Co Ltd 1980) 413.

53 Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (n 36) 25.

54 Whitford (n 50) 196.

55 Whitford (n 50) 196

competition. Further, even if the margin of 'active consumers' was insufficient to do that, even a small margin might still be expected to improve the position of consumers via complaints about unfair terms, which would attract the attention of the Competition & Market Authority (CMA), pointing them towards individual traders or sectors requiring scrutiny. However, there certainly does not seem to be evidence in support of the existence of a sufficient active margin which, as a factor of a consumer market, would result in the market imply functioning as it, ideally, should.

Behavioural economics

In the recent years, more attention has been given to 'behavioural economics' as an additional rationale for consumer protection, and the provision of a better understanding of what will improve the position of consumers. A decision-maker in neo-classical economics will be the economic man, *homo economicus*, and act completely rationally.[56] Consumers, however, rarely behave rationally,[57] and there are factors that, on a psychological level, influence how humans think and make decisions irrationally, particularly under uncertain conditions. Generally, it can be said that consumers struggle with processing and evaluating information.[58] This can partly be attributed to, what is called, the 'bounded rationality' of human beings. The term describes factors that influence how information is absorbed, interpreted, and weighed. The following four statements provide the underlying causes of bounded rationality:

i) humans display a tendency to inertia and procrastination;
ii) they are very sensitive to how information is presented (framing);
iii) as well as to social influences; and
iv) humans do not handle probabilities very well.[59]

Awareness of those influences on human thinking are not new,[60] but it is only in recent years that economists and law makers have started to consider these sociological findings in relation to their models and regulations.[61] In the context of

[56] Richard H Thaler and Cass Sunstein, *Nudge - Improving Decisions about Health, Wealth and Happiness* (1st edn, Penguin Books 2009) 7.
[57] Ramsay (n 13) 57.
[58] Howells (n 21) 359.
[59] Cass Sunstein, 'Empirically Informed Regulation' (2011) 78 University of Chicago Law Review 1349, 1350–1361; see also Anne-Lise Sibony and Alberto Alemanno, 'The Emergence of Behavioural Policy-Making: A European Perspective' in Alberto Alemanno and Anne-Lise Sibony (eds), *Nudge and the law a European perspective* (1st edn, Hart Publishing Ltd 2015) 3.
[60] See Amos Tversky and Daniel Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' (Oregon Research Institute 1973) AD-767 426.
[61] Sunstein (n 59).

regulation of consumer markets, particularly, it is important to understand the limitations of the human mind, especially in relation to protection based on the provision of information.

Inertia and hyperbolic discounting

Humans tend to stick to the 'default' situation, or rule, rather than make a change. This can easily be seen with regard to changing bank accounts, mobile phone plans, internet providers or energy suppliers. The effect is increased with greater complexity.[62] Any necessary change is likely to be pushed back to a later point in time. As the future is uncertain, it is human nature to overrate the present. Despite an obvious, or at least likely, long-term benefit, people would prefer avoidance of unnecessary short-term detriments. Effects of these tendencies can causes problems, particularly where there is a small short-term benefit but at a large long-term cost.[63]

In terms of consumer contracts, where consumer are presented with a choice, such as an extended warranty cover, they are also likely to favour short-term over long-term returns, avoiding loss over making gain and would rather go with the default rule where decision are, or seem to be, too complex. Regulations might, therefore, define default standards which are economically more likely to be beneficial to the average consumer, and determine that, for instance, certain terms are provided as an opt-in rather than a opt-out choice.[64]

Information and framing

The impact of information which is displayed in a statistical and abstract way is low compared to a vivid presentation.[65] Contractual terms often have to be abstract by nature to function properly. The terms are often a collection of rules intended to cover a large variety of possible scenarios that are likely to, or at least could potentially, arise. Using a different, more vivid, design to give the terms greater impact on the consumer's decision-making, would help consumers with noticing these terms. However, if this is not done coherently and appropriately, there is a risk that a more appealing design might distract from other terms of plain design, which might cause conflicts with certain legal concepts, such as 'transparency' under s.68

62 Sunstein (n 59) 1351.
63 Sunstein (n 59) 1352.
64 Ramsay (n 13) 305.
65 Sunstein (n 59) 1354.

CRA,[66] or be an unfair trading practice.[67] People are, of course, also susceptible to indicators of the salience of information and adding visual accents, like colours or bold writing, helps them to become aware of it. Contract law has long indicated the use of highlighting of terms for incorporation of terms by notice. This led to the development of concepts, such as 'reasonably sufficient notice' and the 'red hand rule', which will be discussed in more detail in Chapter 2.[68]

Besides the general provision and presentation of information, the contextual framework in which, it is put forward, also impacts on how it is perceived. A practical example that shows how framing affects decision-making is presented by Thaler and Sunstein:

> 'Suppose that you are suffering from a serious heart disease and that your doctor proposes a grueling operation. You're understandably curious about the odds. The doctor says, "Of one hundred patients who have this operation, ninety are alive after five years." What will you do? If we fill in the facts in a certain way, the doctor's statement will be pretty comforting, and you'll probably have the operation.
> But suppose the doctor frames his answer in a somewhat different way. Suppose that he says, "Of one hundred patients who have this operation, ten are dead after five years." If you' are like most people, the doctor's statement will sound pretty alarming, and you might not have the operation.'[69]

Of course, traders can use this method to present information, such as costs (or savings) the same way, and it is even more effective if such statements also take into account the natural preference of loss avoidance over making gains.[70]

Assessment of probabilities

Another important factor in relation to the decision-making of real people, rather than that of *homo economicus*, influence on people's decision-making is the inability to assess probabilities. When making decisions, people often exhibit, what is called, 'unrealistic optimism'.[71] This commonly means, they consider themselves 'above average' and less prone to misfortune than others.[72] At the same time, people are likely to give more weight to information that aligns with their beliefs, or which they

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66 See Chapter 5, p.178.
67 See Chapter 5, p.192.
68 See Chapter 2, p.34.
69 Thaler and Sunstein (n 56) 39.
70 Thaler and Sunstein (n 56) 40.
71 Sunstein (n 59) 1358; Thaler and Sunstein (n 56) 34.
72 For an empirical example where the majority of smokers estimated their personal risk of smoking to be less than that of the average non-smoker, see Behavioural Insights Team, 'Annual Update 2010-11' 16 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60537/Behaviour-Change-Insight-Team-Annual-Update_acc.pdf> accessed 7 September 2017; from Sibony and Alemanno (n 59) 4.

want to be true. They are also affected by whether a recent event comes to mind, and emotions can also change the ways in which options are weighed.

The availability of seemingly related, recent, events can further influence human decision-making. As an example, when people are asked to guess the number of inhabitants of a city, they will typically use their own location as reference point. Where such reference point is low in relation to the unknown, estimates are generally too low, whereas a larger reference point results in an overestimation.[73] The mind tries to find an anchor point to which an unknown is adjusted.

This means that trader can, by carefully placing anchor points, influence how information is perceived by providing set of data that are relatively large or relatively small, depending on the direction in which the consumer should go.

Access to justice

The last problem which should be noted in relation to consumer protection is the potential issue of accessing justice, and this might also be a valid rationale for consumer protection legislation. However, this topic is far too extensive to be sufficiently covered as part of this thesis. For the present purposes, it will suffice to recognise it as one of the rationales and briefly consider the typical approaches taken in relation to it.

The general concern is reliance on private enforcement. Even in a system where consumer are equipped with sufficient rights to protect themselves, their enforcement would be rare. Due to the low value of most claims, consumers are reluctant to litigate,[74] especially against large corporate entities. Courts might also lack the necessary resources and expertise, particularly in e-commerce, to handle low-value claims in a timely manner.[75] To lower the threshold, a solution could be to make the litigation process 'less expensive, less intimidating, less risky and more convenient'.[76]

The last method which might bring 'justice' to consumer is the use of alternative dispute resolution (and online dispute resolution). The informal structure of the process is designed to circumvent consumers' reluctance to engage in legal

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[73] Thaler and Sunstein (n 56) 25–26.

[74] Geraint Howells and Stephen Weatherill, *Consumer Protection Law* (2nd edn, Ashgate Publishing 2005) 603–604.

[75] Pablo Cortés, 'Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers' (2011) 19 Int J Law Info Tech 1, 3.

[76] Howells and Weatherill (n 74) 604; see also William C Whitford, 'Structuring Consumer Protection Legislation to Maximise Effectiveness' [1981] Wisc LR 1018.

proceeding and to appear in court. Out-of-court solutions lend themselves to low-value claims and, where they are conducted online, this can also lead to cross-border low-value claims. To facilitate this, the European Commission has issued the EU Directive on Alternative Dispute Resolution[77] alongside the Regulation on Online Dispute Resolution.[78] The Directive is more general and expands across all types of contracts and must be read in conjunction with the Regulation, particularly when discussing contracts for digital content.

However, it cannot be denied that an increased focus on out-of-court solutions could have adverse effects on the development of consumer rights as well as their enforcement. Critics are concerned that, should the system be successful and parties are able to find solutions to their disputes, this could hamper the development of consumer protection. Cases decided under ADR measures remain confidential and private, hence, preventing the creation of precedents.[79] Consequently, even though consumer disputes are resolved, the system would do nothing to enforce consumers' rights, as such.[80]

Lastly, there have been attempts of companies setting up their own dispute resolution procedures. Most known for their pioneering work are eBay and PayPal.[81] Their approach is designed to solve disputes between those selling on eBay and their customers. In a confined environment, like a trading platform, a platform provider (as the intermediary) can protect consumers and enforce decision effectively. Furthermore, decisions made by the provider could have long-lasting effects as similar disputes with different customers could not only damage the trader's reputation but lead to more severe actions by the platform provider. However, since those companies are not official ADR entities, they do not have to adhere to the legal requirements established by applicable directives and regulations to try to ensure unbiased decisions. By the same token, their decisions do not need to be publicised and do not assist in improving consumer protection in Europe.

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77 Directive 2013/11/EU on alternative dispute resolution for consumer disputes 2013 (OJ L165/63) (ADR-Directive).

78 Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes 2013 (OJ L165/1) (ODR-Regulation).

79 Giesela Rühl, 'Alternative and Online Dispute Resolution for Cross-Border Consumer Contracts: A Critical Evalutaion of the European Legislature's Recent Efforts to Boost Competitiveness and Growth in the Internal Market' (2015) 38 J Consum Policy 431, 6; Horst Eidenmüller and Martin Engel, 'Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe', *The Transformation of Enforcement: European Economic Law in Global Perspective* (2013) 3.

80 Rühl (n 79) 6.

81 Eidenmüller and Engel (n 79) 9.

Conclusion

Consumer protection is a means of adjusting the 'consumer market' where the operation of the market is impaired. When Government interferes with the parties' contractual freedom in the consumer context, it should be to address, at least, one of the rationales of consumer protection, i.e. inequality of bargaining power, imbalance of information, or access to justice.

Inequality of bargaining power, is of central importance underlying, for example, the Unfair Terms Directive, but imbalances in information have received much attention in recent years. Consumers are often not provided with adequate information or, if they are, have difficulties finding, understanding, or processing it. Existing regulations are making sure that certain information is available to consumers by making it mandatory, but there is a psychological component that is often overlooked. Insight from behavioural economics has provided invaluable knowledge about how the way in which information is provided, and presented, can significantly impact on consumers' understanding and weighing of it and, indeed, its effectiveness to deal with the relative weakness of the consumer in contracting.

Furthermore, it must be remembered that granting rights to consumers is of no benefit to consumers where they are unable, or unwilling, to exercise these rights. When considering enforcement, the consumer's reluctance to litigate over small values should be borne in mind. Introducing a scheme supporting consumers in their claims might make it more likely that consumers exercise their rights.

Chapter 2:

Online Contracting

Summary

The internet has significantly changed the way in which contracts are concluded, and the law more and more often comes to the point where traditional rules are no longer satisfactory. Scholars and practitioners started to develop new ideas as to how the regime for online media should work and transposed existing rules into 'equivalent' online rules or suggested exceptions from those. Right from the start, one of the key ways of finding rules for online contracts has been the use 'functional equivalence'. This method is used as substantive guidance to '*produce equivalent treatment between online and offline activities.*'[1] The initial difficulty is the determination of any intended effect of an existing rule, followed by the task of causing this effect without any additional side effects.[2] To achieve this, it may not always be wise to apply an existing rule to the online environment; more often it requires devising a new rule applying the same rationale.[3] In this chapter, we will look at formation principles and traditional form requirements. The principle of 'functional equivalence' will be used to assess their appropriateness for online contracts and, where necessary, and what adjustments might still be needed to effect functionally equal outcomes.

An initial analysis of the requirements for contracts, and how these are reflected in online contracts, will provide a basic understanding of the difference between 'online' and 'offline' contracts. First, the formation process of 'wrap' contracts is

1 Chris Reed, 'Online and Offline Equivalence: Aspiration and Achievement' (2010) 18 Int J Law Info Tech 248, 254.

2 Chris Reed, 'The Law of Unintended Consequences -- Embedded Business Models in IT Regulation' [2007] JILT <http://go.warwick.ac.uk/jilt/2007_2/reed/>.

3 Maurice Schellekens, 'What Holds Off-Line, Also Holds On-Line?' in Bert-Jaap Koops and others (eds), *Starting Point for ICT Regulation, Deconstructing Prevalent Policy One-Liners*, vol 9 (The Hague: TMC Asser Press 2006) 70.

examined in detail. Based on the well-established 'shrink-wrap' idea, the new online models, 'click-wrap' and 'browse-wrap', exhibit notable side-effects under traditional rules, particularly in relation to consumers. Following the idea of 'functional equivalence', these two concepts are looked at and an attempt is made to accommodate them better under English law. The focus must be on developing rules that allow parties to conclude contracts in the way they intend, while applying those normative rules necessary to create a coherent system under English law. Subsequently, it will be considered how formality requirements of writing and signature fare in the world of electronic documents. This will provide a notion of how the area of electronic documents has to be dealt with.

Wrap Contracts

The, so-called, 'wrap' contract, whether click-wrap or browse-wrap, has become a common form of e-contracting. The terminology is at first sight odd, but stems from the way in which software on a physical medium tended to be acquired. It would be supplied in a box, covered in shrink-wrap film with, ideally, licence terms visible through the wrapping.[4] Opening the shrink-wrap was, then, generally argued to be acceptance of the terms, although there were, of course, arguments in relation to such matters as the sufficiency of the information, which was visible before the package was unsealed, problems about who the contract was with, and how it related to the contract between supplier and acquirer.[5] However, that is not what concerns us here, but rather the situations to which the 'wrap terminology' has been extended, i.e. to contracts for the supply of software online and, more generally, the making of other contracts online. Although the terminology has never become entirely settled, the approach adopted here is to refer to online contracting where there is a distinct 'agreement' button to click on, such as one saying simply 'agree', or 'I agree', as 'click-wrap'. The other major category of 'wrap' contracts' is 'browse-wrap' and that is used here to refer to situations where no specific button, or 'click' is identifiable as creating the contract, but merely undertaking a discrete act, such as 'browsing' the website. As we shall see, these methods of contracting raise two types of basic issue; whether a contract was created at all and, if so, whether standard terms have been incorporated. In relation to both of these issues, the situation, where what is in

[4] *ProCD, Inc v Zeidenberg* (1996) 86 F3d 1447 (7th Cir); for an example see Margaret Jane Radin, *Boilerplate* (1st edn, Princeton University Press 2013) 118.

[5] See *Beta Computers (Europe) Limited v Adobe Systems (Europe) Limited* [1996] FSR 367.

question is a business transaction with a website carries fewer difficulties than where it is a consumer transaction. As will be considered subsequently, consumers are unlikely to read standard terms.[6] Businesses are more likely to do so, or at least be more aware of their existence, related content, or simply of the likelihood that the website is attempting to introduce terms, and to make a contract. The latter will be of some significance when considering browse-wrap, in particular.

Unsurprisingly, there is little in the way of cases which have come before the English courts, in contrast to those of the US. The underlying law is, of course, different in the US and the UK, but commentators, in particular, have tended to look to the US for guidance, and some reference will be made to US cases here. It is informative to look at some of the problems which the US courts have encountered and the results reached. However, we must remember that the differences in the two systems mean that when we might regard the result as appropriate, but we may well have to employ different means to achieve it, and we may regard the result as inappropriate. English law is much more protective of the consumer than US law, where private enforcement is seen as preferable to public intervention.[7]

Click-Wrap

When discussing electronic contracting, we can start from the basic need for agreement, and use the general approach of offer and acceptance. Looking at contract formation by means of offer and acceptance, analysis is not always satisfactory but, at least in relation to click wrap, what will generally be in question is a series of communications, each clearly in response to the other. In *Gibson v Manchester City Council*,[8] Lord Diplock said:

> 'My Lords, there may be certain types of contract, though I think they are exceptional, which do not fit easily into the normal analysis of a contract as being constituted by offer and acceptance; but a contract alleged to have been made by an exchange of correspondence between the parties in which the successive communications other than the first are in reply to one another, is not one of these.'[9]

It may not be anything which would traditionally be thought of as 'correspondence', as the letters and posted forms in *Gibson* would be, but in relation to 'click wrap'

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6 Lord Denning M.R. expressed this already in *Thornton v Shoe Lane Parking* (1971) 2 QB 163, 169: '*No customer in a thousand ever read the conditions. If he had stopped to do so, he would have missed the train or the boat*'.

7 Geraint Howells and Stephen Weatherill, *Consumer Protection Law* (2nd edn, Ashgate Publishing 2005) 50–51; see also Geraint Howells and Thomas Wilhelmsson, 'EC and US Approaches to Consumer Protection - Should the Gap Be Bridged?' (1997) 17 YEL 207.

8 *Gibson v Manchester City Council* (1979) 1 WLR 294.

9 *Gibson v Manchester City Council* (n 8) 297.

contracting, there is clearly communication in response to one another, making an 'offer and acceptance' analysis appropriate.

Often, when looking for agreement by means of offer and acceptance, there is a need to distinguish an offer from an invitation to treat, with the latter merely a part of the process which may lead to an offer, and with an offer being distinguished by the intention of the party making it binding on them, if the other party accepts on the same terms. In relation to the offline world, advertisements are generally regarded as invitations to treat, and not offers.[10] In fact, it can be said that it is the normal inference in relation to anything but the exceptional advertisement which is making the exceptional type of offer of a unilateral contract, which is commonly exemplified by the reward type situation, and by the case of *Carlill v Carbolic Smoke Ball Company*.[11] Of course, many online standard forms will specify that the customer's order is the offer, and that no contract is made until the trader takes a specific action, such as dispatching the goods. On Amazon, the 'Conditions of Sale' explain:

> 'Your order is an offer to Amazon to buy the product(s) in your order. […] The Order Confirmation is acknowledgement that we have received your order, and does not confirm acceptance of your offer to buy the product(s) or the services ordered. We only accept your offer, and conclude the contract of sale for a product ordered by you, when we dispatch the product to you […]'.[12]

However, some further consideration should be given to the situation where there is no specific statement as to the status of the 'order' as the offer, and it should be recognised that the reasons put forward for advertisements not usually being regarded as offers when, if there is eventually going to be a contract, it will be a bilateral one, do not stand up to much scrutiny. In relation to the well-known argument that an advertiser will not have an intention to be bound by the advert because he or she would not want to be bound to sell more of the items advertised than he or she has, there always has been a simple answer: the advert could be seen as implicitly 'subject to availability'. It is said that the advertiser would intend to retain the power to 'chaffer', but negotiation is simply not something which generally happens in today's world in response to the vast majority of advertisements, and would not normally be expected by the advertiser, who generally wants to sell the goods at the price set out. Indeed, there could be an issue of an unfair trading

[10] See *Partridge v Crittenden* (1968) 1 WLR 370; *Grainger & Son v Gough* [1896] AC 325.
[11] (1893) 1 QB 256.
[12] Amazon Ltd, 'Conditions of Sale' <https://www.amazon.co.uk/gp/help/customer/display.html/ref=chk_help_termstop_pri?ie=UTF8&nodeId=1040616#GUID-F1612AE4-0CA0-40C5-9B6C-38E1CB5D9B40__SECTION_DE289546269C476B94AC853787C5CF48> accessed 19 May 2017.

practice, where that did not occur. Another argument is made that the advertiser would intend to retain the power to choose to whom he or she sells, and again that is largely out of keeping with modern practice and, indeed, limited by current non-discrimination legislation.[13] Here, however, in relation to electronic contracting, there may be said to be some greater reality in the argument. Electronic contracting has created a situation in which transactions across borders have become a far more common occurrence than ever before, certainly totally transforming the situation in relation to consumer contracting. Now, if a consumer wants an item, such as a book, which is available from amazon.com, but not amazon.co.uk, it is very simple to buy it from the US website. Cross-border contracts do, however, raise issues of different consumer protection regimes and of different controls on what may be legitimately sold, or the circumstances in which it may be sold, such as medicines, alcoholic beverages and other controlled substances. This meaningfully raises the idea that the advertisement should not be an offer, because the advertiser will intend to retain power in relation to whom he or she sells, in relation to what jurisdiction the purchaser is in. Nevertheless, such matters could be dealt with by the way in which the required means of responding to the advertisement is constructed for an online purchase, or alternatively, by specific limitations being included in the advertisement. In short, the general view of advertisements as invitations to treat, and not offers, does not rest on any very strong arguments, but is simply so well established that it seems unlikely not to be followed in the electronic context. In fact, this position was adopted in art.11 of the United Nations Convention on the Use of Electronic Communications in International Contracts,[14] which states:

> 'A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making a proposal to be bound in the case of acceptance'.

However, unless there is no response, or only a neutral response that a message has been received,[15] whether a website is making an offer or merely an invitation to treat

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[13] See Mark Freedland and Matthias Lehmann, 'Non-Discrimination and the "Constitutionalization of Contract Law"' in Gerhard Dannemann and Stefan Vogenauer (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (1st edn, Oxford University Press 2013).

[14] United Nations, 'United Nations Convention on the Use of Electronic Communications in International Contracts' (United Nations 2007) 7.

[15] Except in non-consumer transactions, where the parties agreed otherwise, Regulation 11.1 Electronic Commerce (EC Directive) Regulations 2002 requires acknowledgement of the receipt of the order by electronic means.

will not generally be the significant question in relation to click-wrap contracting. Unlike the situation in relation to browse-wrap, which we will consider below, even when it is a consumer who is clicking on a button, provided that button is clearly enough labelled, the 'clicker's' intention to contract will be clear. In relation to the consumer placing an order, traders are now required to provide a means allowing the consumer to '*explicitly acknowledge that the order implies an obligation to pay*'.[16] While the Consumer Rights Directive allows this to happen by pressing a button, '*the button […] shall be labelled in an easily legible manner only with the words "order with obligation to pay" or a corresponding unambiguous formulation*'.[17] *Prima facie*, this does not sit very easily beside the idea that the consumer is making the offer, and that the consumer's click does not, in itself, create a contract. However, the '*insensitivity of European law to the integrity of national private law systems*' is notorious,[18] but reconciliation is possible by taking the line that, if the website is just an invitation to treat, by clicking the button, and making an offer thereby, the consumer is potentiating an obligation to pay, which comes to fruition if the website accepts. Of course, it will generally accept as it is the very business it is touting for.

However, when it is the click-wrap scenario which is being addressed, what is more likely to be in issue is not whether there has been offer and acceptance, but whether standard terms were incorporated by it. When that is looked at, the question will more generally be whether, under the rules of contract law, the standard terms are regarded as being included in the offer and acceptance. If they are incorporated by the ordinary contract rules, the website's standard terms will be included in the offer, if it is made by the purchaser, or the acceptance, if that is the purchaser's act. The only difficulty lies in applying those rules in the e-contracting context. We need to consider incorporation by signature, notice, and course of dealing.

There are certain rules affecting incorporation of terms and when considering incorporation of terms, the first question must be in relation to the method employed. English law generally has created a major divide between the incorporation of standard terms where there is a signed contract, and where there is not. In the 'real', paper, world where there is a signature then the rule of *L'Estrange v Graucob*[19] applies, and when we are dealing with unsigned documents or signs, then notice is

16 Article 8.2 Directive 2011/83/EU on consumer rights 2011 (OJ L 304/64).
17 Consumer Rights Directive (n 16).
18 Hugh Collins, 'The Hybrid Quality of European Private Law' in Roger Brownsword and others (eds), *The Foundations of European Private Law* (Hart Publishing Ltd 2011) 453.
19 (1934) 2 KB 394.

required and we must look to cases such as *Parker v South Eastern Rly Co*[20] and the concept of 'reasonably sufficient notice'. Moreover, incorporation by notice also relies on the 'red hand rule',[21] relating reasonable notice of a particular clause to the level of unreasonableness or unusualness of that clause. So when looking at the online world and incorporation of terms, and an action such as clicking on an 'I agree' button, the question is whether such an action can be regarded as a signature for the purpose of applying the rule in *L'Estrange v Graucob*.

When formality requirements are considered below, three aspects of a signature will be looked at, i.e. evidence, caution and channelling.[22] Here, when we are looking at the question of the application of the rule in *L'Estrange v Graucob*, it is caution which must be considered in particular. The point at which a signatory is asked to place his or her hand-written signature under a contract was held as crucial, causing alarm as to the importance that a signature usually carries. As has been suggested, navigation on the internet predominantly works by clicking which has, arguably, become such a mundane action that, even if it is sufficiently clear that the website visitor has reached the point in the chain of clicks at which a contractual offer is made by the particular click on the particular button, there is nothing akin to the alert, and pause for reflection, however momentary, that is caused by being asked to append a manuscript signature to a paper document.[23] The lack of alert in click-wrap transactions may lead to the conclusion that a click cannot have the contractual effect as the signature in *L'Estrange v Graucob* did, but still function as formal element to a contract.

It might seem odd to accept a click as a signature for the purposes of formalities, and not to do so in relation to the rule in *L'Estrange v Graucob*, but that would be possible, particularly as EU Regulation 910/2014 on electronic identification and trust services for electronic transactions[24] distinguishes basic, qualified and advanced signatures in relation to formalities. The effects of an action which constitutes a signature under the rule in *L'Estrange v Graucob* are profound in relation to the incorporation of terms. Treating click-wrap agreements as signed contractual documents would incorporate *all* terms, no matter how unreasonable or unusual, and

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20 (1877) 2 CPD 416.

21 *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433.

22 A more detailed discussion on signatures as formality element can be found on p. 56.

23 Elizabeth Macdonald, 'Incorporation of Standard Terms in Website Contracting - Clicking "I Agree"' (2011) 27 JCL 198, 210; Juliet M Moringiello, 'Signals, Assent and Internet Contracting' (2005) 57 Rutgers L. Rev. 1307, 1331.

24 Regulation (EU) on electronic identification and trust services for electronic transactions in the internal market 2014 (No 910/2014).

no matter how much or little is done to draw attention to particular terms.[25] This effect can be avoided by viewing clicking an 'I agree', or similar, button as akin to agreeing orally, for the purposes of incorporation.

If, due to the undesirable results, incorporation cannot occur by signature, we have to look at the requirements for incorporation of terms into unsigned paper documents or signs by 'reasonably sufficient notice'[26] and the more rigorous 'red hand rule' in relation to unreasonable or unusual clauses. Lord Denning expressed the idea of the 'red hand rule' where, depending on the unreasonableness or unusualness of a term in question, a higher standard of notice should be afforded to terms the more onerous they are to the *proferens*.[27] In principle, this provides some improvement of the situation where a party may very well click without reading standard terms, such as a consumer or small business. This higher standard could only be met if the onerous term draws sufficient attention. The required standard for a particular term is dependent on factors, such as how onerous the term is[28] and how much it stands out from the rest of terms by, for example, '*[printing it] in red ink on the face of the document with a red hand pointing to it*'.[29] What this means in reality is that, to draw attention to an onerous term, the *proferens* might need to use ink of a different colour, highlight the background or add arrows or similar marks.

When transactions occur over the internet, a number of new issues have to be dealt with. The primary issue, here, is the visualisation of the terms on the consumer's device which is not unlike those considered in cases like *Thornton v Shoe Lane Parking*[30] or *Interfoto Picture Library v Stiletto Visual Programmes*.[31] On websites, the visual design of the 'terms and conditions' is effected by the use of HTML which allows for formatting features, such as text and background colouring, bold and italic font styles, underlining, change of font size, etc., similar to most word processors. Even though there are prescribed standards for the visual appearance of HTML components, often browser applications implement those with a degree of variation which will be discussed in greater detail below. However, this idea of giving 'reasonably sufficient notice' of the terms to a click-wrap contract requires

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25 Macdonald, 'Incorporation of Standard Terms in Website Contracting - Clicking "I Agree"' (n 23) 207.

26 See *Thornton v Shoe Lane Parking* (n 6); *Parker v South Eastern Rly Co.* (n 20).

27 *J Spurling Ltd v Bradshaw* (1956) 1 WLR 461, 466 per Denning LJ; *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433.

28 *Thornton v Shoe Lane Parking* (1971) 2 QB 163, 172.

29 *J Spurling Ltd v Bradshaw* (1956) 1 WLR 461, 466 per Denning LJ.

30 *Thornton v Shoe Lane Parking* (n 28) 170.

31 *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* (n 21).

traders to make a series of decisions as to the visual layout of their terms, alongside technical limitations and other crucial factors.

Technical influences

The way in which terms are displayed, or not displayed, on the screens of different consumers may be affected by basic factors, such as the internet connection speed at the buyer's end or service interruptions by the website host. Particularly in consumer transactions, the available bandwidth (download speed) can vary significantly between consumers but also, for individual consumers, throughout the day. The limit is determined by the service deal chosen but, on its own, hardly ever a real issue. The extent to which the consumer can utilise the full bandwidth depends on the infrastructure of the housing area, i.e. in certain areas the bandwidth is limited by the cables serving the area, especially where no fibre optics is available. Further uncertainty comes from the number of active users at any given time within the household, but also within the housing area that is served by a single exchange point, as the available bandwidth is shared among all participants. Effects of varying or limited speed is that parts of a website's page, and its contents, such as contractual terms, may not fully load or be entirely missing. This may be more critical in certain internet browsers where, due to asynchronous data transmission, some objects might be displayed at the bottom of the page before the top is completely transmitted. Thus, the 'I Agree' button might be available before the terms are visible. Even though the availability of high speed internet reduces the changes of this effect, the increased number of network devices connected to a single access point can exacerbate the issue for particular households.

Even when those factors do not create issues, the buyer's hardware and software might have an even greater impact on the visual presentation of terms. Screen size is, for obvious reasons, a vital element and one can easily imagine that buyers will have a much harder time noticing, let alone absorbing, contractual terms on a 5.1 inch mobile phone display compared to a 24 inch monitor and potentially differing resolutions. The problem is somewhat lessened when traders 'recommend' a resolution for which their website was designed,[32] yet squeezing roughly 2 million pixels (standard resolution of 1920 x 1080 pixel) onto a mobile phone display must impact on what the user perceives, despite, or because of, the resolution being

[32] Note, however, that the same problem regarding 'reasonably sufficient notice' would arise in relation to such recommendations which also has to be brought to the visitor's attention.

identical on both devices. Another factor, which can cause further complications is software, and particularly the browser used on consumer internet devices. The way in which the markup language HTML is interpreted depends on the browser and can depart drastically.[33] This means that the appearance of the terms may differ significantly in different browsers. For example, frames containing terms might differ in size (potentially cutting off, hiding or pushing important terms outside the visible area) or highlighted text might be less eye-catching due to a different default colour-scheme applied by the browser. Again, traders could make recommendations as to the supported browsers, but whether or not the buyer has been made sufficiently aware of this recommendation would be likewise affected by the issues at hand. As a possible way forward, the law could employ the 'reasonable browser' or, more probably, the browsers of the reasonable person, as standard. Browsing applications that implement the standard set by the W3C might be viewed as 'reasonable', or one could use statistics to determine the browsers of the reasonable person. Both approaches would include the four major browsers,[34] one of which is typically found on almost every browsing device. What will need to be considered then, in applying the test for 'reasonably sufficient notice', and the 'red hand rule', is the appearance on the display of the particular consumer, if the browser was one of the major ones, or, if it was not, how the display would have appeared, had the consumer used a 'reasonable browser'. Buyers who choose a non-standard browser lacking some elements for it to be 'reasonable', tend to be IT-savvy and take the risk of presentational deviation.

Traders' decisions on how to deal with these technical aspects might cause contractual problems, particularly in relation to incorporation of terms, between the parties. At this point, as has been explained, the 'red hand rule' is of paramount importance and is applied to the most common scenarios.

Visual Design

Issues of technological diversity are not the only factors to be looked at which particularly pertain to the online world and incorporation by notice. The method of providing terms has to be considered, as there are a number of common ways in which traders display their terms.

[33] In fact, only in the rarest of cases does a web browser implement the exact standards as defined by the World Wide Web Consortium, 'W3C HTML 5.1 Standard' (*World Wide Web Consortium (W3C)*) <https://www.w3.org/TR/2016/REC-html51-20161101/single-page.html> accessed 13 December 2016.

[34] Microsoft Internet Explorer / Edge, Mozilla FireFox, Apple Safari and Google Chrome.

A trader might decide to simply provide all terms on a single web page, and pressing the 'I agree' button must be considered as the point by which all the terms must have been introduced in order to be part of the contract. This is the case, even if clicking is an offer, as the offer must include the terms, and therefore they must be introduced in such a way, and at such a time, as to be regarded as terms of the offer. The resulting contract can only be based on those terms which have been presented before that occurs and, obviously, new terms cannot be introduced after the contract is made.[35] Since all terms are contained on a single page, it is very likely that the terms cannot all be displayed at the same time in which case browsers commonly extend the page beyond the visible borders which can be accessed by 'scrolling'. Whether buyers actually browse through them, often depends on the location of the 'I agree' button. Most buyers would only scroll to the bottom of the page if the button is not directly accessible at the top, and this must be directly linked to the question of whether there will be 'reasonably sufficient notice' under all circumstances. In the well-known US case of *Specht,* the court held that a seller could not assume effective incorporation of terms positioned below the 'I agree' button.[36] Similarly, in the UK, it could well be contended that notice was not provided in time for the terms to be incorporated and, more generally doubts must be cast on the incorporation of any terms which are outside the immediately visible area of the screen, unless the 'I agree' button is in the same, not immediately visible area, and the standard terms must be visible on the scroll to that button.

However, commonly the 'I agree' button is located below the terms which avoids the above issue, but this does not mean that once the buyer has reached the bottom all terms above that point are incorporated. The trader might not give sufficient notice as to specific terms, despite the buyer's awareness of the existence of terms in general. This must depend on the factors of the 'red hand rule', i.e. presentation and reasonableness of the term in relation to the contract.[37] It must be noted that applying existing rules on the necessity to highlight terms on paper, are likely to be unsuccessful for contracts concluded via a website. Unlike the typical paper contract, a website contains more than terms on a plain background, and typical methods of highlighting important terms on paper, might not stand out sufficiently, in contrast to

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35 *Parker v South Eastern Rly Co* (1877) 2 CPD 416; *Thompson v London, Midland & Scottish Rly Co* (1930) 1 KB 41.

36 *Specht v Netscape Communications Corporation* (2002) 306 F3d 17 (2d Cir) 31–32; see also Macdonald, 'Incorporation of Standard Terms in Website Contracting - Clicking "I Agree"' (n 23) 215.

37 See *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* (n 27).

other elements of the website, to raise the level of awareness necessary for the effective incorporation under Denning's rule.[38] More might be required to give notice to the buyer, but the precise requirements for any specific term will depend on the reasonableness of term itself, the chosen method of highlighting in comparison to other terms, i.e. is it apparent that this term is intended to be 'even more important' than others, and in relation to the overall design of the website.

Some traders use scroll boxes, due to layout constraints or preference, to display large quantities of content, such as contractual terms. Here, the argument is not significantly different from what has been discussed so far. Besides the whole appearance of the website, the location of the button significantly impacts on whether there is reasonably sufficient notice of the terms to be incorporated into the contract. Two situations must be distinguished:

First, if the 'I agree' button is placed below the scroll box and can be clicked without the need to scroll through the terms, only the visible contents, which are still subject to the 'red hand rule', can be considered for incorporation. Second, where the buyer cannot proceed unless the box containing the terms has been scrolled through, either because the button is located at the bottom of the box or because the button outside the box remains disabled until the buyer reaches the bottom, all terms in the scroll box can be considered for incorporation into the contract.[39]

Whatever the portion of terms previously identified, there will still be issues relating to the 'red hand rule' to be considered. If the buyer can proceed without scrolling then a question arises as to whether the extra notice required by the 'red hand rule' in relation to unreasonable or unusual terms, at least, requires something to be done to alert the buyer, before he or she scrolls, that such types of terms will be encountered on scrolling through. It would seem that this indeed is the least that should be required, with the argument actually arising as to whether even that would be sufficient, or whether any such terms need to be visible, and sufficiently highlighted, without scrolling. Of course, where the visitor is not, by technical means, compelled to scroll through the terms, the trader might add a check box in proximity to the 'I agree' button, requesting approval of the terms within the box. The legal meaning of requesting 'check box approval' will be assessed carefully later and might pose a challenge under English law.

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[38] Moringiello (n 23) 1332.

[39] Macdonald, 'Incorporation of Standard Terms in Website Contracting - Clicking "I Agree"' (n 23) 212.

References

Another way of limiting the amount of content displayed during the contracting process to something which can be presented on a single page, traders direct users to other locations where the 'user agreement', 'terms of use' and other sets of standard terms, sought to be incorporated, can be accessed. These pages can be reached by following hyperlinks,[40] and consideration must be given to incorporating terms by notice where the document, or sign, immediately presented, does not include the standard terms themselves, or not all of them, but it refers to them and provides such a hyperlink.

Giving notice of contractual terms by reference, rather than the need to have all of the terms on the paper notice, or unsigned document (such as a ticket) has long been recognised in cases such as *Thompson v L M & S Rly Co*.[41] In that case, the unsigned document in question was indeed a railway ticket and that makes clear the practicalities behind the recognition of the sufficiency of a reference. The standard terms to the contract could only be found if the buyer followed a reference trail from the front of the ticket, to its back, and then to the railway timetable, where the relevant clause was to be found on page 552. The situation needs to be considered where the reference is supplied by a hyperlink.

First, the hyperlink that the buyer needs to press in order to access the terms, must be clearly recognisable as an interactive object of a particular type: a button, clicking on which will lead to standard terms. Thus, a lack of contrast to the background, as in *Pollstar v Gigmania Ltd*,[42] or similarity to regular text, for example by avoiding the default underlining of hyperlinks, would not constitute giving sufficient notice of the existence of the terms. Beside the general visual design, a hyperlink leading to a set of contractual terms must also convey certain information to the buyer. At face value, the buyer must understand that by following it, he or she would reach the terms the trader is trying to incorporate, and an inconspicuous caption such as 'Click here' might not suffice. In other words, there needs to be 'reasonably sufficient notice' that the buyer will find contractual terms governing the contract at the other end. Lastly, a hyperlink, even if identifiable as such and clearly labelled, must by design raise sufficient awareness of its importance, and location and relative

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40 Andrew D Murray, 'Entering into Contract Electronically: The Real W.W.W.' in Lilian Edwards and Charlotte Waelde (eds), *Law and the Internet* (2nd edn, Hart Publishing Ltd 2000) 30.

41 (1930) 1 KB 41; see also Macdonald, 'Incorporation of Standard Terms in Website Contracting - Clicking "I Agree"' (n 23) 216–218.

42 170 F.Supp.2d 974 (ED Cal 2000) 981.

attention compared to other static and interactive objects in proximity to the hyperlink are the key elements here. Additional hyperlinks leading to other parts of the website, non-essential to the contract, would distract further and lower the level of awareness as to the existence of those terms. These elements all impact upon whether the hyperlink can successfully provide sufficient notice of the existence of terms in order to incorporate them generally.

A hyperlink that satisfactorily makes the buyer aware of the existence of terms is, however, only the first issue which must be looked at here. Once the buyer has been given sufficient notice of the existence of the terms, it brings up the question of sufficient notice of the terms themselves. When what was being considered was terms on the particular page, there are issues in relation to the general visibility and presentation of the terms, for example whether all the terms are inside the immediately visible area of the screen or scrolling is required to see some of them. There is also again the question of the operation of the 'red hand rule', and the highlighting of more 'unreasonable' or 'unusual' terms on the page reached by the hyperlink.

With regard to unreasonable or unusual terms, it ought to be considered whether it requires that notice of the inclusion of, at least, the type of terms be given before the hyperlink is activated. What might be needed is that, where providers try to incorporate terms by reference using a hyperlink, it might not be sufficient under the 'red hand rule' to only highlight those terms in a way that makes them stand out from other terms as the intended effect of highlighting term would be void were the transaction can be completed without activating the hyperlink.[43] To give effect to any highlighting of the actual term, the webpage containing the hyperlink should incentivise the visitor, by raising awareness of the existence of this type of terms, to access the linked webpage. Arguably, only this might provide sufficient notice of the existence of such terms when the terms are not directly embedded on the same webpage.

There is also another issue which arises in relation to the hyperlink as its use introduces another step at which technical difficulties can arise. When activating the hyperlink to the 'terms' page, the buyer might find nothing but a blank page.[44] In this

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[43] Macdonald, 'Incorporation of Standard Terms in Website Contracting - Clicking "I Agree"' (n 23) 217.

[44] For example, on signing up for a membership with the Society of Legal Scholars, the visitor, when clicking the hyperlink to a PDF file containing the 'rules' will reach a loading error as the file does not seem to exist (Society of Legal Scholars, 'Membership Rules' (*404 Not Found*) <https://www.legalscholars.ac.uk/rules/rules.pdf> accessed 5 June 2017).

case, unless the terms are incorporated by previous dealing on the same terms, '*[it] may lead to the inference that there were no such terms to be applied to the particular transactions*'[45] and, as a result, insufficient notice of them.[46]

'Read and understood' declarations

Traders are aware of the fact that consumers do not typically follow a hyperlink, or read the terms to which it takes them. In an attempt to ensure that those terms are effective, they add, so-called, 'read and understood' declarations during the contracting process, requiring buyers to tick a box which is accompanied by a text stating something like:

> 'I/We have read the Conditions of Sale and agree to be bound by them.'[47]

If effective, such declarations could, without more, incorporate the standard terms, whether, or not, the consumer has read them, and with there being every likelihood that they have not been read. In order to determine the effectiveness of such declarations regarding terms that are accessed via a hyperlink, their incorporation into a contract and their effectiveness vis-á-vis the consumer are looked at.

Such declarations could be regarded as a term which makes a reference to those other standard terms the trader tries to incorporate into what is probably designed in the form of, a 'click-wrap' contract.[48] Again, the distinction between signed and unsigned documents must be considered.

It might be argued that the contract is a signed one, it would mean that all terms are incorporated, so long as the document signed was contractual and the signature in an appropriate place, but it would be necessary to consider of what the signature consists. In theory, the common law would allow for a signature to take the form of a button click (or the ticking of a box).[49] Since the buyer has to tick the box before he or she can click the 'submit' button, it may be argued that the signature is a combination of ticking a box and clicking a button. Once the buyer has completed these steps, i.e. he or she has submitted the 'order form', the declaration would be incorporated. On the other hand, unsigned documents must provide 'reasonably

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45 Macdonald, 'Incorporation of Standard Terms in Website Contracting - Clicking "I Agree"' (n 23) 218.

46 See *Poseidon Freight Forwarding Co Ltd v Davies Turner Southern Ltd* [1996] CLC 1264.

47 Example taken from 'Unfair Contract Terms Guidance - Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' Annex A, Group 18(e).

48 A trader cannot use evidential estoppel in relation to such declarations, because the trader cannot belief that the other party who is trying to generate estoppel had read it (*Watford Electronics v Sanderson* (2001) 1 All ER (Comm) 696, 711).

49 See p.33; further analysis from p.58.

sufficient notice' of the declaration, and the 'red hand rule' must be satisfied before a term will be incorporated by notice.[50] Whichever approach is adopted, it should not be a great problem for traders to contend, successfully, that such declaration has been incorporated into a contract.

However, the CMA has indicated concern about the use of, so-called, 'have read and understood declarations',[51] which would include the use of a tick box alongside a declaratory text. The Guidance explains:

> 'Including a declaration of this kind in a contract effectively requires consumers to say that these conditions have been met, whether they have or not. This tends to defeat the purpose of the [Unfair Terms Directive], and as such is open to serious objection. […] The purpose of "a read and understood" declarations is clearly to bind consumers to wording regardless of whether they have any real awareness of it.'[52]

Such serious objection could be met by the use of the unfair terms regime contained in Part 2 of the Consumer Rights Act 2015. Such a clause is an attempt to bind consumers to 'hidden' terms and falls within the 'grey list' of terms which may be unfair. Paragraph 10 of the grey list in sch.2 CRA covers:

> A term which has the object or effect of irrevocably binding the consumer to terms with which the consumer has had no real opportunity of becoming acquainted before the conclusion of the contract.

Prima facie, the use of a term trying to incorporate further terms which are available when following a hyperlink, does not seem entirely fitting. The consumer does usually, literally, have an opportunity to read the terms unless the hyperlink does not work. The 'reality' of the opportunity is raised, but that is most obviously brought into question where the hyperlink is visually inconspicuous or hidden.[53] But where the hyperlink is clear and, for example, directly beside the 'read and understood' declaration, the Unfair Contract Terms Guidance makes it clear that 'hidden' should be interpreted as encompassing terms 'solely incorporated by reference' and even makes express reference to the 'tick box' scenario.[54] The likelihood of such a clause being found to be unfair and 'not binding on the consumer' seems high. Clearly, where such clauses cause a significant imbalance, they will do so where the consumer suffers from a relative weakness of knowledge or rationality.

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[50] The requirements of 'reasonably sufficient notice' and the 'red hand rule' have been discussed at p.34.

[51] 'Unfair Contract Terms Guidance - Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' (n 47) 5.34.5-5.34.8.

[52] 'Unfair Contract Terms Guidance - Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' (n 47) 5.34.5-5.34.6 (sic).

[53] See, for example, *Pollstar v Gigmania Ltd* (n 42) 981.

[54] 'Unfair Contract Terms Guidance - Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' (n 47) 5.20.2.

Browse-Wrap

We now need to consider browse-wrap, and the potential for contracts where there is nothing as definite, in relation to formation, as a click on an 'I agree' button. The term 'browse-wrap' is used to describe a website provider's attempt to regulate visitors' use of its contents by contract, and he or she will contend that by using the website the visitor has accepted the provider's proposed offer. Visitors would often be surprised by any contention that their browsing activities have led to them being contractually bound. In 2000, the first cases had been brought in the US, requiring the judges to consider the existence of browse-wrap agreements.[55] The US courts were reluctant to prematurely rule against the possibility of browse-wrap agreements, and allowed traders to assume that continued use of a website could be taken as acceptance of its 'terms of use',[56] and in 2004, *Register.com v Verio*[57] affirmed the validity browse-wrap agreements. However, it was only in 2010 that a case on browse-wrap reached a European court in the Irish case of *Ryanair Ltd v Billigfluege.de GmbH*,[58] whose analysis was influenced by US judgements. It is the position under the law of England and Wales, to which consideration must now be given.

When we consider the traditional offer and acceptance analysis, what becomes clear is that there must be considerable focus on the intent with which the acts, which are said to amount to acceptance, were carried out, i.e. whether there is to be found any sufficient intention to accept. There is no doubt that contract law generally utilises an objective test to determine the parties' intentions,[59] but the idea that a contract could be ‘accepted’ by a party who subjectively has no idea that they are in the process of making a contract is, nevertheless, troubling. In the paper world, what is generally in issue when the question of whether an acceptance of an offer has occurred is, whether the offeree, who undoubtedly subjectively knew he or she was in a situation in which a contract might be made, passed the borderline between negotiation and acceptance. In the browse-wrap context, in effect the question is whether a contract can be made entirely ‘by accident’, without any subjective awareness on the offeree’s part that he or she is even an offeree. It is suggested that the assessment can be divided into a 'formalist' part, considering public policy

[55] See *Pollstar v Gigmania Ltd* (n 42).
[56] See *Specht v Netscape Communications Corporation* (n 36).
[57] 356 F3d 393 (2d Cir 2004).
[58] [2010] IEHC 47.
[59] *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal (The Hannah Blumenthal)* (1983) 1 AC 854.

reasons against general inference of legal contracts in domestic situations, and a 'substantive' part.[60] The latter injects the element of intention into the 'offer and acceptance model' which, in relation to 'acceptance' of a browse-wrap contract, needs elucidation. The lack of awareness as to the existence of a browse-wrap contract exhibited by visitors might indicate the absence of legal intention which could impact on the validity of browse-wrap agreements.

McKendrick's 'sale of the lost dog', albeit an example from the offline world, accurately portraits the possible consequences of lack of awareness:

> 'X offers £100 for the safe return of his missing dog. Y returns the dog but is unaware of X's offer. […] A good argument can be made out to the effect the Y should be entitled to the money. X got what he wanted, and there seems no reason in justice why he should not be required to pay what he has publicly promised to pay. At the same time Y has performed a socially useful act in returning the dog, and he should be rewarded for doing so. […] On the other hand, in case of a bilateral contract which imposes mutual obligations upon the parties, the effect of such rule would be to subject the 'accepting' party to obligations of which he was unaware. For example, if X offered to sell the dog for £50 to the first person who returned it to him, Y who returns the dog, unaware of the offer, should not thereby be held to have accepted an offer to purchase the dog for £50.'[61]

The same can be said to be true for browse-wrap contracts, but it would certainly be too easy to conclude that they cannot exist under English law. We should rather consider whether the law provides a mechanism to accommodate the situation. Intention is objectively determined by apparent intention perceived by the reasonable person,[62] but its typical application poses a problem under browse-wrap contracts. It is the offeror who makes a unilateral offer and, at the same time, dictates the action which should objectively be perceived as acceptance, such as returning a dog or continued use of the website. Obviously, the objective test would then point towards the existence of a contract but the important point, here, is whether the parties must be sufficiently aware of the possibility of a contract, before the objective test can be applied.

Just like the acceptor in McKendrick's example, who would not know of the obligation to buy the dog, website visitors, in the case of browse-wrap transactions, have no awareness of the contractual consequences of their action. The reason for this is that, unlike an 'I agree' button, browsing is not perceived as transactional. Factors like reciprocity or transfer of money, which might raise awareness, are not

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60 Michael Furmston and Greg Tolhurst, *Contract Formation: Law and Practice* (2nd edn, Oxford University Press 2016) para 6.07.

61 Ewan McKendrick, *Contract Law* (11th edn, Palgrave 2015) 35.

62 Edwin Peel, *Treitel on the Law of Contract* (14th edn, Sweet & Maxwell 2015) para 2-002.

obvious to the reasonable visitor.[63] Thus, all that visitors might do is committing a simple act, free of the intention to enter into a contract.[64] However, this does not preclude the general possibility of browse-wrap contracts under the law of England and Wales.

We have established that lack of awareness as to the existence of a contract is the primary issue, and it might be necessary to assess the need for some form of awareness of the possibility of a contract. The obvious approach is to obligate the website provider with the task of giving 'notice' to the visitor. The idea of 'notice as to the potential for a contract to be concluded by the buyer's action' never had to be considered under UK law before, but that does not mean that there is no case law which can be used to introduce such rule. Basically, what is sought is something to the effect of 'reasonably sufficient notice' under incorporation of terms by notice, and an analogy can be drawn to Denning's 'red hand rule'.[65] From it follows that '*[t]he less clear the transactional context, the more notice would be required*'[66] and under browse-wrap agreements, where there is a general lack of transactional awareness,[67] the existence of a contract might be unreasonable until sufficient awareness is raised by way of 'notice'.[68]

Generally, websites will provide a link to their 'Terms and Conditions' when the visitor enters the website, and in other jurisdictions it has been held adequate notice of the link leading to the terms and conditions as sufficient.[69] Under English law, 'adequate notice' will certainly require more than informing visitors of the possibility that their visit is about to become subject to a contract with binding obligations. In addition to this essential step, it is suggested that website providers must satisfactorily comply with three further steps in order to give sufficient notice.[70] Unless the visitor knows the steps that lead to the conclusion of such a contract, there is still the same chance of having agreed to the 'sale of the lost dog'. This information

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63 Furmston and Tolhurst (n 60) 6.08.

64 Elizabeth Macdonald, 'When Is a Contract Formed by the Browse-Wrap Process?' (2011) 19 Int J Law Info Tech 285, 301.

65 Macdonald, 'When Is a Contract Formed by the Browse-Wrap Process?' (n 64) 300. N.b. Hanna J in *Ryanair Ltd v Billigfluege.de GmbH* (n 58) [21] also applied the 'red hand rule', but only in relation to incorporation of the terms.

66 Furmston and Tolhurst (n 60) 6.11.

67 Furmston and Tolhurst (n 60) 6.08.

68 Timing is an important factor but, unlike the situation in *Olley v Marlborough Court Hotel* (1949) 1 KB 532 where terms will not be incorporated into a contract because the notice given was insufficient, any analysis for browse-wrap contracts must be looked at the other way around, i.e. there cannot be a contract unless 'reasonably sufficient notice' is given.

69 See *Century 21 Canada Limited Partnership v Rogers Communications Inc* [2011] BCSC 1196.

70 Christina L Kunz and others, 'Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements' (2003) 59 Bus. Law. 279, 281.

is far more important and cannot be buried in the 'terms of use'. Any notice must also inform visitors that 'continued browsing' is the key element to the conclusion of the contract. To avoid unintentional conclusions, all of this must be clearly conveyed to the visitor before the simple act of 'continued browsing' can be taken as acceptance of a contract. These steps, like the first one, require the provider to give notice in a way that is sufficient under the particular circumstances. Whether the website provider fulfils these requirement satisfactorily depends on those known factors under the 'red hand rule', i.e. the circumstances under which and how that information is given to the visitor.

Vigilant visitors might, then, want to consider the nature of the obligations imposed upon them, and ought to be given 'a meaningful opportunity to review the terms'.[71] The accessing of the page containing the 'terms of use' must not, at this stage, be interpreted as intended acceptance but as a simple navigatory necessity to make an informed decision, delaying the creation of the contract. Only if website providers comply with those steps, the visitor can be assumed to have 'reasonably sufficient notice' as to the impending browse-wrap contract at which point continued browsing would amount to acceptance of the proposed offer.

Given that the website provider has effectively given notice as to the contract, the continued use must objectively be understood to signal acceptance. However, before the website provider can rely on and enforce the terms, where the visitor is a consumer, the terms governing the relation between the parties have to satisfy the 'fairness' test under s.62 Consumer Rights Act 2015, whereas in business transactions and no agreement to the contrary, s.11 UCTA 1977 will impose the 'requirement of reasonableness' which has to be met.

Formality Requirements

Over the years Government has attached formal requirements to various document types in order to be valid by law. Most commonly, statutes require certain contracts to be in writing or evidenced in writing, others had the additional prerequisite of a signature, maybe even in a designated area, on the document. Examples of documents requiring some form of writing are bills of sale, contracts for sale or disposition of land, and consumer credit agreements to name only a few. The Bills of

[71] This must not be confused with incorporation of terms. At this stage, the availability of the contract is solely for the visitor to consider whether he or she wants to enter into the contract generally.

Exchange Act 1882,[72] for example, deals with the requirements of two very specific types of contracts, namely bills of exchange and promissory notes. A similar type of document, i.e. bills of lading, takes a somewhat special position with regard to the formal requirement that are imposed, as will be explained in due course. These rules were introduced for the protection of the parties and add certainty as to what has been agreed and, that an agreement has been reached, generally.[73] They developed at a time when computers did not exist or were not as common as they are now. Consequently, traditional provisions are usually silent as to their application to and interpretation of digital transactions. To analyse issues in relation to formality requirements in an electronic context sufficiently, it must be asked how far non-paper-based recordings can amount to 'writing', whether such recordings can be a 'document' and how they can be signed with legal effect.

Three basic functions (evidence, caution, channelling) are typically ascribed to traditional requirements of form.[74] They all provide a certain level of evidence of the action to which the formality relates. Furthermore, the use of formalities may raise awareness as to the legal significance of the actions a person is about to undertake. Lastly, it provides a channel through which the person can express their intention to bring about the resulting consequences. Different formalities place emphasis on certain functions and possibly fulfil additional special functions.

The use of paper documents, the 'requirement of writing' and 'signatures' are highly relevant in relation to online contracting and will be addressed with those traditional functions in mind. For an analogous application, functional equivalence will be sought, meaning that online methods must produce equivalent outcomes to their offline counterparts under those functions.

Physical documents

Of the formalities looked at here, the physical requirement of a document is the most basic and probably most historic one. Historically, a deed had to be in writing, sealed[75] and produced on paper, papyrus, or vellum.[76] The seal was abolished by the Law of Property (Miscellaneous Provisions) Act 1989[77] and replaced with the 'face-

[72] See sections 3(1) & 83(1) Bills of Exchange Act 1882.
[73] Peel (n 62) 5-002; Diane Rowland, Uta Kohl and Andrew Charlesworth, *Information Technology Law* (4th edn, Routledge 2012) 262.
[74] Lon L Fuller, 'Consideration and Form' (1941) 41 Colum. L. Rev. 799, 800–803.
[75] HG Beale, *Chitty on Contracts*, vol I (32nd edn, Sweet & Maxwell 2015) para 1-085.
[76] Law Commission, 'The Execution of Deeds and Documents by or on Behalf of Bodies Corporate Consultation' para 3.2; *Goddard's Case* (1584) 2 Co Rep 4b, 5a.
[77] Law of Property (Miscellaneous Provisions) Act 1989, s.1.1(b).

value requirement',[78] signature, and attestation.[79] Prescription of substance of the medium, on the other hand, even though seen as unnecessarily strict as any other material equally sufficed as carrier,[80] at least ascribed a certain evidential weight to the document. Thus, providing a valid deed, for instance for the transfer of land, was a strong sign of entitlement for the person named on it, and it also showed the intention of the drafter of the deed to commit to whatever act he or she agreed under the deed.[81]

However, what can be observed is that, in relation to some deeds, the need for a physical document is dispensable. The Land Registration Act 2002 has a provision expressly dealing with conveyance of land via electronic instruments and '*[regards an electronic] document to which this section applies for the purposes of any enactment as a deed*'.[82] The Act then demands that for a document to be deemed a deed, it must contain a certified signature of each signatory.[83] The substitution of the 'physical' document for a digital signed one is possible as the functions ascribed to the deed, i.e. record and authentication, can be fulfilled by the electronic equivalent signed with a qualified signature.[84] Yet, there may, indeed, be a more pressing reason for the use of a physical document on occasion.

The tangible character of a document has been a necessary element in the past where it is used as a 'document of title', as is the case with bills of lading. Basically, the holder of the document is regarded as 'in constructive possession' of the goods to which it relates, and as transferring possession when he or she hands over the bill of lading.[85] Since there is only one single document[86] relating to the goods under a particular contract, it provides a way for the '*sale of goods to be performed by the delivery of documents*'.[87] There is, however, a problem with replicating this in online transactions, which means that law and technology, yet, do not cater for the

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78 'Face-value' under s.1.2(a) of the Law of Property (Miscellaneous Provisions) Act 1989 means that '*[a]n instrument shall not be a deed unless it makes it clear on its face that it is intended to be a deed [...]*'.

79 Law of Property (Miscellaneous Provisions) Act 1989, ss.2 – 4; Kevin J Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, Oxford University Press 2009) para 8.1.88.

80 Law of Property (Miscellaneous Provisions) Act 1989, s.1.1(a).

81 See Gray and Gray (n 79) 8.1.86.

82 Land Registration Act 2002, s.91(5).

83 Land Registration Act 2002, s.91(3)(c).

84 'Land Registration Act - Explanatory Notes' para 147.

85 With some exceptions under *nemo dat quod non habet*; see LS Sealy and RJA Hooley, *Commercial Law: Text, Cases, and Materials* (4th edn, Oxford University Press 2009) 349ff.

86 For historical reasons, bills of lading are still issued in sets of three which, to a degree, defeats their purpose. However, this only poses an issue in rare cases, and for the sake of this argument, uniqueness of a bill to a particular transaction is assumed.

87 *Arnhold Karberg & Co v Blythe Green Jourdain & Co* (1916) 1 KB 495 (CA) 510, per Bankes LJ.

possibility of transferring legal title in an analogous way.[88] Transmission of an electronic document creates a copy, rather than transferring the unique document itself, so that after transmission, both parties would possess a 'document of title' over the same goods. This is typically known as the 'double-spending' problem. The important feature of uniqueness of the document has disappeared and the problem in relation to using an electronic document as a 'document of title' is clear.[89]

From a commercial view point reliance on physical documents is no longer a feasible method of conducting international transactions. In terms of commercial practicality, the industry has voiced a demand for a modernised version of the concept allowing for an electronic version. Under the Carriage of Goods by Sea Act 1992, the Secretary of State has the power to pass provisions to make an electronic bill of lading admissible.[90] Although this has not happened yet it evidences that Government certainly thought it acceptable in theory. This animates a discussion about the measures which have been taken by entities in the commercial sector and those which must be taken, should Government decide to adopt an electronic equivalent.

Electronic documents of title can only work if the 'double-spending' problem is dealt with, i.e. it can be assured that once the transferee received the document, the transferor can no longer claim to be the 'holder'. To replicate this characteristic, companies have created online platforms[91] that provide a form of 'online bills of lading'. Such 'documents' only exist inside the system so that a 'transfer' can take place by the information on the current 'holder' of the bill being changed. It is a possible workaround, but hardly touches the essence of the problem at hand as the carrier is not free to draft the bill of lading on his or her computer and tender it to the shipper. Furthermore, it must be noted that those systems are only open to

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88 AN Yiannopoulos, *Ocean Bills of Lading: Traditional Forms, Substitutes, and EDI Systems* (Kluwer Law International 1995) 37.

89 The bill of lading can be contrasted with the sea waybill. Niv examines both documents thoroughly in her article and notes that the sea waybill is not a document of title and can therefore exist in electronic form (Lili Sehayek Niv, 'Symposium: The Living Law: Reasonableness in the Standard Practices of International Trade and Business: Article: The Electronic Express Sea Waybill as Perceived in Sea-Land Service, Inc. v. Lozen International, L.L.C. and Later Case Law' (2013) 30 Ariz. J. Int'l & Comp Law 507, 512ff; see also Diana Faber, 'Shipping Documents and EDI' (1992) 6 Int'l Y.B. L. Computers & Tech. 73).

90 Section 1(5) Carriage of Goods by Sea Act 1992 states: '*The Secretary of State may by regulations make provision for the application of this Act to cases where a telecommunication system or any other information technology is used for effecting transactions corresponding to – (a) the issue of a document to which this Act applies; (b) the indorsement, delivery or other transfer of such a document; or (c) the doing of anything else in relation to such a document*'.

91 'EssDOCS - Electronic Shipping and Trade Document & Data Solutions' (15 December 2014) <http://www.essdocs.com/> accessed 15 December 2014; 'Bolero International Limited' <http://www.bolero.net/> accessed 15 December 2014.

subscribers to the services. In order to use the electronic version all parties involved, which are at least the shipper, carrier, bank, and consignee, but might extend to charterers, agents and further buyers, must have subscribed to the same service.

There might be a new technology emerging with the potential to solve the 'double-spending' problem. Distributed Ledger Technology (DLT), often simply called 'blockchains', provides a 'trust-less' public ledger to which strings of data, for instance a digital document, can be added represented by a nominal fee of virtual currency.[92] The system distributes the ledger across all participants to the system. Any new transactions to the ledger has to be authenticated by 'proof of work',[93] a mathematical puzzle, before it is added, and even though it is openly accessible to anyone, tampering with the data will not affect the global ledger but merely invalidate the data held by that particular client, which will then be discarded by the system. Any new entries contains an identifier initially linking it to the identity of the person who created the document. Subsequently, entries can be transferred (or sold) to other persons who will then become the new 'owner' of the entry.

As for bills of lading, carriers could create a digital document (the bill) and add it as an entry to the ledger. This entry, alongside a digital copy of the document, can then be tendered to the shipper by assigned the shipper as the new 'owner'. DLT deals with the 'double spending' problem by attributing every entry to an 'owner'. The 'holder' of a digital copy can make a request on the system and retrieve the current 'owner' of the document, and it does not matter who or how many different parties hold a copy of the bill, the current 'owner' of it is accurately determined in the ledger. Just like the holder of a physical bill, the person currently linked to the entry can be said to be in constructive possession of the goods.[94]

The system is akin to those existing systems mentioned before, but is superior in two important aspects: first, parties can draft contractual documents in a manner to which they are used, rather than an abstract entry in a database. Second, the use of DLT only requires access to the ledger system which can be obtained easily and freely. This increases the availability of digital bills of lading by lowering the threshold for entrants to participate. Yet, there are still a number of issues which need to be dealt with before the legal validity of electronic bills of lading can be

[92] In relation to bitcoin, for instance, the value of such a transaction must, however, be greater than 0.0000564 bitcoins, not be considered a 'dust transaction' and not be discarded (Pedro Franco, *Understanding Bitcoin: Cryptography, Engineering and Economics* (Wiley 2015) 80).

[93] See Henning Diedrich, *Ethereum: Blockchains, Digital Assets, Smart Contracts, Decentralized Autonomous Organizations* (Preview 3, Wildfire Publishing 2016) 144

[94] This might be a good use of smart contracts, because transfer of possession can the executed at the same time the payment is made.

confirmed. Endorsements of bills of lading on a ledger, the duty to transfer 'ownership' of the ledger entry under a sales contract, which is covered by a bill of lading, and delivery of the electronic document are but a few examples of challenged ahead.

Issues in relation to bills of lading are specific to international trade and must not be confused with the functionality of this technology. The use of DLT effectively prevents 'double spending' of those assets registered to the ledger, such as any electronic document, at which point the need for a physical document seems dispensable from a legal point of view.

Writing

In the traditional sense, 'writing' is understood to encompass words in ink on paper. With new means of communication quickly emerging in the second half of the last century, that image had to be adjusted to also include printed media[95] and fax.[96] Online contracts, and other digital documents, have now become increasingly common and the concept needs to be re-addressed. In comparison to older forms of contracting, the transposition of contracts into the digital realm brings obvious issues in relation to visibility and durability, and it must be asked whether these and other differences cause difficulties for the application of the traditional rules of contract law.

The Interpretation Act 1978 states '*"Writing" includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are construed accordingly*'.[97] The key element is 'visibility' and whether the provision of information in electronic form satisfies this aspect, depends on the interpretational approach taken. A narrow approach to electronic information would be to regard it as merely a sequence of digital impulses translated into a visible form, and not as visible *per se*. On the other hand, a wider approach would emphasise that such impulses can be made visible on a screen.[98] The latter view has been preferred by academics[99] and was embraced by

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95 *Newborne v Sensolid (Great Britain) Ltd* (1954) 1 QB 45.

96 *Yellow Pages Sales Ltd v Davie* [2012] ICR D 11.

97 Interpretation Act 1978, sch.1.

98 Steve Hedley, *The Law of Electronic Commerce and the Internet in the UK and Ireland* (2nd edn, Cavendish Publishing Ltd 2006) 252.

99 Rowland, Kohl and Charlesworth (n 73) 263; Andrew Murray, *Information Technology Law* (3rd edn, Oxford University Press 2016) 509. Both refer to UNCITRAL and s.8 of the Electronic Communications Act 2000.

the Law Commission in their Advice on Electronic Commerce[100] in 2001. It would seem that, provided information can be made visible as writing on a computer screen, such transitory visibility is viewed as sufficient because of its consistent and standardised interpretation of binary input into visible form, even if the basic state is simply as electronic impulses.

However, while the requirement of 'visibility' in the general definition of writing in the Interpretation Act 1978 can be met by electronic messages or information, we should, nevertheless, consider those other formal functions of writing, identified by Fuller previously. The requirement of writing was developed for various purposes: evidence of factual events, raising awareness of the significance of the contractual obligations, and providing clarity as to the drafter's intentions. It is those elements which need to be fulfilled sufficiently to apply the legal status of 'writing' to electronic writing.

Evidence

Over the years, the law has brought forward various rationales for imposing writing as a formal requirement. The most prominent reason is its status as evidence.[101] There are various aspects to this, and when designing a Model Law on Legal Aspects of Electronic Data Exchange in 1996, the General Assembly of the United Nations adverted to 'reliability, traceability and unalterability'.[102] These are the key factors in relation to evidential value of writing and the Guide on the Model Law, thus, places great importance on these factors if something is to be regarded as 'writing'. We are, thereby, reminded that recognition of an electronic equivalent should not be denied for reasons solely based on the electronic form, if the electronic version can achieve an equal level of functionality with regard to those key factors.[103]

There is, however, little guidance as to what each single factor relates to. They all jointly relate to the ability of the recipient to rely on what the parties initially set out to be 'in writing' which is best captured under the term of 'reliability'. However, editing electronic writing, and therefore compromising its reliability as a record, is easier than editing its paper-based counterpart. An electronic document can be changed and saved without a trace, though this problem is not confined to electronic

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[100] Law Commission, 'Electronic Commerce: Formal Requirements in Commercial Transactions' para 3.10-3.16.
[101] Hedley (n 98) 251.
[102] United Nations, 'UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with Additional Article 5 Bis as Adopted in 1998' para 49.
[103] UNCITRAL Model Law on Electronic Commerce 1996, art.5.

documents only, but to digital files in general. Furthermore, this record has to be preserved over time so that, in case of a unilateral change in one party's intention, the 'writing' remains unalterable warranting continued reliability. Since the possibility to amend the contents of a document conflicts with the idea of continued reliability, the general ability to undertake changes to electronic documents, or files, poses a problem. Again, this is not exclusively a legal problem.

In the past, suppliers of digital content had to find a way of verifying the genuineness of their files to protect customers of digital products from product copies illegitimately altered by fraudsters. The solution was the provision of checksums, a numerical sequence created by an algorithm based on the binary content of a file. Changing the content of a file would result in a different checksum.[104] Such checksums in combination with the size of the file can be generated at any point and compared to those attributes of the original file to detect alterations. Any deviation from either information would prove that the document differs from the original, and thus reveal any attempt to alter its content. This essentially makes the issue manageable. Another safeguard is to keep copies of electronic writing on durable devices, such as CDs or DVDs, in analogy to storing paper-based documents, to expose alterations made to the corresponding counterpart.

Preservation of a contract in 'writing' is also possible by making it 'traceable'. This principle relates to exposure of changes which have been made to a document and possibly by whom. Checksums are not suitable to detect exact changes to digital documents as they are only an arbitrary code generated from the contents of the original file. If the file is changed subsequently, the generated checksum will be different, indicating changes but not exposing them. Exact changes can be detected with aid of file comparison software[105] by directly comparing two files. It is obvious that this will only be possible when the original accessible. While this exposes all differences between the two files, the person responsible for any such changes can only be identified if an internal system is in place to log activity on the network or system. However, knowledge of neither part, i.e. exact exposure of changes and identification of the person who made the changes, is particularly important for the determination of the contract. The most relevant factor must be the identification of

[104] For further discussion see Gopalan Sivathanu, Charles P Wright and Erez Zadok, 'Enhancing File System Integrity Through Checksums' [2004] Technical Report FSL <http://www.am-utils.org/docs/nc-checksum-tr/nc-checksum.pdf>; 'SHA1 Secure Hash Algorithm - Version 1.0' (2 October 2014) 1 <http://www.w3.org/PICS/DSig/SHA1_1_0> accessed 2 October 2014.

[105] For example WinMerge: '*WinMerge can compare both folders and files, presenting differences in a visual text format that is easy to understand and handle.*' ('WinMerge' (29 October 2014) <http://winmerge.org/about/> accessed 29 October 2014).

the initial version showing the parties' original contract. If that version can be found, any altered version[106] is invalid regardless of what has been changed and by whom.

Another method of determining whether an electronic document has been altered could be the use of cloud storage. Using cloud storage, files are usually versionised, i.e. alterations inside the document simply create a new version whilst a copy of the old version is retained. If the original version uploaded to the cloud is changed, that will be recorded. The method is generally safe but if user accounts are not monitored and passwords chosen carefully, unauthorised users might gain access to the cloud and, depending on the system, might be able to delete earlier version irrevocably. Even though, technically possible, this seems an unlikely scenario.

From a functionalistic view point, electronic writing can satisfy the key aspects that have been identified as imperative for evidencing the express content of the contract. Thus, there seems to be no good reason why words in digital form should have a lower evidential value than their paper-based counterparts – both can confirm the existence of a contract and its terms.

Caution

Another function fulfilled by writing is cautionary. Engaging with a written document often makes the parties consider their intentions preventing them from hastily, or pre-maturely, entering into legal obligations.[107] Undoubtedly, a signature sends a strong signal to the party who is supposed to sign a document and, to a lesser extent, this also applies to the requirement of a 'writing'.[108] For most online transactions a consumer engages in, there is no such requirement to put something in writing and, of course, being merely presented with a written document does by no means have the same effect. The idea of caution from physically writing the terms would not be one that could be taken seriously since standard forms became common, and we are so used to standard forms now that any such alerting function is limited in relation to terms in writing anyway.

For many decades, standard term contracts have been used equally under long-established methods of writing, such as printing. Yet, printed standard term contracts

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[106] Alterations in this context can be presumed to be deliberate. Transmission errors can certainly occur but would result in a document which would suddenly break up or contain a string of random and potentially non-displayable characters. An incidental alteration due to an error which would result in a meaningful document is virtually impossible.

[107] Fuller (n 74) 800; Moringiello (n 23) 1313; Elizabeth Macdonald and Ruth Atkins (eds), *Koffman and Macdonald's Law of Contract* (8th edn, Oxford University Press 2014) para 3.20.

[108] Fuller (n 74) 800.

are viewed as 'in writing' even though they, likewise, fail to comply with this function. This realisation is by no means intended to question the attribution of 'writing' to those documents, but rather strengthens the assumption that caution is not a fundamental element to the determination of what is 'writing'.[109] Due to the similarities of printed and electronic instruments in this regard, it should not pose an obstacle to electronic documents being recognised as 'writing' to fulfil formal requirements. Thus, it should be viewed as a complementary element to some types of document instead of a strict necessity.

Channelling

Although the other two functions are discussed most frequently, Fuller also refers to the importance of the channelling function. He reminds that formalities are deliberately used by the parties to signal the intention to bring about resulting obligations and legal consequences.[110] It provides a framework into which parties can fit their intended acts or '*channels for the legally effective expression of intention*'.[111]

The main factor is to find a suitable means of conveying an idea. Already in Roman times, legal intention was expressed in writing[112] and, here, there does not seem to be a difference between the traditional and the electronic methods. With regard to 'writing', intention is channelled and conveyed by the use of words irrespective of the method in which these words are communicated or visualised. Thus, a possible obstacle would arguably be the lack of 'visibility' of electronic documents, but as has been explained before, the accepted interpretation of digital impulses translated into a visual representation of words should be taken as satisfying this aspect, and as long as this intention can be retrieved, the fact that this is done electronically has no implication on the effect of electronic writing.

However, nowadays there might be a practical limitation on its applicability. The general idea seems to be the fact that the drafting party has to engage in expressing contractual intention and formulating the terms and conditions of the agreement. In many cases (and virtually all consumer transactions) the drafting party is the trader who does not even draft individually tailored contracts but relies on pre-drafted standard term contracts. All the consumer can do in order to enter into a contract is to

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[109] The lack of alertness resulting from standard term contract is now one of the main factors that consumer protection legislation has to deal with. This will be looked at in later chapters.
[110] Fuller (n 74) 801.
[111] Fuller (n 74) 801.
[112] Fuller (n 74) 802.

accept all terms unconditionally.[113] Thus, in most online, and 'real' world, transactions neither party has engaged in the drafting of a contract to an extent that would require the channelling of the parties' intention. It is therefore questionable how pressing this function actually is, considering that application of the principle would only benefit the trader, as drafting party, who is not the party who predominantly needs to consider the extent of their obligations.

Overall, for something to be viewed as 'writing' it must hold evidential value and be capable of channelling the party's intentions, and individually drafted documents might also need to satisfy the caution principle for the drafter, and none of the above criteria poses a substantial obstacle to 'writing' assuming an electronic form.

Signature

The final major question, arising in the context of formalities, is whether agreements concluded by electronic means can also be signed electronically, and how. Only in rare cases does the act of signing something electronically resemble the act of producing a traditional signature. This is only the case if the signatory uses a pen on a touch-sensitive screen to write his or her name.[114] In most other scenarios, the act looks different but in fact the signatory's mark appears in a personalised or normative form, i.e. it resembles hand-writing or typed letters visually, but not necessarily to the same effect. More abstract, it has been argued, are discrete acts, such as clicking a button on a website or typing pre-scribed words, which could also be considered methods of electronic signatures.[115] To consider which of these should constitute a signature in relation to formality requirements, the functions of traditionally accepted signatures need to be addressed. The important functions which ought to be considered here are 'authentication' and the 'cautionary principle', but it is undeniable that signatures, as formal element, are also employed for their evidential value. However, while a signature theoretically provides evidence of the existence of contract, like 'writing', it is predominantly linked with authentication. Paper-based documents are signed to authenticate (i) the content and (ii) the signatory.[116]

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[113] Objection to any of such terms is neither possible nor wanted. The only way the consumer can react is by not entering into a contract on the proposed terms.

[114] n.b. Small variations, such as the use of one's finger instead of a pen, could already have an effect on the 'caution' function and compromise the legal effect.

[115] See p.29.

[116] OA Orifowomo, 'Manual Signature and Electronic Signature: Significance of Forging a Functional Equivalence in Electronic Transactions' (2013) ICCLR 357, 358–359.

Reed appropriately identifies the decisive elements for signatures, explaining '*English courts are prepared […] to accept signatures made in any manner which provides evidence of: 1. the identity of the signatory; 2. that the signatory intended the "signature" to be his signature; and 3. that the signatory approves of and adopts the contents of the document*'.[117] While the issue of identification of the signatory is certainly pertinent in some cases, it will not be considered here as it poses a completely separate problem of digital identity which goes beyond the scope of this thesis.[118] Suffice to say that even certain accepted signatures do not necessarily provide any real evidence of the identity of the signatory.[119] The two other aspects, approval of contents and intention to sign, are now looked at in more detail.

The first purpose of a signature is to approve and adopt contractual contents which traditionally was done by attaching one's hand-written signature to the document. The common law has long extended the scope of accepted methods of approving contents in documents by way of signature from only handwritten names to printed,[120] typewritten[121] or stamped[122] names, phrases[123] and other visible marks.[124] Any of those methods carries legal effect under English law, unless a particular form is prescribed by law. In contrast, the European Union defines, for the purpose of harmonisation, three classes of signature, simple advanced and qualified, under EU Regulation 910/2014 on electronic identification and trust services for electronic transactions (eIDAS).[125] It replaces Directive 1999/93/EC on electronic signatures[126] and uses 'authentication' as the mechanism to classify the various methods of signature. Here, 'authentication' must be understood as '*an electronic process that*

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117 Chris Reed, 'What Is a Signature?' [2000] (3) JILT <http://elj.warwick.ac.uk/jilt/00-3/reed.html>; Orifowomo (n 116) 359.

118 Understanding the concept of digital identity requires in-depth analysis of the concept. The online world allows individuals to create various user profiles and accounts on social media, online shops, etc. However, there is not necessarily a strong connection between the individual and the identity created, i.e. the information does not match with the individual. Arguably, it is not necessary for an online identity to reflect the individual's true name, geographical address, date of birth, etc. As long a unique link between individual and the online identity can be established, that is the identity relates only to one individual and only this individual can hold this identity, any online identity created could be considered to be legal. On the other hand, the traditional understanding of 'identity' is strictly associated with the legal identity of a person, and before any conclusion as to the identity of a signatory of an online contract can be made, the legal concept might require re-examining.

119 *Goodman v J Eban Ltd* (1954) 1 QB 550, 562, per Denning LJ.

120 *Brydges (Town Clerk of Cheltenham) v Dix* (1891) 7 TLR 215.

121 *Newborne v Sensolid (Great Britain) Ltd* (n 95).

122 *Goodman v J. Eban Ltd* (n 119).

123 *In the Estate of Cook (deceased); Murison v Cook* (1960) 1 All ER 689.

124 *In the Goods of William Fairlie Cunningham (deceased)* (1860) 164 ER 1491; Elizabeth Macdonald, 'Incorporation of Standard Terms in Website Contracting - Clicking "I Agree"' (2011) 27 JCL 198, 202.

125 eIDAS (n 24).

126 Directive 1999/93/EC on a Community framework for electronic signatures (OJ L 13/12).

enables the electronic identification of a [person]'.[127] An electronic signature is, then, the logical association of data, such as a contract, with the signatory.[128] This approach seems to focus predominantly on the identification of the signatory which, moments ago, has been excluded from the analysis for its 'relative' insignificance in contractual consumer transactions. However, in the wider sense, it follows that the identified signatory will be deemed to have adopted contents he or she signed. For completeness, we will now look at the categories and the methods falling under them, before the relevance for contractual transactions is assessed.

Simple signature

The most rudimentary method of electronic authentication is by typing one's name in an electronic document or e-mail. It is an easy and cheap process but arguably such action cannot be compared to a traditional signature. Article 26 eIDAS separates typed names and scanned images, as simple methods, from those other, more sophisticated, models as they are neither linked to nor identify the signatory or use 'electronic signature creation data' to create a signature which is cryptographically linked to the data signed thereby. While this is correct, one must remember the line taken by the English courts to resolve the matter. Originally, handwriting specialists were often able to detect forgeries of handwritten signatures,[129] but by extending the scope to typewritten and other methods, identification of the signatory was no longer possible.[130]

In recognising the extension beyond handwritten signatures, the English courts seemed to be denying any such distinction. In *Bennett v Brumfitt*, for example, Keating J, focussed on the basic idea of authentication of content and expressed his lack of understanding about how '*[a document] is better authenticated by a signature by means of a pen than by means of an impression of a stamp*'.[131] In this regard, electronic signatures equate with those earlier methods and placed the focus more on intentional authentication of content. Furthermore, the Department for Business, Innovation and Skills issued the Guide on Electronic Signatures acknowledging that '*[e]lectronic signatures come in many forms, including:*

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[127] eIDAS, art.3(5).
[128] eIDAS, art.3(10).
[129] *Goodman v J. Eban Ltd* (n 119) 561, per Denning LJ.
[130] Leif Gamertsfelder, 'The Validity of Electronic Bills of Exchange: An Australian Perspective' [1999] CTLR 6, 7.
[131] *Bennett v Brumfitt* [1867] LR 3 CP 28, 32.

[t]ypewritten [and s]canned'.[132] It shows the recognition not only of typed signatures, but also scanned images of signatures, to a certain extent. Thus, attaching one's scanned signature as image to a document or e-mail should be seen, under English law, as equally acceptable as long as no better signature is required by law. Such 'simple' methods are very similar to their non-electronic counterparts but might be distinguishable on the aspect of 'visibility'.

In the case of *William Fairlie Cunningham*[133] the signatories to a will retraced their previous signatures with a dry pen to re-execute a corrected version of the will. It was held that merely tracing a former signature, without a visible mark, was not equivalent to a signature, thus confirming the need for a visible mark. The requirement of visibility is also known to exist for electronic writing and was considered above.[134] Writing on a screen was held appropriate as equivalent to traditional writing because of the consistent and standardised way of converting data into visible, intelligible text and images. A simple signature similarly appears as 'writing' in the legal sense and, thus, there similarly should be no difficulty in satisfying the requirement of visibility in relation to electronic signatures, particularly when represented by text or image.

'Simple' signatures are capable of carrying legal effect in most situations[135] but, under eIDAS, are now only available to individuals,[136] while legal persons have to employ those other more secure methods. Under the law of English and Wales, an individual's 'simple' signature will still be treated as having the same effect as a handwritten signature in most regards.

Advanced signature

An 'advanced signature' denotes more secure methods of authentication with an additional security aspect. Such signatures, due to the cryptographic technology they are based on, are much more difficult to forge than simple signatures, and therefore safer. For a person to use advanced signatures, they need to acquire a digital certificate from a certification authority.[137] It is used to create a signature for the data to be signed electronically via the, so-called, Public Key Encryption (PKE) method.

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132 Department for Business, Innovation and Skills, 'Guide on Electronic Signatures' 3.
133 (n 124); see also *Baker v Dening* (1838) 8 Ad & El 94.
134 See p. 51.
135 eIDAS, art.25(1).
136 Electronic Communications Act 2000, s.7(2)(b).
137 Department for Business, Energy & Industrial Strategy, 'Electronic Signatures and Trust Services - Guide' 7.

Electronic certificates include a unique private key with which the owner can encrypt (and thereby sign) documents. The encryption algorithm will, based on the private key, create an encrypted document which can then be sent to another party. Besides the private key, the certification authority also provides an asynchronous public counterpart which is available to any other party.[138] This key is designed to decrypt the document and verify its integrity. Yet, being in possession of the public key does not allow reconstruction of the private key. Therefore, the valid decryption of a 'signed' document with the public key is strong evidence that the owner of the certificate and the private key is the signatory.

In a dispute where a document was signed by a certified PKE method under eIDAS, such a signature would unequivocally identify the signatory and the document as authentic, unless rebutted by the disputing party. In contrast, a simple signature will give evidence of authenticity, yet the onus would still be on the signatory to prove that it is.[139]

Qualified signature

The 'qualified signature' is the most secure and credible way of signing documents electronically under eIDAS because of the high level of certainty,[140] and is in fact recognised as '*[having] the equivalent legal effect of a handwritten signature*'[141] across all Member States.[142] It describes an advanced signature which uses a 'qualified certificate',[143] issued by a 'qualified trust service', and a 'qualified electronic signature creation device' to generate a signature relating to the data that is to be signed. This physical device usually comes in the form of a smart card, USB dongle or number pad holding or generating a key with which a unique one-time signature is created. However, due to the additional costs for the certificate and hardware, only a relatively small number of commercial entities has utilised the technology. However, this number is likely to have increased since eIDAS restricts the use of simple

[138] This should be contrasted with, for example, the Caesar cipher which is a synchronous method because both parties use the same key to en- and decrypt. However, in terms of certainty it would be of no use because once the key is communicated to another party, they would be able to forge the signature. Therefore, the keys are asynchronous with no direct connection to each other. See Andrew Murray, *Information Technology Law* (1st edn, Oxford University Press 2010) 430–431.

[139] Murray, *Information Technology Law* (n 138) 430.

[140] From a technical perspective, an qualified signature is by no means forgery-proof. Depending on the type of key, a rogue can retrieve the physical key to create the signature.

[141] eIDAS, art.25(2).

[142] eIDAS, art.25.3.

[143] Such 'qualified certificates' have to comply with Annex I eIDAS which set out a list of requirements relating to the identify of the signatory and cryptographic security.

signatures to individuals.[144] The issue of choosing the right type of signature is something which consumers will seldom encounter. Typical consumer issues are rarely caused by the use of less secure signing method, and the low value of most transactions does not warrant the acquisition of digital certificates that link the consumer's identity to the transaction. Of course, identity theft is not an issue unheard of, but will not be dealt with here, as it does not relate to the contractual aspects of e-commerce or form part of the typical problems that consumers experience.

However, there might be activities which, by law, require a higher degree of certainty as to the signatory's identity. Simple methods will not suffice and contracts for the sale of land are one example. The Land Registration Act 2002 (LRA) demands that for a document to be effective, it must contain a certified signature of each signatory.[145] The Act contains no explicit statement as to admissible types of signature required for execution, but the Explanatory Notes to the LRA set out that '*certification is the mechanism by which an electronic signature is authenticated*'.[146] A signature created by the use of a certificate, issued by online authorities,[147] is at least 'advanced' but, depending on the certificate and the use of a 'qualified electronic signature creation device', could also be 'qualified'. It follows that, at least for registration of land, a document signed by simple electronic signature is not sufficiently signed. It does not provide sufficient certainty as to the identity of the signatories. However, if the signature is certified, the Act explains that '*(4) [a] document to which this section applies is to be regarded as (a) in writing, and (b) signed by each individual, and sealed by each corporation, whose electronic signature it has*',[148] making it express that such a document has satisfied all formal requirements that the law imposes on traditional documents.

Furthermore, identification of the signatory might generally be important under qualified electronic methods. It should be noted that qualified signatures do not, as such, possess a 'visibility' characteristic, unlike simple signatures. However, they might show another attribute to the same effect. Besides approving content, qualified signatures, and advanced signatures to a lesser extent, also perform security tasks. Therefore, the encrypted data cannot be altered, as the public key would no longer

144 Electronic Communications Act 2000, s.7(2)(b); Department for Business, Energy & Industrial Strategy (n 137) 7.
145 LRA, s.91(3)(c).
146 'Land Registration Act - Explanatory Notes' (n 84) 147.
147 Law Commission, 'Land Registration for the Twenty-First Century - A Conveyancing Revolution' para 13.14 & 13.16.
148 LRA, s.91(4).

match, nor read by anyone who does not have access to the public key. 'Visibility' is necessary for simple signatures to link the signatory, even though not beyond doubt, to the contents to satisfy the three requirements set out by Reed.[149] Qualified methods use algorithms to link the signatory to data and if one considers those aspects suggested by Reed, despite the lack of a visible mark, successful decryption of data with the public key allows for an almost certain inference that the owner of the key is the signatory, and that he or she approved of the contents.

Intention to sign

Until now, we have mostly considered two crucial elements English law requires for a signature, and so far, English law and EU law seem reconcilable without causing tension or interpretational disparities. We remember Reed's definition of a signature and that it must also provide evidence '*that the signatory intended the "signature" to be his signature*'.[150] The question is whether the law requires the intention to carry out an act which counts as a signature, or merely to carry out an act, which the law will treat as a signature. A literal interpretation would point towards the former, subjective approach. It is difficult to find evidence of an approach with such a high level of subjectivity under English law. Usually, the law applies a label to an act carried out with sufficient intention to carry out the act, i.e. it does not usually require intention as to the legal characterisation of the act.

In relation to advanced and qualified methods, where the signatory uses a particular signing device or cryptographic application to create a signature, awareness and intention will be difficult to deny as the act is rarely incidental and exclusively aimed at producing a signature. Certain 'simple' methods, however, and in particular click-wrap, might require greater analysis before it can be concluded that the person clicking has the intention to sign.

While it has been argued that a buyer clicking an 'I agree' button carries the intention to pledge him- or herself to the contract, the dissimilarities of clicking a button to signing a document by hand, particularly with regard to the alerting function, are obvious. This act might neither possess the subjective state of mind of the person clicking the button nor give the objective appearance of the intention to make this click the 'signatory's' signature.

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[149] Reed, 'What Is a Signature?' (n 117).
[150] Reed, 'What Is a Signature?' (n 117).

In the recent case of *Bassano v Toft*,[151] the court was confronted with the situation, where the creditor offered consumer credit agreements which were concluded online by mere button-clicking.[152] A consumer credit agreement which according to the Consumer Credit Act 1974 (CCA) '*is not properly executed unless – (a) a document in the prescribed form itself containing all the prescribed terms and conforming to regulations under section 60(1) is signed in the prescribed manner […]*'.[153] Regulation 4(3)(a) of The Consumer Credit (Agreements) Regulations 2010[154] specifies the 'prescribed manner' and demands that '*[t]he signature of the document shall be made […] by the debtor […] in the space in the document indicated for the purpose*'. The effect of improper execution would be unenforceability of the agreement against the debtor (i.e. the consumer) unless a court order is obtained.[155] When the question of enforceability of the agreement arose, Popplewell J held that signature by clicking a button '*constituted signing [the agreement] so as to fulfil the requirements of s. 61 [Consumer Credit Act 1974 (CCA)]*'.[156] He also affirmed the possibility of signing online agreements by typed names, referring to the case of *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd*.[157]

Finding intention where a party typed their name is, however, different to mere button-clicking. It seems more likely to be done with awareness. This might be a signature having legal consequences as such, but before accepting *Bassano* as a precedent on the general acceptability of click signatures, one observation needs to be noted. Popplewell J confined his judgement to cases concerning the requirements of s.61 CCA. The reason for this might be related to the nature of the transaction which the consumer is about to undertake. Consumer credit agreements are heavily regulated by the Government and impose strict obligations on creditors. It is an important aspect of the making of such agreements that the creditor must provide the debtor with certain pre-contractual explanations.[158] This information is designed to raise the consumer's awareness of the significance of the transaction to which he or she is about to commit. This could arguably be sufficient to make the signatory also aware of the nature of the imminent act, i.e. signing by pressing the button. This

[151] [2014] EWHC 377 (QB).
[152] The word 'click-wrap' has been avoided on purpose as the issue related to it is a matter of incorporation of terms rather than compliance to form. Detailed explanation can be found on p.29.
[153] CCA, s.61(1)(a).
[154] The Consumer Credit (Agreements) Regulations 2010 (SI 2010 No 1014).
[155] RM Goode and others, *Goode: Consumer Credit Law and Practice* (Butterworths 1999) para 30B.64.
[156] *Bassano v Toft* (n 151) [44].
[157] (2012) 2 All ER 978; see *Bassano v Toft* (n 151) [42].
[158] CCA, s.55A.

stands in stark contrast with click-wrap contracts for goods, digital content and services where no form requirements are imposed by the law, and since the conclusion of such a contract is generally possible without a signature, buyers of such products might not intend their actions as a signature. If the consumer is asked not only to sign but to place his or her signature in a designated box, it raises additional awareness as to the importance of the action by making it, what could be regarded, as something of a 'ceremonial' execution of signature.[159] Macdonald also detects this function of form requirements and explains that '*formality requirements can encourage consideration of the legal obligations being undertaken*'.[160] What must be queried is the consumer's alertness as to the seriousness of the impending action, in the absence of the provision of sufficient information as required under consumer credit agreements. While it is probably undeniable that the consumer knows of the legal contract he or she has entered by pressing the button, there is nothing that alerts the consumer of the full effect. Pressing buttons has become a mundane action which in actuality is nothing but another click. Consumer might assume that signatures produce the signatory's name or mark but, again, having clicked the button 'only' displays the 'order confirmation' page. Therefore, one could argued that a click of a button which does not have the necessary 'alerting power' should not be considered as a signature in consumer contracts.

Conclusion

In this chapter, the two common types of electronic contract, namely, 'click-wrap' and 'browse-wrap' were looked at. An 'offer and acceptance' analysis in relation to 'click-wrap' contracts did not reveal any great problems in relation to the making of such contracts. They fit well with the existing, off-line, case law on offer and acceptance. The main issue in relation to the making of 'click-wrap' contracts was the determination of the method by which terms are incorporated into such contracts. Since there was uncertainty as to whether a button-click would be interpreted as signature for the purpose of incorporating terms, consideration was also given to incorporation by notice. Technical influences, such as the limited size of a device's display, and, in relation to that, issues on presenting terms to consumers needed to be

[159] Juliet M Moringiello, 'Signals, Assent and Internet Contracting' (2005) 57 Rutgers L. Rev. 1307, 1313.

[160] Macdonald, 'Incorporation of Standard Terms in Website Contracting - Clicking "I Agree"' (n 124) 205.

considered and were found impact on the incorporation under the rule of 'reasonably sufficient notice' and the 'red hand rule'. Particular attention was given to situations where terms were only accessible via a hyperlink or where consumers were presented with a 'read and understood' declaration. Here, consumers were less likely to engage with the terms, and make an uninformed purchase decision. Irrespective of how a button-click is viewed, signature or not, such declaration itself, if incorporated, such a clause would be a term under the contract and would be assessed (and it suggested, often found wanting) under the rules on 'unfair terms'.

The need to scrutinise terms of 'browse-wrap' contracts, as well as the effectiveness of this type of contract generally was addressed. Beside one European case which heavily relied on US law, there was a general lack of guidance on how such contracts should be viewed under the Law of England and Wales. Basically, the most applicable approach was to look at the rules of 'reasonably sufficient notice' and the 'red hand rule'. However, it was not only the amount of notice that was given on the existence of the terms, which needed to be considered. Due to the special nature of 'browse-wrap' contracts, notice that a trader intends that a contract will be made by the consumer carrying out a specified action (such as browsing a site) will need to be sufficiently given and highlighted. Such requirements, strictly enough applied, would limit the potential for a contract to be made 'accidentally'. The prospect of 'accidental' contracts need not be of great concern in the context of unilateral contracts, such as contracts for rewards, but they certainly should not be readily recognised where obligations would also fall upon the consumer, and ‘browse-wrap’ contracts should not, therefore, be easily formed.

Afterwards, the two most important form requirements in relation to online contracts, 'writing' and 'signature' were considered. It is safe to say that, at least, writing is fully recognised in the electronic environment, and doubts regarding alterability and traceability of alteration could be dispelled by employing mathematical algorithms which allow detection of alterations with only little effort and no additional costs. Any other requirement was fulfilled by the electronic equivalent.

The situation was somewhat different with regard to electronic signatures. The law has drawn a line between advanced methods, with greater certainty in relation to the identity of the signatory, and simple signatures like typing one's name in an e-mail or adding an image of the hand-written signature. English law generally grants legal effect to all of those methods as they all are capable of authenticating the

contents to which they are linked. However, some statutes demand a higher standard of certainty for some transactions, such as the conveyance of land, when conducted electronically and, therefore, need advanced signatures. The drawback of those advanced methods is that they are cost-intensive and cumbersome in comparison to other methods and, from that perspective, do not constitute a feasible equivalent to the traditional method.

The other aspect which was looked at was whether a deed could assume electronic form. The idea seemed arbitrary as deeds have traditional requirements like a seal or delivery. Furthermore, statutes like the Law of Property (Miscellaneous Provisions) Act 1989 make it express that certain documents are deemed to have the same legal effect as a deed which allowed the assumption that an electronic deed could not exist by law.

Chapter 3:

Conflict of Laws

Summary

This chapter will now consider the rules which are used to determine jurisdiction and the applicable law under consumer contracts for digital content. Due to lack of a physical product, which might need to be shipped and cleared in customs, digital content has encouraged trans-border transactions within Europe as well as globally, as its supply is, for instance, free from cost and delay. Supply of digital content is usually instant, but where the parties are in different geographical locations, conflicts as to the jurisdiction and the applicable law are inevitable. When examining the rules which determine these matters, heed must be paid to the special position of consumers. Such rules have a significant impact on the level of protection conferred upon consumers. Flexible rules give businesses the benefit of choosing the applicable law and a jurisdiction which is most favourable to them, or more familiar to them than to consumers which might be reflected in a lower product price. In contrast, rigidity will favour the law and location with which the consumer is most likely to be familiar and is likely to enhance consumers' trust in the 'digital single market'.[1] The analysis will commence with the rules on determination of the applicable law. After brief consideration of the general rules, the focus will be on those rules dealing with consumer contracts under the Rome I Regulation.[2] Once that has been dealt with, the analysis will look at the rules on the jurisdiction, as provided under the Brussels I Regulation,[3] and the effect of the outcome on consumers. Even though both Regulations contain certain requirements which have to be satisfied, for

1 See David Byrne, 'Consumer Confidence in the Online Marketplace – Boosting Competitiveness' (European Consumer Day Conference, Dublin, 2004).
2 Regulation (EC) No 593/2008 on the law applicable to contractual 2008 (OJ L177/6).
3 Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast) 2012 (OJ L351).

the protective rules on consumer contracts to apply, certain requirements differ and it needs to be considered why this might be the case and what the implications are.

Determination of the applicable law

It might be surprising to find a discussion on 'determination of the applicable law' rather than the more commonly used 'choice of law' and, in fact, if one considers the Rome I Regulation, art.3 confers upon the parties to a contract the freedom to choose the applicable law and reflects one of the prevalent contractual principles in the EU, i.e. autonomy. The principle has generally proven effective in commercial transactions, but the concept is known to cause problems where the parties' bargaining positions are imbalanced, such as consumer contracts.[4] When considering consumer contracts, 'choice' might be more an illusion when, in reality, consumer have no meaningful choice and control. The Rome I Regulation recognises the need for some limitation of freedom in consumer contracts and acknowledges that in situations where one party is '*regarded as being weaker, [this party] should be protected by conflict-of-law rules that are more favourable to their interest than the general rules*'.[5] To balance the parties' interests, the Commission have provided a separate rule for consumer contracts. Under art.6(1) Rome I Regulation, it is explained that if a contract is classified as consumer contract, such contract '*shall be governed by the law of the country where the consumer has his habitual residence*', provided that the professional pursues commercial activities in or directs them to that Member State. The requirements for a 'consumer contract' under Rome I Regulation and those additional requirements must, therefore, be further investigated.

Consumer Contracts

Article 6 Rome I Regulation is limited to 'consumer contracts' and any assessment is dependent on the transactions satisfying that definition. First, it requires a natural person who acts '*for a purpose which can be regarded as being outside his trade or profession*'[6] (the consumer) and a professional exercising their trade or profession. The definition of a 'consumer' is vague with regards to the activities 'which can be regarded' as outside that scope, and the extent of the 'consumer' concept can be best

4 Zheng Sophia Tang, *Electronic Consumer Contracts in the Conflict of Laws* (1st edn, Hart Publishing Ltd 2009) 169.
5 Rome I Regulation, Recital 23.
6 Rome I Regulation, art.6(1).

understood, in this context, by analysing the contrasting idea of the 'professional'. The term 'professional' serves a dual purpose in this context. On the one hand, it is used to segregate those buyers who, despite being a natural person, should not be allowed to rely on the protection conferred upon consumers and, on the other hand, to determine the scope of traders under the Regulation. With regards to buyers, the Rome I Regulation Council Report makes it clear that natural persons exercising a trade or profession, such as doctors, are ousted when buying, for example, equipment for their practice. Purchases with mixed purposes will be covered only if they are '*primarily outside [the professional's] trade or profession*'.[7] There is some uncertainty as to the meaning of 'primarily' and, on various occasions, the CJEU had to provide guidance. For the general understanding of the concept, the court explained its limitations to '*contracts concluded for the purpose of satisfying an individual's own needs*'.[8] In *Gruber v BayWa AG*, the court held that a professional could only rely on the protection conferred to consumers under a mixed-purpose contract if '*the link between the contract and the trade or profession of the person concerned was so slight as to be marginal and, therefore, [negligible]*'.[9] These statements, of course, do not remove uncertainty completely, but they are indicative of how 'marginal' the professional part in a contract can be, before a contract becomes excluded from the scope of art.6 Rome I Regulation.

Based on those rules, the method of determining whether or not an individual has acted as consumer is clear, but it is imaginable that the same distinction between trader and consumer will become increasingly important with expanded activity on online selling platforms such as Amazon Marketplace or eBay. Here, electronic commerce can involve another kind of seller who raises difficulties in relation to the coverage of the definition. These hybrid sellers, or 'prosumers', as they can be referred to, are individuals who sell (and potentially buy) on various online market platforms, with some pattern or frequency. The problem such individuals raise is that no line can be easily drawn to determine when their activities become such that they should be regarded as conducting a 'trade' or 'profession'.[10] However, this issue is more general as it affects every piece of legislation which tries to distinguish

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7 Mario Giuliano and Paul Lagarde, 'Council Report on the Convention on the Law Applicable to Contractual Obligations' [1980] O.J. C282/ 1, 23.

8 C-269/95 *Benincasa v Dentalkit* [1997] ECR I-3767 [17].

9 C-464/01 *Gruber v BayWa AG* [2005] ECR I-00439 [39].

10 Christine Riefa and Julia Hörnle, 'The Changing Face of Electronic Consumer Contracts in the Twenty-First Century: Fit for Purpose?' in Lilian Edwards and Charlotte Waelde (eds), *Law and the Internet* (3rd edn, Hart Publishing Ltd 2009) 94–96; see also Patrick C Soares, 'Has the Taxpayer Traded?' (1992) 13 P.L.B. 39.

consumers from businesses. Both Regulations are an example illustrating the point on a European level.

In cases involving hybrid sellers, the contract in question might fall outside the scope of art.6 Rome I Regulation, where the selling party is not found to be outside a 'trade' or 'profession'. For the majority of cases, however, the existing definitions of 'consumer' and 'consumer contract' in the European Union are sufficient to identify whether the contract in question is in fact a consumer contract.

Pursuing and Directing Activities

The mere existence of a consumer contract alone is not enough to make the contract subject to the rule in art.6 Rome I Regulation. There seems to be some notion that the professional should have adopted an approach to conducting business which sufficiently linked the professional to the consumer's place of residence to justify a rule favouring the law of that location. This connection is made under the Rome I Regulation by requiring that the professional should either (a) pursue their activities in the country where the consumer has his or her 'habitual residence' or (b) direct such activities to that country.[11] Reference to the same activities is made under the Brussels I Regulation. Thus, when exploring the meaning of those terms, the discussion is assisted by materials on the matter in relation to both Regulations. Generally, either condition needs to be met for the Regulations to apply. Thus, it must be established whether either case is suitable to accommodate contracts for the supply of digital content.

When exploring the meaning of those terms, one must keep in mind that it is irrelevant under which of the two activities online transactions fall as long as they are covered by the collective concept of 'pursuing in or directing to'. Even though the rules regarding choice of law and jurisdiction are enshrined in separate documents, they serve the common purpose of protecting consumers in non-domestic transactions and, hence, should be interpreted harmoniously.[12] Furthermore, any interpretation '*should be made on the basis of the purpose and legislative history of the provision*'.[13] Øren asserts that, in analogy to the wording employed in other Member States, the words '*pursues […] activities in the Member State*' should be understood as requiring businesses to physically carry out such activities in the

[11] Rome I Regulation, artt.6.1(a) and (b).
[12] Rome I Regulation, Recital 24.
[13] Peter Arnt Nielsen, 'Section 4' in Ulrich Magnus and Peter Mankowski (eds), *Brussels I Regulation* (2nd edn, sellier european law publishers GmbH 2012) 380.

Member State; particularly, when contrasted with the other option '*directs […] to*'.[14] In absence of a physical presence, a special connection of a trader's commercial activity, showing an intention to attract consumers, to the Member State might equally satisfy this requirement.[15] Commercial activity such as direct targeting of consumers via the press, radio, television, cinema, or any other means would sufficiently establish that connection,[16] confirming Øren's statement as to physical proximity to the consumer.

Tang takes this idea of 'physical presence' somewhat further and proposes that the physical location of the server on which the trader's website (or the digital product) is hosted might be another geographical location at which a trader might be present and whose jurisdiction might be applicable. Drawing this conclusion seems far-fetched because a trader's decision to place a commercial website on a particular server is probably mainly influenced by technical factors, such as available connection bandwidth, and maybe factors relating to liabilities and responsibilities of ISPs. It is difficult to imagine that a trader would make a conscious decision to host their website on a server located in a country in which they would like to be represented.[17] Yet, in spite of an intentional decision, hosting a website on a server might be interpreted as being legally represented in this country. Assuming this position, it must be understood that this would only have a marginal, yet positive, impact on consumer protection. Finding pursuit of commercial activity in the country where the website is hosted would only extend the list of applicable countries by one, which might not even be a Member State of the European Union, whereas the majority of Member States remained outside the scope.

However, as the phrase seems to imply a somehow '*stronger, more purposeful and more expectable connection between commercial activities and a concerned Member State*'[18] than 'direct […] to' would require,[19] there might be no immediate need to construe geographical representation for e-businesses as long as their activities are sufficiently caught by the alternative of 'directed activities'. One should keep in mind that, even though e-commerce is becoming increasingly important, the Regulations are not solely designed for e-commerce and the requirement of 'pursuing activity' seems to be aimed at those, more traditional, business models. Dicey confirms this

[14] Joakim Øren, 'International Jurisdiction Over Consumer Contracts in E-Europe' (2003) 52 ICLQ 665, 676–677.
[15] Øren (n 14) 676.
[16] C-96/00 *R Gabriel v Schlank & Schick GmbH* [2002] ECR I-6367 [44–45].
[17] See also Tang (n 4) 49.
[18] Tang (n 4) 49.
[19] Øren (n 14) 676–677.

assumption and explains that subsection (b) is to '*take account of the development of distance selling techniques, particularly techniques involving electronic commerce*'[20] and, hence, will be of greater importance to digital consumers. This leaves open the question of the criteria which are to be utilised in order to assess whether a trader has directed his activities to a particular country.

Unfortunately, apart from Recital 24 which indicates that '*the language or currency which a website uses does not constitute a relevant factor*',[21] there is little guidance as to the factors which must or can be taken into account to satisfy the condition. Recent case law is more informative and has explored the matter. In *Pammer v Reederei Karl Schlüter GmbH & Co KG*[22] the Oberste Gerichtshof (Supreme Court, Austria) found that, generally, commercial or professional activity is evidenced by all traditional methods of advertising, i.e. '*by the press, radio, television, cinema or any other medium*'.[23] The reasoning behind this approach is based on intention which is evidenced by the fact that such activities '*involve the outlay of, sometimes significant, expenditure by the trader in order to make itself known in other member states*'.[24] However, the court had to recognise that internet traders will not always exhibit a clear intention to advertise in a particular Member State for a number of reasons.[25] Firstly, by advertising via such means traders do not necessarily incur any additional costs, or at best ones that are negligibly low, from which such conclusion could be drawn. Furthermore, intention to direct activities to a certain state cannot be derived from the mere accessibility of the website within a given state since the contents are generally globally available.[26] Therefore, where there is an accessible website, something more, beyond that mere accessibility, must be sought. The view was taken that '*the trader must have manifested its intention to establish commercial relations with consumers from one or more other Member States*'.[27] Certain indicators might be available and aid in forming a decision. Relevant indicators are '*all clear expressions of the intention to solicit the custom of that State's consumers, or the disbursement of expenditure on an internet referencing service to the operator of a search engine in order to facilitate access to the trader's*

[20] Lord Collins of Mapesbury (ed), *Dicey, Morris and Collins on The Conflict of Laws*, vol 2 (15th edn, Sweet & Maxwell 2012) para 33-133.

[21] However, the courts have examined the statement and found that, for the assessment of 'directing activity' it can be of relevance indeed (see C-585/08 *Pammer v Reederei Karl Schlüter GmbH & Co KG* [2010] ECR I-12527 [84]).

[22] C-585/08 *Pammer v Reederei Karl Schlüter GmbH & Co KG* (n 21).

[23] C-585/08 *Pammer v Reederei Karl Schlüter GmbH & Co KG* (n 21) [66].

[24] C-585/08 *Pammer v Reederei Karl Schlüter GmbH & Co KG* (n 21) [67].

[25] C-585/08 *Pammer v Reederei Karl Schlüter GmbH & Co KG* (n 21) [68].

[26] C-585/08 *Pammer v Reederei Karl Schlüter GmbH & Co KG* (n 21) [68–71].

[27] C-585/08 *Pammer v Reederei Karl Schlüter GmbH & Co KG* (n 21) [75].

site by consumers domiciled in various Member States'.[28] Also, the international nature of the activity at issue, such as certain tourist activities; mention of telephone numbers with the international code; use of a top-level domain name[29] other than that of the Member State in which the trader is established can be used as evidence. It should also be borne in mind that, even though Recital 24 explains that '*the language which a website uses does not constitute a relevant factor*', the court held that it does, if the language or currency offered on the website is different from the one of the Member State in which the trader resides.[30] Entirely ousted from the assessment are details such as the trader's email address or geographical address, or a telephone number without an international code.[31] They are not necessarily an expression of intention but, in many cases, are mandatory for the conclusion of distance selling contracts with consumers.[32]

In the context of online contracting, pursuit of commercial activity in a Member State alone would only cover a relatively small number of online traders, i.e. those that are physically present in the Member State and use an online platform as a further means of promoting their products. The option of 'directing activities' is more suitable and, since irrespective of the trader's location, could be used where traders show an intention to 'direct activities' to Member States. This is capable of catching internet traders, but due to the lack of clarity how the necessary intention is established, more guidance is needed as to the factors that are taken into account for an assessment.

Identification of Habitual Residence

Besides the determination of the existence of a consumer contract and the identification of pursued or directed commercial activity, the applicable law will depend on consumer's place of 'habitual residence'. For the correct interpretation of the concept, the courts have repeatedly emphasised that the natural meaning of the phrase should be employed in all areas of the law.[33] However, exceptions have been made[34] and there is no uniform understanding of the phrase on a national or on a

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28 C-585/08 *Pammer v Reederei Karl Schlüter GmbH & Co KG* (n 21) 80–81.
29 Top-level domain names are the last part of a URL, for example .uk, .de, .fr.
30 C-585/08 *Pammer v Reederei Karl Schlüter GmbH & Co KG* (n 21) [84].
31 C-585/08 *Pammer v Reederei Karl Schlüter GmbH & Co KG* (n 21) [77].
32 C-585/08 *Pammer v Reederei Karl Schlüter GmbH & Co KG* (n 21) [78]; see also CRD, art.6.
33 *Re J (A Minor) (Abduction: Custody Rights)* (1990) 2 AC 562.
34 Lord Collins of Mapesbury (ed), *Dicey, Morris and Collins on The Conflict of Laws*, vol 1 (15th edn, Sweet & Maxwell 2012) para 6-124.

European level.[35] Some form of guidance was needed, and in subsequent cases the courts began to debate the conception and identification of relevant factors. Most notable are two factors mentioned by Lord Scarman in *Ex p. Shah*.[36] His Lordship explained that such residence must be 'voluntarily adopted' for a 'settled purpose' which could relate to '*[e]ducation, business or profession, employment, health, family, or merely love of the place*'.[37] However, such purposes could be spread across two or more Member States, and it becomes obvious that this concept supports the conclusion that an individual might have more than one place (or country) of habitual residence.[38] Plural habitual residence has a critical impact on the determination of the applicable law. In the past the Court of Appeal has held that an individual can have dual habitual residences.[39] Brussels IIa Regulation,[40] on the other hand, makes express use of 'habitual residence' in the singular;[41] an assumption which, at least with regards to social security, has been confirmed by the European Court of Justice.[42] In an attempt to remove uncertainties as to the applicable law, the concept should be understood as 'chief habitual residence' pointing to a single country.

If this approach is taken, should determination of the 'chief habitual residence' depend on those factors which can be spread across different Member States, it would still require careful weighing of the factors, and particular care must be taken in relation to factors which might be conclusive in some situations, but should not be in all. The place of employment or business of a consumer, for example, might strongly point to one state, particularly if other family members also work in the same state, but the mere fact that a consumer (and other family members) works in this state, does not necessarily mean that he or she should be covered by that state's rules on consumer protection. The impetus could become even stronger if, for work-related reasons, health care is also based in this state. However, making the assumption that this, possibly incidental or unavoidable, choice is indicative of the applicable law to deal with the consumer's private purchases, seems undesirable, if the protection the consumer receives is dependent on it.

35 Pippa Rogerson, 'Habitual Residence: The New Domicile?' (2000) 49 I.C.L.Q. 86, 87–88.
36 *R v Barnet London Borough Council, Ex parte Nilish Shah* (1983) 2 AC 309.
37 *R v Barnet London Borough Council, Ex parte Nilish Shah* (n 36) 344.
38 CGJ Morse, 'Consumer Contracts, Employment Contracts and the Rome Convention' (1992) 41 ICLQ 1, 9.
39 *Ikimi v Ikimi* [2001] EWCA Civ 873.
40 Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility 2003 (OJ L338/1) (Brussels IIa Regulation).
41 Lord Collins of Mapesbury (n 34) 6-151.
42 C-589/10 *Wencel v Zakład Ubezpieczeń Społecznych w Białymstoku* [2011] OJ C 89/5.

However, it might not be necessary for 'habitual residence' to be a singular concept, if factors indicate that a consumer is habitually resident in more than one country, then either law could apply. Determination cannot depend on the seller as they would not have sufficient information to establish that the consumer is habitually resident in two or more countries. The consumer, on the other hand, should not be given the possibility to choose as this could result in the application of laws or jurisdiction which was unenvisaged by the seller. Sensibly, if the seller directs his or her activities to more than one country to which the consumer has equally weighted links, the decisive factor could be the country in which the consumer happened to be at the time the contract was made.

Applicable law by agreement

At this point it is important to note that, even if a consumer contract falls under art.6 Rome I Regulation, the situation is not as simple as always applying the law of the consumer's place of habitual residence. An unqualified rule simply dictating the proper law in all consumer contract was viewed as too paternalistic, and as infringing too greatly upon the parties' autonomy and freedom of contract. Therefore, under subsection (2) it is still possible to diverge from this default position if the parties choose to do so. *Prima facie*, this seems to contradict the core aim of art.6 which is the protection of consumers against traders abusing their generally stronger contracting power. However, in order to maintain a certain level of protection for consumers, this choice cannot have the effect of depriving consumers of the protection of the 'mandatory' legal provisions of the country of his or her 'habitual residence'.[43] Of course, maintaining some protection for the consumer in this way is not a simple solution. Mixing rules of different legal systems is inherently problematic. This issue is addressed under Rome I Regulation by art.6(2) and art.9 which cover 'mandatory' and 'overriding' rules.

Mandatory rules

Determining what is meant by a 'mandatory' rule under the Rome I Regulation is crucial as it, firstly, impacts on the level of protection of which consumers cannot be deprived and, secondly, affects the likelihood of inconsistent laws. There are different types of rules that are designed to aid consumers in any legal system but

[43] cf. Jonathan Hill and Adeline Chong, *International Commercial Disputes* (4th edn, Hart Publishing Ltd 2010) para 14.5.11.

which of these rules are to be used when the chosen law is not the law of the consumer's place of 'habitual residence' has to be examined. The starting point is those rules which directly protect consumer transactions and from which businesses cannot depart under national law (for example the Consumer Rights Act 2015 or the Electronic Commerce (EC Directive) Regulations 2002). There are core elements of domestic consumer protection, and under art.6(2) effect must be given to them, even when the parties agree on the application of laws from another jurisdiction. However, art.6(2) is not limited to provisions directly concerned with consumer protection; its aim is the protection of consumers in the wider sense. As such, Tang identifies other mandatory rules, like s.2(2) UCTA prohibiting the restriction of liability '*for negligence in the case of loss or damage unless such a term is reasonable*',[44] designed to protect the general public, as another set of rules caught under the term. Their unavoidability under national law and protective nature bring such rules within the scope of art.6(2) of the Rome I Regulation.

Enforcing these mandatory rules carries the risk of causing conflicts between rules of the chosen country and the consumer's place of habitual residence. Generally, two, or more, rules taking different lines should be avoided and mixing the laws of two jurisdictions complicates this. Applying a wide scope of interpretation to the term 'mandatory' could improve consumer protection but might significantly increase the likelihood of incompatibility between rules of different jurisdictions. An increased number of potential clashes would reduce certainty as to the applicability, or operation, of a rule which, in turn, could counteract the idea of consumer protection. Any assessment of diverging laws must therefore be carried out with due care in order to avoid unnecessary confusion and uncertainty.

In the simplest case, the chosen law is silent on aspects which are controlled and mandatory under the consumer's residential law. In this case, art.6(2) clearly demands the existing rules of the latter to be applicable. More controversial is the case where the chosen law contains a rule which is more generous to the consumer. The clash between two rules where the chosen rule is more generous than the one in the consumer's country of habitual residence is addressed under Rome I Regulation. Generally, art.6(2) would only apply, and only needs to be applied, where the chosen law 'deprives' the consumer of some protection, and a rule that is more generous does not 'deprive' but rather extends rights. It seems sensible that where the agreed rule is more generous than the mandatory rule, the 'better' law should be used.[45] As Morse

[44] Tang (n 4) 195.
[45] Morse (n 38) 8–9.

explains, the Regulation only defines the minimum level of protection which is to be awarded.[46] This standard is determined by the law of the consumer's place of habitual residence of which the actual level of protection the consumer receives under the chosen law cannot fall short. Awarding protection at the minimum level can successfully establish a protection standard where rules are comparable, but in reality the laws of two, or more, jurisdictions will rarely match each other in terms of the intended effect and only vary in quality. Tang uses the example of a right to return and the resulting requirement for the trader to refund.

A simple comparison of rules is impossible, where their purposes do not match each exactly. A rule under the chosen jurisdiction may offer better protection to the consumer in one aspect and fall below the standard set by the consumer's domestic rules. It must be doubted that consumers could rely on only the protective aspects of both rules,[47] as the correct interpretation of such 'merged' rules would create uncertainty for both parties and pose an enormous challenge of any court.

The best solution to avoid this problem might be to prioritise the protective nature of art.6(2), the assumption would be that a rule under the chosen law which falls below the standard of the law in the consumer's domestic jurisdiction must be disregarded. This way, the consumer cannot be at a disadvantage because of a rule which overall might look, or actually is, beneficial to the consumer, but deprives him or her of a protective element which would otherwise be applicable.

Overriding rules

While the previous part was concerned with law of the consumer's place of habitual residence taking precedence over the rules of the chosen law, there are also rules of the chosen forum which, in turn, might override, and thus cancel the effect of, those rules. Such overriding rules of the law of the forum should prevail because of being '*regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation […]*'.[48] In such cases certain provisions which would be otherwise applicable under art.6 might be overridden by national rules safeguarding such policies as listed under art.9(1).[49] Another provision with potentially a similar effect is that of art.21.[50]

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46 Morse (n 38) 8–9.
47 Morse (n 38) 9.
48 Rome I Regulation, art.9(1).
49 See also Hill and Chong (n 43) 14.5.15-14.5.16.
50 Moritz Renner, 'Article 9 Overriding Mandatory Provisions', *Rome Regulations* (Kluwer Law International 2011) 195.

In spite of the possibility to diverge from the default and choose a different law under art.6(2), the rule is sufficiently narrow to prevent companies from using it to gain an advantage over consumers. It gives parties the freedom to agree otherwise which, the Commission felt, was necessary ensure freedom of contract. However, it does not mean that the law is satisfactory. Conflicts between the laws of the forum, its public policy, and overriding mandatory rules from the country of the consumer's place of residence are likely and somewhat antagonise the purpose of art.6. Particularly, with digital content in mind, trans-national contracts are far more likely since there is no delay in delivery or customs duties to pay. Rome I Regulation still has a positive effect on consumers. Since consumers tend not to engage with the applicable laws, uncertainty would generally be an issue for traders; whereas, the protective nature takes full effect.

Determination of jurisdiction

With the law on determination of the application law explained, it is time to consider the possibility of the parties to determine the jurisdiction under with those laws are enforced. European contract law rules allow for parties in non-consumer contracts to choose the applicable jurisdiction freely.[51] Freedom of choice over jurisdiction would, in most consumer contracts, allow traders, who are in a dominant position due to bargaining or information imbalances between the parties, to abuse their strong position to, effective, dictate the applicable jurisdiction, which would be either advantageous to the trader or disadvantageous to the consumer. Thus, the rules could be used to deter legal actions against the trader by increased litigation (or arbitration) costs or taking advantage of the consumer's reluctance to start actions against businesses, particularly on a trans-national level. Even more so, since businesses avoid negotiations with the other party in online transactions in order to lower costs and only offer contracts on their standard terms to which consumers more and more often blindly agree as they feel unable to negotiate their contractual position. Since consumers are not able to protect or enforce their own interests, contractual freedom tends to be restricted when one of the parties is a consumer. Section 4 of Chapter II of the Brussels I Regulation provides three Articles that define the conditions and rules for the determination of the applicable jurisdictions under which the parties to a consumer contract can sue. Accordingly, the applicable

[51] Hill and Chong (n 43) 1.2.12.

jurisdiction in consumer contracts is solely determined by this Section as long as the requirements of art.17 are satisfied.

Consumer Contracts

As the heading of Section 4 already indicates, its application will be limited to 'consumer contracts' and, obviously, one party to the contract has to be a 'consumer'. Under the Regulation, the term is defined as a person '*[acting] for a purpose which can be regarded as being outside his trade or profession*'[52] which is a codified definition of the judgement in *Société Bertrand v Paul Otto KG*.[53] It is worth noting that the wording does not expressly limit the scope to 'natural' persons, and thus, it might still allow legal persons to rely on this rule. However, it has been asserted that, in accordance with the concept used for unfair terms in consumer contracts, the definition would only extend to natural persons.[54] This assumption was re-enforced in *Benincasa v Dentalkit*[55] where the court refers, for the purpose of defining the scope of 'consumer', to '*contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption*'.[56] Limiting the scope to individuals, or natural persons, is, in the UK and the EU generally, the widely accepted standard,[57] and ties in with the rules on determination of the applicable law under Rome I Regulation which also relies on 'natural' persons. Assuming this position, whether a person is a consumer follows the same rules that have been discussed above and depend on the extent, if any, to which the transaction relates to that person's 'trade or profession'.[58]

Once one party is successfully identified as a 'consumer', the contract must be covered by one of the categories under art.17(1) which then qualifies as 'consumer contract' for the purpose of the Regulation. Subsection (1) makes available three categories and, while options (a) and (b) deal with sale of goods on instalment credit terms and contracts for a loan repayable in instalments, option (c) has a much wider scope and will be important for the debate. It applies in all other cases between a consumer and a trader when the trader 'pursues activities' in or 'directs' them to the

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52 Brussels I Regulation, art.17(1).
53 [1978] ECR 1431; see also Nielsen (n 13) 374.
54 Hill and Chong (n 43) 5.8.25.
55 C-269/95 *Benincasa v Dentalkit* (n 8).
56 C-269/95 *Benincasa v Dentalkit* (n 8) [17]; Kevin M Rogers, *The Internet and the Law* (1st edn, Palgrave 2011) 131.
57 In Australia, this protection has been extended to also apply to small businesses as they tend to suffer from the same imbalances particularly with regard to bargaining power.
58 See p.68.

Member State of the consumer's domicile.[59] The general applicability to consumer contracts is of great assistance to consumers who purchase not only goods and services, but also digital content, via the internet. Its wide scope avoids the need for interpretation of the existing wording in order to establish whether the instrument would impliedly cover digital content or intentionally limits its application to what is expressly stated.[60] A number of other instruments,[61] whose focus was traditionally on goods and services, will be subject to such academic analysis which, until settled, is likely to cause uncertainty, possibly obstructing effective consumer protection. The types of contracts which come under Section 4 may not constitute a challenge and art.17 covers contracts for the supply of digital content.[62]

Identification of Domicile

Article 17(1)(c) employs the same criteria, i.e. for traders to 'pursue' activities in or 'direct' activities to a Member State, as Rome I Regulation, and there is no reason why interpretation of those should be different here. There is, however, one crucial difference in wording. While Rome I Regulation focusses on 'habitual residence', jurisdiction under Brussels I Regulation is determined based on the consumer's 'domicile'. The use of two different concepts is generally not problematic but it begs the question as to why the Commissions chose to diverge when all other parts of the tests are identical. Harmonious interpretation can only help to an extent, but if the Commissions chose to make a conscious distinction between 'habitual residence' and 'domicile' then effect must be given to it.

We should remind ourselves that the issue at hand is the determination of the jurisdiction under which the parties can sue or be sued. The need for singularity is not only of relevance for the determination of jurisdiction. Under the rules for the determination of jurisdiction uncertainty might carry an even more worrying

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59 Tang (n 4) 380; one other point which should be mentioned is that art.17(2) Brussels I Regulation deems non-Member State based businesses domiciled if they have a branch in one of the Member States.

60 By contrast, art.7 Brussels I Regulation on the general rule on determination of jurisdiction does not express its scope clearly. While it defines special jurisdiction for contracts relating to the sale of goods and provision of service, no mention is made of digital content.

61 See, for example, Recital 14 Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes 2013 (OJ L165/1).

62 Article 17(3) excludes contracts of transport, except contracts of package travel. Other legal instruments deal with those to such extend that additional regulation would only complicate matter. Peter Schlosser, 'Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on Its Interpretation by the Court of Justice' (1979) OJ C 59/71 para 160; Tang (n 4) 50.

consequence as an indication as to plurality might defeat the purpose of Section 4 and must be avoided. Therefore, the potential reason for relying on a different concept is the avoidance of conflicts.

Thus far, there is no unified definition in Europe and Brussels I Regulation explains that '*[i]n order to determine whether a party is domiciled in the Member State […] the court shall use its internal law*',[63] and in the UK the established definition is provided by the Civil Jurisdiction and Judgements Order 2001 and states that an individual is domiciled in the UK if (a) resident, and (b) indication of substantial connection with the UK.[64] An individual will be resident in a part of the UK '*if that part is for him a settled or usual place of abode*'.[65] A settled or usual place of abode must be understood to demand '*some degree of permanence or continuity*'.[66] This test requires more than just a quantitative approach as it is the quality of the evidence which is decisive.[67]

However, the individual's intention to acquire a new domicile, says nothing about whether the individual would lose their former domicile as a result. Pfeiffer explains that the notion of 'domicile' is not uniform and only the minority of the Member States rejects plurality of domiciles,[68] and, at least with regards to legal persons, the Schlosser Report allows them to be domiciled in more than one Member State at a time.[69] It has been suggested[70] that this concept applies to natural persons likewise but, even though this question has not arisen before a European court, it seems questionable whether this would be a desirable position. Using a concept of plurality in order to establish the applicable jurisdiction is bound to cause uncertainty as a result. Similar concerns are raised by Dicey clearly favouring a concept with a singular connotation.[71]

Article 18 regulates the applicability of jurisdiction in consumer contracts, and provides consumers with a choice as to the jurisdiction in which they wish to sue. The options available are the trader's or his or her own domicile.[72] It gives consumers the opportunity to choose a geographically convenient forum unswayed by the trader.

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63 Brussels I Regulation, art.62(1).
64 Civil Jurisdiction and Judgements Act 1982, s.41(3).
65 *Bank of Dubai Ltd v Fouad Haji Abbas* [1997] ILPr 308.
66 *Bank of Dubai Ltd v Fouad Haji Abbas* (n 65) 311–312.
67 Jonathan Hill and Adeline Chong, *International Commercial Disputes* (4th edn, Hart Publishing Ltd 2010) para 4.1.3.
68 Burkhard Hess, Thomas Pfeiffer and Peter Schlosser, *The Brussels I-Regulation (EC) No 44/2001* (1st edn, CH Beck, Hart, Nomos 2008) para 173.
69 Schlosser (n 62) 75.
70 Hill and Chong (n 67) 4.1.11.
71 Lord Collins of Mapesbury (n 34) 6-035; *Udny v Udny* [1869] LR 1 Sc 6 Div 441.
72 Brussels I Regulation, art.18(1).

Assuming a consumer's domicile is uncertain, i.e. there is more than one country in which the consumer might be domiciled, this might arguably extend the consumer's choice under art.18(1). This should cause no problems for traders who are represented in both countries. On the other hand, if the trader's activities are only 'pursued in' or 'directed to' one of the countries, this choice might be limited to those countries. Traders, on the other hand, have to approach the courts of the Member State in which the consumer is domiciled.[73] It ensures that, in case of proceedings against the consumer, he or she is protected from having to travel to another country in order to defend him- or herself. If a consumer is found to have multiple domiciles, it is unlikely that traders will be able to pick a country. They will usually not have sufficient information about the consumer to conclude that a particular country qualifies as the consumer's 'domicile'.

This interpretation of the rules would give consumers a greater choice of jurisdiction but considering that these rules are designed to protect consumers, it does not seem inappropriate, as this would not burden traders unduly.

Consumer choice and exceptions

Despite those rules, traders still try to add jurisdiction clauses, which attempt to make a different jurisdiction applicable, in addition or instead of, the one determined under art.18, to consumer contracts. As a general rule, art.19 makes it clear that, by agreement, it is not possible to deprive consumers of their rights under art.18.[74] Yet, it is possible to agree on a different or additional jurisdiction in consumer contracts if such clause falls under one of three exclusive exceptions.[75]

The applicable jurisdiction can be changed by agreement when it is entered into after a dispute has arisen.[76] This also works by way of consumer ratification on pre-existing jurisdiction clauses in a contract which otherwise would have no effect. In this case, consumers can comprehend more easily the effect of the clause and the reasonableness of entering into such an agreement.[77] Secondly, a jurisdiction clause is valid if it widens the consumer's choice of jurisdictions.[78] An agreement which widens the choice for both parties is also valid but only proceedings launched by the

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73 Brussels I Regulation, art.18(2).
74 Nielsen (n 13) 389.
75 Nielsen (n 13) 389.
76 Brussels I Regulation, art.19(1).
77 Nielsen (n 13) 388.
78 Brussels I Regulation, art.19(2).

consumer will only be upheld before the courts.[79] Lastly, jurisdiction agreements under national law, where the consumer has moved subsequently to a different Member State, are also valid as it would be unfair on the other party to subject the contract to a new jurisdiction after the contract was entered into. All requirements of art.19(3) must be satisfied which then bars the consumer from suing in the jurisdiction of his or her new domicile while the trader can sue under either jurisdiction.[80]

The validity of a jurisdiction clause under Section 4 of Brussels I Regulation is not enough to render it effective in a contract. A clause might still be unfair under the Unfair Contract Terms Directive,[81] and, as a consequence, not bind the other party if, '*contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer*'.[82] A detailed analysis of the functioning of the Directive is omitted at this point as it will form part of the discussion in the relevant chapter on Unfair Contract Terms.[83] Suffice to say that the CJEU has expressed that, in their opinion, such clause might fail the 'fairness' test under art.3(1) of the Directive.

Conclusion

In this chapter, question of conflict of the laws was looked at. The rules determining the applicable law and jurisdiction come from Regulations of the European Union, i.e. Rome I Regulation and Brussels I Regulation. Both instruments contain narrow sets of rules which apply to consumer transactions, and determine which law applies and under which jurisdiction they fall (instead of leaving this to be agreed by the parties). Even though the two instruments address different aspects, they both aim to achieve a common goal. As such, many of the requirements in the 'consumer' sections are identical and were interpreted homogeneously.

First, the rules under Rome I Regulations are examined which essentially determine that the applicable law is that of the consumer's 'habitual residence' where a consumer contract exists and where the trader pursues commercial activities in or directs them to that country. A consumer contract requires a trader and a consumer

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79 Nielsen (n 13) 389.
80 Nielsen (n 13) 389–390.
81 Council Directive 93/13/EEC on unfair terms in consumer contracts 1993 (OJ L95/29) (Unfair Terms Directive).
82 Unfair Terms Directive, art.3(1).
83 See Chapter 5, p.171.

who has to act 'for a purpose which can be regarded as being outside his trade or profession'. This definition was generally in line with the definition of 'consumer' found in other EU directives and regulations.

However, there is some uncertainty regarding the interpretation of 'pursuing' and 'directing' activities. Pursuing an activity was found to relate to a physical presence or other commercial activity, such as direct targeting of consumers. In relation to electronic commerce this condition seemed too restrictive and would exclude most professionals who have no physical presence in the country. A suggestion to extend that scope of the country in which the server of an online trader's website is located, was considered, but it could be concluded that this seemed far-fetched and would only have a marginal effect on the level of protection.

The understanding of 'directing activity' seemed wide enough to cover electronic contracting activities. However, there is a lack of guidance as to the factors which have to be taking into account to make an assessment. Recent case law indicated that the language of the sales website or its general availability in a country are not decisive, but that these and other factors, such as the currency, or the presentation of a telephone number with international dial code can be used as evidence.

The next part of the analysis focussed on the meaning of 'habitual residence'. While there is no uniform understanding, there are indicators (or 'settled purposes'), as such education, business, employment or health, which might pointing to the consumer's habitual residence. A question whether the concept had to be understood as only pointing to a single country was asked. Again, no uniform definition could be established, but it seemed plausible that plural habitual residence was possible.

Even though the general rule under Rome I Regulation simply determines which law applies, the Regulation does allow for the parties to agree on a different law. However, even in this case, the parties cannot avoid the protection of 'mandatory' rules of the law of the consumer's habitual residence. It had to be considered how potential conflicts are dealt with. It could be said that these 'mandatory' rules set a minimum standard and will apply unless the chosen law offers a rule even more favourable to the consumer. Where rules are not comparable as they differ on more than one aspect, it was suggested to rely on the 'mandatory' rule.

Determination of the jurisdiction is covered by Section 4 of the Brussels I Regulation which follows the same approach in that it simply determines the jurisdiction. One difference was that Brussels I Regulation does not rely on the 'habitual residence' of the consumer, but rather his or her domicile, and it had to be

considered how this is determined and how it differs from the 'habitual residence'. At closer examination, the definition of 'domicile' was very similar and relied on aspects such as 'residence' and 'substantial connection'. The was the same problem in establishing whether consumers could have more than one 'domicile' and nothing indicated that this was not the case.

Brussels I Regulation also allows the parties to a consumer contract to choose a different jurisdiction, but the options for this are narrow and cover a change after a dispute has arisen, if the clause widens the consumer's choice of jurisdictions or clauses that select the jurisdiction in which the consumer was domiciled at the time the contract was made, but the consumer subsequently moved to another Member State.

Chapter 4:

Digital Content

Summary

This chapter will examine the nature of consumer contracts for the supply of digital content and issues which might arise in relation to them. 'Digital content' is an umbrella term for software, games, apps, music files, e-books and other forms in which data is provided. The introduction of the Consumer Rights Act 2015 (CRA) changed the law on consumer protection significantly and, since it was Parliament's first attempt to enact a single, comprehensive piece of legislation dealing with all facets of consumer protection covering goods, digital content, services, and unfair terms, problems relating to the protection granted under the Act were to be expected. Chapter 3 of the CRA deals with digital content and will be examined to analyse the impact it has upon areas like e-commerce, and contract law. Before the CRA, there had already been discussions as to whether digital content should be classified under the Sale of Goods Act (SGA). For two reasons, this approach of classifying digital content also must be looked at. First, a comparative analysis is necessary to find improvements in the new legislation. Secondly, the new chapter is based on the 'goods' part of the SGA and, therefore, the former approach can give invaluable guidance towards the interpretation of Chapter 3. This analysis will concentrate on the implied terms of description, satisfactory quality, and fitness for purpose and how well they can function when applied to contracts for the supply of digital content.

Then, the focus will move to the remedies which the new Act now provides. Certain problems arise in relation to specific remedies which are exclusively available under contracts for the supply of digital content. They emanate from the fact that software cannot be entirely free of defects when it is delivered. Although this is accepted, it must be asked to what extent consumers are protected from

damage that is caused to other digital content or hardware. This is addressed under s.46 CRA, but a number of issues arise in relation to it, and thorough analysis is required to establish how well the remedy can perform. Then, there will be an examination on whether consumers might be able to seek compensation for 'loss of enjoyment' if the product in question does not fully comply with the terms of the contract, but the available remedies are unreasonably expensive or unavailable. This type of compensation is not new but has yet to be tried for digital products.

Finally, the extent to which traders should be liable for damage that is caused to digital content during transit will be considered. In relation to this, it will also be necessary to examine whether there should be an obligation to re-supply digital content, even in situations where the reason for an unsuccessful transmission lies with the consumer.

Background

Before the Consumer Rights Act 2015, there was no legislation in English law specifically dealing with digital content. This grey area caused major concern for businesses and consumers. A major problem in relation to digital content was the determination of the implied terms. There is well-known legislation, such as the Sale of Goods Act 1979 (SGA) and the Supply of Goods and Services Act 1982 (SGSA), as well as common law rules filling gaps that remained,[1] which imply what can be broadly categorised as 'quality' terms, into contracts for the supply of goods or supply of services, but there were issues as to which type, if any, a contract for the supply of digital content was, and thus which terms were implied.[2] As will be shown below, either classification was likely to produce some unsatisfactory results in relation to digital content.[3] The courts, and academic commentators, were inventive when addressing this issue, trying to fit contracts dealing with digital content into either the goods or services category by offering analogies to cases, which pointed towards either 'goods' or 'services', to find a way of making such contracts subject to the relevant implied terms. An examination of their arguments and the case law will assist in fully understanding the categorisation approach the courts pursued and the problems it caused with digital content before the enactment of the CRA.

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1 Christian Twigg-Flesner, Rick Canavan and Hector MacQueen (eds), *Atiyah and Adams' Sale of Goods* (13th edn, Longman / Pearson 2016) 25.
2 Twigg-Flesner, Canavan and MacQueen (n 1) 24.
3 See Twigg-Flesner, Canavan and MacQueen (n 1) 27.

If one wanted to bring contracts for the supply of a digital product under one of the two headings, categorisation under 'goods' would generally have offered stronger protection for its acquirer. Sections 13 and 14 SGA implied terms about description, satisfactory quality and fitness for purpose providing a basic level of protection which the seller could not exclude or restrict in relation to consumer acquirers under s.6 of the Unfair Contract Terms Act 1977, and could only exclude or restrict, in relation to any other acquirer, if the clause satisfied the requirement of reasonableness. In broad terms, goods have to match their description and have to be of satisfactory quality and reasonably fit for purpose. A breach of these terms would entitle a buyer to general and goods-specific remedies, and ss.48A-C SGA extended the range of remedies for consumers to include rights to repair, replacement, and price reduction. In comparison, when services were in question, the SGSA conferred a significantly lower level of protection, only requiring those services to be carried out with reasonable care and skill. There were two additional differences making protection under a sale of goods more favourable. First, contracts for the supply of services did not benefit from specific remedies, so that only basic contract law remedies would be available, i.e. damages and, depending on the classification of a term, termination of the contract. Second, implied terms in consumer contracts for supply of services were '*excludable subject to the reasonableness requirement [of ss. 2(2) and 3] of the Unfair Contract Terms Act 1977*'.[4]

For a contract to be subject to either set of terms, its subject matter had to match the characteristics of that category. In order to benefit from the terms implied by ss.13 and 14 SGA, for example, digital content had to possess the relevant attributes to be classified as 'goods'. An important aspect of goods has been seen to be their tangibility, and things like intellectual property or company shares are excluded from the definition.[5] However, a requirement of tangibility was not expressed in UK legislation, and it was vigorously debated whether '*a transaction involving the supply of intangible "products" in digital form can […] be a transaction relating to goods, it being argued goods must be tangible*'.[6] Moon examined the nature of computer programs to consider their suitability to be classified as goods, and the same line of reasoning can also be applied to other types of digital content. Essentially, if digital content could be said to be tangible, it would strike down a

4 Twigg-Flesner, Canavan and MacQueen (n 1) 25.
5 Twigg-Flesner, Canavan and MacQueen (n 1) 52.
6 Robert Bradgate, 'Consumer Rights in Digital Products - A Research Report Prepared for the UK Department for Business, Innovation and Skills' para 12; Natali Helberger and others, 'Digital Content Contracts for Consumers' (2013) 36 J Consum Policy 37, 39.

major argument why it should not be goods. However, after considering the decision in *St Albans City and District Council v International Computers Ltd*[7] and cases from the US and New Zealand, the judgements of these cases predominantly pointed towards a preferred interpretation of digital content as intangible.[8] In these cases, the view of digital contract was often similar to that taken by Sir Iain Glidewell in *St Albans City and District Council*,[9] i.e. '*software is a set of instructions [which] cannot be touched*'.[10] However, in some jurisdictions certain types of digital content have been viewed as tangible. For example, in the Supreme Court of Louisiana, Hall J affirmed tangibility of software because '*[software] is knowledge recorded in a physical form which has physical existence, takes up space on the tape, disc, or hard drive, makes physical things happen, and can be perceived by the senses*'.[11] The idea of tangibility where the digital content is provided on a tangible medium was also addressed and accepted in *St Albans City*. Both at first instance and in the Court of Appeal, the judges held that the rules on 'goods' are applicable when digital content is delivered on a computer disk, or other physical medium. The tenor seemed to be that a mixed product, i.e. part good and part digital content, would also, in part, share the characteristics typical of a good which would bring it within the scope of the SGA. More obvious examples are computer systems and gaming consoles, and even washing machines and cars combining hardware and software in one inseparable product. Bradgate contended that such mixed software and hardware products, as well as software delivered on tangible media, like DVDs, also qualify as 'goods' since (at least) parts of them fulfilled the requirement of tangibility.[12] Inseparability of the two components seemed to be the key argument why such hardware-software products were commonly accepted as goods. Following this approach, the terms implied by ss.13 and 14 SGA were applicable to these mixed products. However, dealing with mixed products by conferring some rights upon buyers, still left two aspects unanswered. First, exclusively digital purchases, such as downloads, remained unprotected under the SGA, and second, even though the terms were

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7 [1997] FSR 251.

8 Ken Moon, 'The Nature of Computer Programs: Tangible? Goods? Personal Property? Intellectual Property?' (2009) 31 E.I.P.R. 396; see also *St Albans City and District Council v International Computers Ltd* (n 7) 265; *District of Columbia v Universal Computer Associates* 465 F 2d 615 (DC 1972); *Erris Promotions Limited v Commissioner of Inland Revenue* (2004) 1 NZLR 811.

9 *St Albans City and District Council v International Computers Ltd* (n 7) 265–266.

10 *Erris Promotions Limited v Commissioner of Inland Revenue* (n 8) 826.

11 *South Central Bell Telephone Co v Barthelemy* (1994) 643 So2d 1240 (Supreme Court of Louisiana) 1246.

12 Australian Case of *Toby Constructions Products Pty Ltd v Computa Bar (Sales) Pty Ltd* (1983) 2 NSWLR 48 accepted in *St Albans City and District Council v International Computers Ltd* (n 7); see also Bradgate (n 6) 16, 17, 21.

implied in relation to mixed products, there were difficulties where any problems lay in the software component.

In order to provide coverage to contracts exclusively for digital content, the alternative, which was frequently considered, was the classification as service under the SGSA. Part II of the Act dealt with supply of services and listed a number of terms implied into '*contracts for the supply of a service*', the most important being the implied term about the use of care and skill. When in breach, this term allowed for compensation, should the buyer be able to prove negligence. Although tangibility was not a problem, it was questionable whether the supply of digital content would fit the description of a service under the Act. Section 12 SGSA explained that '*a contract for the supply of a service means […] a contract under which a person […] agrees to carry out a service*'. Examining the nature of different types of digital contents, products like bespoke software or commissioned digital works were surely covered because in such situations the buyer contracts for the manufacture,[13] for suppliers to use their expertise in developing a product. However, when buying software off-the-peg, one would hardly argue that the contract is one of service. It is rather a contract concerned with the provision of some 'thing', even though that 'thing' cannot readily be categorised as a 'good'. Such a distinction has long been significant in distinguishing contracts for the sale of goods and supply of a service, with well-known borderline cases, such as *Lee v Griffin*,[14] where a contract under which a denture was made and provided was classified as one for the sale of goods. The question arises whether the acquirer contracts for the exercise of skill or a result. Certainly, when it is the acquisition of standard software which is in question then the general categorisation of a contract under which it is acquired as a service is inappropriate.

However, when software is simply accessed on the supplier's server via 'cloud computing' it '*resembles the supply of a service such as telephony, or rental of premises*'.[15] Bradgate identified it as being covered by the SGSA due to its very nature, and an analogy to s.9 SGSA, implying terms about quality or fitness into contracts for the hire of goods, could be considered. Of course, one would then return to the basic problem that software is not 'goods', but the access to software in 'cloud storage' could, arguably, have been viewed as 'hiring' which would have to be done with reasonable care and skill, and this could, in absence of express contractual

[13] Twigg-Flesner, Canavan and MacQueen (n 1) 23.
[14] [1861] All ER Rep 191.
[15] Bradgate (n 6) 19.

provisions and with the necessary contractual intention of the parties, require the 'hirer' to exercise reasonable care and skill to ensure the product is of satisfactory quality and fit for purpose.[16]

Considering the view that access to remotely stored software could not be seen as 'hiring', terms to the same effect have been implied into contracts generally. In *St Albans*, Sir Iain Glidewell concluded that

> '[i]n the absence of any express term as to quality or fitness for purpose, or of any term to the contrary, such a contract is subject to an implied term that the program will be reasonably fit for, i.e. reasonably capable of achieving the intended purpose'.[17]

The line of reasoning offered by Sir Iain Glidewell is independent of any classification and can provide the necessary protection but, since it depends on a term implied in fact, the situation turns on the circumstances of each case and cannot be taken to apply generally.

Both of these situations must be contrasted with the case of *Robinson v Graves*[18] where the parties contracted for the skill and labour of the artist to produce a portrait. Exercising skill and labour was essential for the production which cannot necessarily be said for a product that is made available via 'cloud computing'. Ultimately, the consumer wants to gain access to the software which could happen by various means of delivery, and only in a limited number of cases, access via 'cloud computing' is elementary to the product.

At this point, at the latest, one will realise that the legislation prior to the CRA was not well suited, and generally not designed, to deal with digital content. Most of these rights would not offer adequate protection or would not be directly available because certain characteristics of digital content rendered the situation somewhat different. With a classification which was never entirely convincing, as it had too many uncertainties and insufficiencies to function as a means of consumer protection, or even simply to provide the general background to commercial contracts, in relation to contracts dealing with the supply of software and other types of data, it was welcome when change was embarked upon.

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16 HG Beale, *Chitty on Contracts*, vol II (32nd edn, Sweet & Maxwell 2015) para 33-069.
17 *St Albans City and District Council v International Computers Ltd* (n 7) 266.
18 [1935] All ER Rep 935.

The Consumer Rights Act 2015

From the beginning of the debate, commentators have argued that digital content does not fit in any existing category and should be treated *sui generis*. In the Scottish case of *Beta Computers (Europe) Limited v Adobe Systems (Europe) Limited*,[19] it was said that

> 'the only acceptable view is that the supply of proprietary software for a price is a contract *sui generis* which may involve elements of nominate contracts such as sale, but would be inadequately understood if expressed wholly in terms of any of the nominate contracts'.[20]

In relation to contracts of a new kind, '*the courts might well invoke the general principles of common law leading to a similar result as those that would be applicable under the Sale of Goods Act or the Supply of Goods and Services Act*'.[21] In effect, this type of potential development has been taken to its logical conclusion under the Consumer Rights Act 2015 which, alongside the established categories of goods and services, adopts a new type of contract, dealing with the supply of digital content. Sections under that Chapter are a reflection of the implied terms for the sale of goods under the CRA with special awareness of the characteristics of digital content. An examination of ss.33 – 47 CRA (or Chapter 3) will reveal the coverage and limitations of the new class, and the effects the new legislation has on dealing with digital content and, ultimately, how it affects the protection of consumers.

A new category – a new type of contract

First, we should explore what is covered by this new category of 'digital content' and the contracts falling within the CRA's provisions on digital content. In general, Chapter 3 of the CRA deals with consumer contracts for the supply of digital content. For a contract to fall within its scope, s.33(1) CRA requires the existence of a contract '*for a trader to supply digital content to a consumer, [which] is supplied or to be supplied for a price paid by the consumer*'.[22] This definition contains a number of elements which need to be looked at.

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19 [1996] FSR 367.

20 (n 19) 377 per Lord Penrose.

21 Natali Helberger and others, *Digital Consumers and the Law* (1st edn, Kluwer Law International 2013) 29; also *Beta Computers (Europe) Limited v Adobe Systems (Europe) Limited* (n 19).

22 n.b. There are yet no statutory regulations dealing with digital content in B2B contracts. Of course, the courts may decide to adopt an approach similar to Chapter 3 CRA by analogy, but it would also be possible to argue that they have to apply a different approach because, if the legislator wanted to same law to be applicable for B2B contracts, they would have designed similar provisions for business transactions.

Consumer

Unsurprisingly, given the general coverage of the CRA, the parties to the contract need to be a 'trader' as selling party and a 'consumer' to whom the product is supplied. Both terms are defined by the Act under s.2 CRA and essentially reflect the definitions generally used in European law, for example, under Council Directive 93/13/EEC on unfair terms in consumer contracts.[23] The CRA uses a somewhat wider scope, both here and elsewhere, as to the term 'consumer' by extending it to '*purposes that are wholly or mainly outside that individual's trade, business, craft or profession*'.[24] The extent to which the reference to '*mainly outside that individual's trade, business, craft or profession*' widens the scope must be assumed to be small following *Gruber v BayWa AG*[25] stating:

> '[A person would only be a consumer,] if the link between the contract and the trade or profession of the person concerned was so slight as to be marginal and, therefore, had only a negligible role in the context of the supply in respect of which the contract was concluded.'[26]

It should, however, be noted that there are cases where that distinction may not be as clear-cut. 'Hybrid sellers', or 'prosumers', are individuals who exist on the border line between consumer and professional, selling items on online market platforms. Typically, they view themselves as consumers, but factors relating to the number or frequency of re-occurring transactions,[27] with which they may (or may not) supplement their income,[28] or maintenance of stock,[29] might point towards them having crossed over into the category of 'trader'. There have been no cases under English law to give an indication as to the important elements and their weighing for the correct classification. In other European jurisdictions, like France and Germany, the courts have already had the chance to review the situation, yet with conflicting results.[30]

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23 Council Directive 93/13/EEC on unfair terms in consumer contracts 1993 (OJ L95/29), art.2.
24 CRA, s.2(3).
25 C-464/01 *Gruber v BayWa AG* [2005] ECR I-00439.
26 C-464/01 *Gruber v BayWa AG* (n 25) [39].
27 Sarah Deeks, 'Trading Income' in Natalie Lee (ed), *Revenue Law – Principles and Practice* (28th edn, Bloomsbury 2010) 269.
28 Martin Morgan-Taylor and Chris Willett, 'The Quality Obligation and Online Market Places' (2005) 21 JCL 155, 165.
29 cf. *Rutledge v IRC* (1929) 14 TC 490.
30 German courts were, on a number of occasions, invited to consider whether a 'private' seller had exceeded the acceptable limits and was dealing as trader. Two important cases took place roughly at the same time and the sellers' activities varied from 8 months to over 3 years. In *OLG Koblenz Az 5 U 1145/05, 17/10/2005*, the courts found that 252 transactions in 31 month sufficiently show the existence of a business, whereas in *OLG Frankfurt Az 6 W 153/04, 22/12/2004*, 68 transactions in 8 month could only be taken as indicating business activities.

Digital content

Of course, any contract covered by Chapter 3 will need to be for the supply of 'digital content' which is the very essence of this Chapter of the Act. It is the first time this terminology has been used and understanding it is the key step in determining the coverage of its sections. The Consumer Rights Act states in s.2(9) CRA that '*"Digital content" means data which are produced and supplied in digital form*'. The Act makes it clear that the 'product' under a contract for the supply of digital content must be data, and the different ways in which digital content can be 'produced and supplied' should now be considered.

Consideration of what is meant by 'produced and supplied' should begin with the issue of, what can be termed, 'mixed products' involving both digital content and goods. Such a situation will result in a 'mixed contract' under the Act, i.e. the physical parts of the products have to comply with the requirements under Chapter 2 on 'goods', and 'digital content' must meet the requirements of Chapter 3. Section 16 CRA explains that goods are not in conformity with the contract if the 'digital content' part of the product does not conform to the requirements for digital content. This covers situations where digital content is supplied on a physical medium, such as a CD or DVD.[31]

This approach to mixed products gives an indication of how 'produced and supplied' should be interpreted. The most obvious scenario covered by the Act is where a consumer purchases software, music, or a film online which is supplied via the internet and the approach to 'mixed' contract makes it clear that the requirement in relation to digital content extends to supply on a physical carrier. Here, 'supplying' describes the method by which the product reaches the consumer, similar to 'delivering' goods. With a product that is digital, however, neither the data file itself, nor data on a physical medium, either of which might be a film or software, for example, might be sent to, or downloaded by, the consumer. With such purchases, the product might be simply made available on the trader's website, with access to it being 'unlocked' on the consumer's payment. Of course, if data is made available on the provider's website, it is inevitable that the product, in form of data, reaches the consumer somehow. The difference is that what reaches the consumer is transient and can only be used as is permitted on the website.[32] Even though the product may

[31] 'Consumer Rights Act 2015 - Explanatory Notes' (Department for Business, Innovation and Skills 2015) paras 39, 79.

[32] n.b. Technically, it is possible to intercept and capture such transient data, and thus keep a permanent copy of it stored on the device, but most consumers will not have the necessary

only be temporarily on the consumer's device, it can still be seen as 'supplied' but, for example, 'cloud storage' products that allow users to store, backup and access personal files do not fit readily into this categorisation, as they neither 'produce' nor 'supply' data but merely provide the means by which the consumer can store and access their data.

There is a lack of clarity as to what situations are intended to be covered, so the European Commission have proposed a new Directive on Digital Content[33] (pDCD). Part of this proposed Directive adds additional activities for traders, under the definition of 'digital content', which, if provided under a contract, would result in a contract for the supply of 'digital content'. If the UK has to adopt, or adopts,[34] a Directive in line with the proposal, then 'digital content' would mean:[35]

> (a) data which is produced and supplied in digital form, for example video, audio, applications, digital games and any other software,
> (b) a service allowing the creation, processing or storage of data in digital form, where such data is provided by the consumer, and
> (c) a service allowing sharing of and any other interaction with data in digital form provided by other users of the service.

This would clarify the issue identified above. If this definition was adopted, it would widen the scope to an extent that would cover 'online services', like cloud storage, and other online activities which traders typically offer to consumers. However, if the rules are applied carelessly, there might be unintended consequences for providers of social media platforms, and some further guidance might be necessary explaining the intended scope. Under the current criteria of the pDCD, social media platforms, such as facebook.com, linkedin.com, twitter.com, fall, at least, into one of categories of (b) or (c), and providers of such platforms would offer 'digital content'. This alone is not sufficient for the pDCD, or the CRA, to apply, but if the existence of a contract between platform provider and consumer can be shown, they might need to comply with consumer protection legislation. Under the CRA, such contracts would still fall outside the scope of Chapter 3, as it has attached to it more stringent conditions which will be looked at in the following paragraphs, but the pDCD also

knowledge nor any interest in doing so, as the content is available online.

33 Proposal for a Directive on certain aspects concerning contracts for the supply of digital content (2015/0287 (COD)) (Proposed Digital Content Directive).

34 On the 29th March 2017, the UK triggered art.50 of the Lisbon Treaty and will leave the European Union. However, even after Brexit, the UK might still choose to adopt this approach.

35 pDCD, art.2.1.

proposes change in this regard[36] which might then be sufficient to capture social media platforms; an effect which might be unintended.

Price

We will continue with the analysis of the final requirement of 'price' for a contract for the supply of digital content. The Consumer Rights Act requires there to be a contract '*for a price paid by the consumer*' which, at first sight, seems to refer to monetary payment and, thus, excluding all other methods. In fact, the Explanatory Notes confirm this impression by clarifying that digital content has to be paid for with money.[37] However, a framework solely allowing direct monetary payment would arguably be too rigid. Therefore, s.33(2) CRA also extends to contracts for the supply of digital content when the product '*is supplied free with goods or services or other digital content for which the consumer pays a price, and it is not generally available [unless paid for]*'. This covers transactions in which digital content was supplied with a magazine, for example, as long as the software is not generally available on the internet for free. The Explanatory Notes also clarify that

> '[it is possible to pay for digital content] with a facility, such as a token, virtual currency, or gift voucher, that was originally purchased with money (e.g. a magic sword bought within a computer game that was paid for within the game using "jewels" but those jewels were originally purchased with money)'.[38]

This extended interpretation allows for a wider range of contracts to fall under Chapter 3. It is still too limited as traders may adopt a business model under which products are offered for 'free', only requiring consumers to complete a survey or to accept the occasional interruption of, for example, a film by an advert. Such companies have found channels of generating income, other than monetary payment by consumers. It has become common practice for companies to offer third party products, not in exchange for money, but information. Buyers have to participate in a consumer survey where they have to provide detailed personal data. On completion they are directed to a location where they can download a legal copy of the product. Information of this kind is clearly of monetary value to companies when sold on.[39] However, although, at the moment, a contract demanding barter as method of

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[36] Article 6(2)(a) pDCD implied certain terms in relation to quality of digital content to the contract, where it is provided '*in exchange for a price or other counter-performance than money*'. See below.

[37] 'Consumer Rights Act 2015 - Explanatory Notes' (n 31) 174.

[38] 'Consumer Rights Act 2015 - Explanatory Notes' (n 31) 174.

[39] pDCD, art.3(1).

payment will escape the CRA's scrutiny, it is envisaged that protection could potentially be extended to include other methods of providing consideration other than money, should the Secretary of State think it necessary.[40] Of course, if digital content is truly free from obligations on the consumer side, an agreement would lack consideration which is a basic prerequisite for a contract.[41] Where the product is free there can, and should, be no contractual liability and s.33(1) CRA demands the underlying agreement to be contractual before the sections of Chapter 3 can apply.

The danger of only focussing on payment of a 'price' has also been recognised by the European Commission and, alongside changes to the definition of 'digital content', the proposed Digital Content Directive aims to provide a 'level playing field' and different treatment of contracts, where a price has been paid, to those, where other counter-performance was sought, would introduce an '*unjustified incentive for businesses to move towards offering digital content against data*'.[42] There are, however, limitations as to when data provided by the consumer counts as counter-performance. The key aspects are a request of data by the provider and an active provision of it by the consumer.[43] It ousts data that is automatically generated and transferred by technological means, such as the consumer's internet browser.[44] This definition would successfully extend the scope to those situations where digital content is provided in exchange of data but, as has been mentioned before, it would also catch social media platforms.

However, the proposed Directive provides some, albeit limited, exceptions, where the provision of information by the consumer, even at the request of the provider, would not be such as to be covered by it. Of course, information cannot be considered in a contractual context if it is required by law. The same is true, where the provider '*collects information, including personal data, such as the IP address, or other automatically generated information*'.[45] An example of this is the information contained in a cookie, even though the consumer may have 'accepted' the transmission and collection. The last exception concerns information which is necessary for the product to function properly. Data, such as login information identifying the user, or the geographic location of a device for an app, would be examples of this. In the context of social media products, which request a fairly wide

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40 'Consumer Rights Act 2015 - Explanatory Notes' (n 31) 176.
41 See *Currie v Misa* [1875] LR 10 EX 153.
42 pDCD, Recital 13.
43 pDCD, Recital 14.
44 Such data would, for example, include the user's public IP address.
45 pDCD, Recital 14.

range of information from the consumer, it could be argued that it is necessary for the functioning of those social media sites. Furthermore, most of the information that consumers provide, and share, is entered voluntarily. Only in cases where information is collected and then used for purposes other than the functioning of the product, for example, by selling data, the lawfulness, and fairness, of which will be questioned at a later point, could be considered as counter-performance under the contract.[46]

Having considered the scope of Chapter 3, consideration must now be given to the rights and remedies it confers on the consumer to whom digital content is supplied.

Implied Terms – Description, Quality, Purpose

Terms implied by statute have been used in contracts for the sale of goods since the Sale of Goods Act 1893, and their mandatory nature in consumer transactions has become an important instrument for protecting private buyers.[47] It is the application of similar implied terms to 'digital content', and the level of protection resulting from those, that is of interest here. Under the Consumer Rights Act 2015, contracts for the supply of digital content are subject to a specific set of implied terms as set out under Chapter 3 of the Act, and concern description, satisfactory quality, and fitness for particular purpose of the subject matter. Those aspects are implemented by ss.34 – 36 CRA which provide additional sub-requirements for an assessment. Similar terms have long been in existence for contracts for the sale of goods and, in relation to consumer, are now implemented into Chapter 2 of the CRA. Both show a notable resemblance to the existing approach taken under the SGA. In an attempt to analyse those terms implied into contracts for the supply of digital content, the resemblance to provisions under Chapter 2 and the SGA needs to be looked at to evaluate the new approach. The sections implying terms into contracts for the supply of digital content are scrutinised in turn with a particular focus on the special nature of digital content and issues that arise in dealing with that.

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[46] See page 194.

[47] cf. UCTA, s.6(2) and CRA, s.31.

Description of Products

Section 36 CRA states:

> (1) Every contract to supply digital content is to be treated as including a term that the digital content will match any description of it given by the trader to the consumer.
> (2) Where the consumer examines a trial version before the contract is made, it is not sufficient that the digital content matches (or is better than) the trial version if the digital content does not also match any description of it given by the trader to the consumer.
> […]

This can be immediately contrasted with the wording of s.11 CRA, which deals with the well-established term which is implied in contracts for the sale of goods that the goods should correspond with their description. In s.11 CRA, the term as to correspondence with description is only implied where the sale is 'by description', and there is no similar limitation in s.36 CRA. The limitation on the implication as to goods' correspondence with description raised questions about whether specific, ascertained or seen goods, for example, were sold 'by description',[48] but its impact has basically been removed from situations in which it is clear that the buyer is *only* buying the thing in front of him, as a unique good.[49] The omission of any need for the sale to be 'by description' in s.36 CRA is of limited practical importance then, but it can be seen as a recognition of the fact that digital content is not an 'item' which can be touched and examined in a physical sense, and it is very unlikely to be supplied simply as a unique item, without any description being applied. Of course, it would not be impossible for digital content to be sold as the item which the trader allows the consumer to trial, either as a full version, or some truncated version, but description accompanying a trial is more likely and a limited version, in particular, will usually require some description to accompany it, to make it clear what more the full version can do. As it has come to be understood, the restriction that a sale must be 'by description' has limited impact in relation to the implication of a term as to correspondence with description in relation to sale of goods. It would be very unlikely to have any significant effect in relation to the supply of digital content, but it also seems inappropriate in relation to something which is not meaningfully, and in itself, perceivable as corporeal. To supply it without any significant description being involved seems only likely in a contrived supply as to be, at best, incongruous and

[48] Twigg-Flesner, Canavan and MacQueen (n 1) 131; see also Lord Wright in *Grant v Australian Knitting Mills Ltd* [1936] AC 85, 100; and *Beale v Taylor* (1967) 3 All ER 253.
[49] *Harlingdon & Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* (1991) 1 QB 564.

more likely an attempt to avoid the implied term. Where there is a trial of digital content provided, s.36(2) CRA makes it clear that, not only must what is supplied correspond with the trial version, it must also match its description.

However, having noted the lack of any requirement that the supply be 'by description', the important question arises as to what will constitute a description for the purpose of s.36 CRA, and in relation to what amounted to a description under s.13 SGA there was a need not only for it to be an express term in its own right, but also an important term.

Consumers are provided with a variety of communications regarding a product, such as statements, advertisements and product details. An express contractual term will be found where one was objectively intended by the parties.[50] An important indicator of such intention is the level of influence which the statement had on the conclusion of the contract.[51] The courts have commonly looked at whether there was reliance by the buyer on the communication but, of course, the reasonableness of the reliance is key when the underlying question is that of the (objective) intention of the parties. In *Beale v Taylor*,[52] a private seller of a car innocently presented his car as a 'Herald convertible' from 1961. As it turned out later, this was only true for the rear part, but the falsity of the statement could not be discovered with the mere eye. The buyer could not have been aware of it, and the age of cars was an important factor in their purchase. When the buyer claimed for damages, Sellers LJ held that the statement was a term in itself, and a description under s.13 SGA, due to the fact that it was relied upon by the buyer.[53] In *Harlingdon & Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd*,[54] the courts rejected a claim, because the plaintiff company, who dealt in German art, did not rely upon the description of it as painted by Munter. On appeal, Nourse LJ, in concurrence with County Court Judge Oddie, found that the plaintiff relied on his own judgement rather than relying upon that description.[55] The statement was not a contractual term in its own right, nor was it part of the description for the purposes of the term implied by s.13 SGA. The lack of reliance on the statement about the painting in question was the decisive factor in finding the statement non-contractual.

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50 See *Heilbut, Symons & Co v Buckleton* [1913] AC 30.
51 See *Bannerman v White* (1861) 10 CBNS 844 (CP).
52 *Beale v Taylor* (n 48).
53 *Beale v Taylor* (n 48) 256.
54 *Harlingdon & Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* (n 49).
55 *Harlingdon & Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* (n 49) 570.

However, as has been indicated, for the purposes of s.13 SGA, it came to be recognised that it was not enough that the description should be a term in its own right. It also needed to be a term which 'identified' the goods, in the sense of stating that which was essential about them; it had to be, in itself, a condition. To understand this major limitation on the impact of s.13 SGA, i.e. that the description had to be such that it was a term which was a condition in its own right, in order to be covered by the implied condition in s.13 SGA, it is necessary to consider the effect of the approach to the interpretation of the content of the term. Until s.15A SGA was inserted in the SGA 1979 by the Sale and Supply of Goods Act 1994, a breach of the term implied by s.13 SGA was always a breach of condition, which therefore gave the buyer the right to reject the goods. This meant that the buyer could reject the goods for any breach of that implied term, no matter how inconsequential. This problem is nicely illustrated in *Re Moore & Co Ltd and Landauer & Co*,[56] where tinned fruit was packed in cases of 24 tins, but the contract stipulated packing in cases of 30. The correct overall number of tins was delivered, and the different packaging made no material difference. Nevertheless, at the time, it was viewed as a breach of the term implied by s.13 SGA, and thus a breach of condition, allowing the buyer to reject the goods. By the time that Lord Wilberforce was faced with similar circumstances in *Reardon Smith Line Ltd v Hansen-Tangen*,[57] *Hong Kong Fir Shipping v Kawasaki Kisen Kaisha*[58] had been decided, and led the way in making clear the benefits of the innominate term classification, which makes the availability of the right to terminate depend upon the breach being sufficiently serious. The term implied by s.13 SGA was labelled as a 'condition' by statute, the courts could not change that, and reserve the right to reject the goods for situations in which the breach had a serious impact. What they could do, to combat termination for trivial breaches, was to restrict what fell within the statutorily implied term. Lord Wilberforce stated that '*some of these cases [e.g. Re Moore] I find to be excessively technical and due for fresh examination in this House*'.[59] He placed great emphasis on the descriptions falling within s.13 SGA being those which identified the goods, in the sense of stating what was essential about them. In the case, the question was as to the significance of the number which was given to the ship in the contractual documents, and which indicated where the ship was intended to be built. Obviously,

[56] (1921) 2 KB 519.
[57] (1976) 3 All ER 570.
[58] (1962) 2 QB 26.
[59] *Reardon Smith Line Ltd v Hansen-Tangen* (n 57) 576.

there was a sense in which it identified the ship, but the particular shipyard it indicated as where it was to be built was not important to the parties. It did not identify the location in the sense of stating what was essential; the deviation did not touch the essence of the contract. As Lord Diplock pointed out in *Ashington Piggeries Ltd v Christopher Hill Ltd*:[60]

> 'The "description" by which unascertained goods are sold is, in my view, confined to those words in the contract which were intended by the parties to identify the kind of goods which were to be supplied. [...] The key to s 13 is identification.'[61]

A description which is a term, but not covered by s.13 SGA, as identifying what is essential about the goods, can be a warranty or innominate term which did not conflict with existing rules, but allowed more flexibility. This would still enable consumers to claim for damages, but rejection as sought in *Re Moore & Co* would not be automatically available. Of course, breaches of one of the statutory implied terms as to goods' correspondence with description, satisfactory quality, and fitness for purpose, have for a long time received enhanced protection in relation to exemption clauses trying to exclude or restrict liability in relation to them. Under s.6 UCTA, any such exemption clauses were subject to the requirement of reasonableness in relation to business-to-business sales, but in relation to a consumer purchase, such attempted exclusions or limitations were simply ineffective. That distinction continues today, with business-to-business contracts still dealt with by s.6 UCTA, but with consumer purchases now covered by s.31 CRA. More importantly, for what is under consideration here, the CRA confers the same level of protection on consumers in relation to the similar statutory implied terms dealing with digital content. Under s.47 CRA, liability for breach of the implied term as to digital content corresponding with its description cannot be excluded or restricted in relation to a consumer. Liability for breach of a descriptive statement which is found to be an express term of the contract, but not covered by the term implied by s.36 CRA, can be excluded or restricted if the term is fair under the test set out in s.62 CRA.

As mentioned above, the new Act is not concerned with classifying terms as warranties or conditions. Rather, ss.42(1) and (2) CRA explain that remedies of repair / replacement or price reduction, under ss.43 and 44 CRA, become available '*if the digital content does not conform to the contract [i.e. a breach of a term implied under sections 34, 35, or 36]*'. Sections 42(6)-(7) CRA specifically provide that other remedies, such as damages remain available, provided double recovery for

60 (1971) 1 All ER 847.
61 *Ashington Piggeries Ltd v Christopher Hill Ltd* (n 60) 883–884.

the same loss is avoided, but it is also explicitly stated in s.42(8) CRA, that it is '*not open to the consumer to treat the contract as at an end*' for any such breach. In other words, the impetus which drove the development of a very narrow approach to the meaning of description in s.13 SGA 1979, is not present in relation to s.36 CRA. However, that impetus was also largely removed from the sale of goods context with the insertion of s.15A SGA, which removed the right to reject in the business-to-business context where the breach was so slight that it would be unreasonable to reject. It seems unlikely that the court will now revert to a more natural meaning of description for the purposes of s.36 CRA.

However, what is regarded as essential to the identity of digital content might be seen as more extensive than in relation to goods, because of generally greater significance of 'description' in the context of digital context. Further, there will also be an additional impetus to rely upon descriptive statements when e-commerce, generally, is in question and digital content, nowadays, is more often bought online than offline. Regardless of whether supply is immediate, in digital form, or on a physical medium, typical features of e-commerce will make consumers more dependent on descriptive statements about the item.[62] Moreover, in their marketing, online traders can easily provide extensive information, which consists of a mix of serious statements and mere puffs,[63] about their products to attract attention. The range of information and their presentation on online platforms can be overwhelming and difficult to filter. For those descriptive statements to form part of the 'description' within s.36 CRA, they might have to identify the subject matter of the contract, in the sense of stating that which is essential to it. In this regard, the presentation of the information may be significant, so that repetition of statements, for example, with traders including the same information multiple times in the extensive marketing materials which can be accessed online, might well add to the impetus to find a descriptive statement is a term. Such repetition will be used to give the information more weight and influence the buyer's decision-making.

However, it might be possible to argue that there is a difference between the approach that was developed under s.13 SGA and the one taken in relation to digital content. The narrow view on what could constitute 'description' in relation to goods,

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62 Any product, physical or digital, acquired online cannot be physically inspected, just as in relation to any distance contract. However, digital content, in any event, does not as such, have an observable existence, except through its use.

63 Those puffs are often slogans like 'Fly the friendly skies of United', yet no one would hardly ever believe that it would be a breach of contract, should one encounter rude personnel. See Ivan L Preston, *Great American Blow-up: Puffery in Advertising and Selling* (2nd edn, University of Wisconsin Press 1996) 20.

was partly formed because, as was explained above, a wider interpretation would allow parties to terminate the contracts under s.13 SGA for breach of a condition with insignificant deviations. There is no similar right under the CRA in relation to contracts for the supply of digital content. Furthermore, the wording of s.36(1) CRA also seems to support an interpretation different from the one under s.13 SGA, and s.11 CRA. While s.13 SGA requires goods to correspond with 'the description', s.36(1) CRA includes '*a term that the digital content will match any description of it given by the trader to the consumer*'. Of course, this does not expressly clarify how 'description' has to be understood, but it shows the intention to apply a more relaxed understanding of the term and, although it does not give the right to terminate for breach, it would provide specific remedies.[64]

In conclusion, the understanding of which statements form part of the description and the level of interpretation applied to them are general issues in relation to e-commerce and not limited to contracts for the supply of digital content. Under the CRA, the term requiring compliance with the description of the product will be implied into every contract for the supply of digital content, as opposed to s.11 CRA which applied only to goods sold 'by description'. This greater reliance on description will, therefore, necessitate a clear understanding of the concept, not only to avoid legal conflict, but also to enhance consumers' trust in the electronic market. With a wider interpretation of what constitutes 'description' under contracts for the supply of digital content, it would be possible to avoid having to test descriptive parts as to whether they are essential to the parties. Due to the specific remedies that the CRA provides, there would be no risk of consumers terminating contracts for small deviations from the description as such right does not exist.

Satisfactory Quality

Section 34(1) CRA states:

> 'Every contract to supply digital content is to be treated as including a term that the quality of the digital content is satisfactory'.

Although this mirrors the well-known term implied into sale of goods contracts, in relation to digital products heed will have to be taken of their particular nature in determining its content in this new context. Under s.34(2) CRA, it is, as it always has been in relation to goods, a matter of what a reasonable person would consider satisfactory 'taking account of' its description, price, if relevant, and all other relevant

[64] CRA, s.42.

circumstances.[65] Establishing what the reasonable person would consider satisfactory is inherently uncertain, and it may not be simply made less so. This has long been recognised in relation to goods because of the vast range of situations to be covered, from a shoe to a car.[66] In relation to digital products, consumers are faced with both immense product differentiation and amalgamation. Some products, although seemingly similar, are actually too different to be subjected to the same standard, while others comprise different types. An accounting software product might also encompass some online banking functionalities, without offering the full 'standard set' of functions that would be found in an online banking product.

Further, the information technology sector advances quickly, changing technology, and with it, the nature of digital products, frequently. This does not allow much experience to be gained for expectations of a product to become settled, and inform what the reasonable person would regard as satisfactory. Yet another aspect of the provision of digital content, which immediately distinguishes it from goods, and which may impact upon how the reasonable person would view it, is that of the licences under which digital content is provided, or the limitations which may be built into its usage, such as Digital Rights Management (DRM) systems, restricting the devices it can be used on, or the copies which can be made (the particular problem of licences and DRMs will be returned to below).

However, as has been indicated the basic test is that of the standard that a reasonable person would regard as satisfactory, taking account of description, price (if relevant) and all other relevant circumstances. Section 34(3) CRA adds to this, stating that the quality of digital content 'includes its state and condition', and then provides a non-exhaustive list of factors, which are aspects of its quality 'in appropriate cases': 'fitness for all the purposes for which digital content of that kind is usually supplied'; 'freedom from minor defects'; 'safety'; and 'durability'. All of these are familiar from the implied term of satisfactory quality in relation to goods, but they are now used in relation to a product which is often very different from goods. What transfers from consideration of goods, as well as what does not, both need to be considered in looking at each of the identified factors in turn.

In relation to this, we must have a brief look at the origin of 'satisfactory quality' and how it developed. It was introduced as requirement of the term implied by

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[65] 'Consumer Rights Act 2015 - Explanatory Notes' (n 31) 178. The Act offers some assistance to clarify what satisfies the quality requirement by providing further details on what amounts to 'other relevant circumstances'. Section 34(5) CRA outlines that this includes '*any public statement about the specific characteristics of the digital content made by the trader [...]*'.

[66] Twigg-Flesner, Canavan and MacQueen (n 1) 138.

s.14(2) SGA by the Act of 1994 replacing the former requirement of 'merchantability'. Originally, there was no statutory definition of merchantability in the 1893 Act. The definition which was incorporated into the 1979 Act relied heavily on what was used in the case of *Rogers v Parish (Scarborough) Ltd*,[67] and one of those factors were the 'reasonable expectations' of a buyer.[68]

After the introduction of 'satisfactory quality' into the SGA, the old case law largely remained relevant. It was important as indicator in '*[determining] the correct approach across as many broadly similar cases as possible*' because of the small body of case law that could be used '*as each case turns largely on its own facts*'.[69] Under the CRA, this needs to be treated with care, as there is now a statutory definition, so the old case law will not always be correct. The relevance of cases, such as *Rogers v Parish*, which placed great importance on 'reasonable expectations', will only be ancillary. The differences between the definition and the old case law have to be recognised. When looking at past cases, it must be borne in mind that such cases only rarely concern transactions between a business and a consumer since, firstly, the recognition of the need to protect a private buyer as the weaker party is a fairly recent development and, secondly, the value claimed in potential consumer cases is generally too low to take actions in a court of law (with the exception of automobile cases). This might make it difficult to draw analogies to issues of the present as these cases do not take into account the special need for protection that consumers might enjoy. Therefore, all the cases must be read with due care, keeping in mind the special position of the consumer. More particularly, here, due care should be taken when making an analogy to cases on goods, as there are fundamental differences between goods and digital content which must be recognised.

Fitness for usual purpose

Any of the 'aspects of quality' listed under s.34(3) CRA are to be considered in appropriate cases and 'fitness for all the purposes for which the digital content is usually supplied' will generally be relevant. It must be noted that it is the purposes for which the digital content is usually supplied which matter here. It is essential to distinguish what may well be a relevant aspect of satisfactory quality from the term which is implied by s.35 CRA, which deals with the digital content's fitness for the

[67] [1987] QB 933.
[68] See *Rogers v Parish (Scarborough) Ltd* (n 67) 944.
[69] Twigg-Flesner, Canavan and MacQueen (n 1) 140.

consumer's 'particular purpose' in contracting for the digital content. The latter is hedged round with restrictions on the situation in which it will be implied, to make requiring fitness for that specific purpose fair to the supplier, i.e. before the contract is made, the buyer must have made known to the seller any particular purpose for which he or she intended to use the digital content, and have reasonably relied on the seller in relation to such fitness.

One relevant point to consider here, which is brought to light from the case law on merchantability, is the fact that this aspect is specifically referred to as covering 'all' the purposes for which digital content is commonly supplied. Lord Reid gave a formulation for the old test of 'merchantable quality' which was formerly expressed by Lord Wright in *Cammell Laird & Co Ltd v Manganese Bronze and Brass Ltd*.[70] In *Kendall v Lillico*, Lord Reid stated '*[w]hat sub-s (2) now means by "merchantable quality" is that the goods in the form in which they were tendered were of no use for any purpose for which goods which complied with the description under which these goods were sold would normally be used, and hence were not saleable under the description*'.[71] While this may state the former position, as has been indicated, the statutory statement of satisfactory quality made 'fitness for *all* common purposes' an aspect of that which should be understood to cover '*all normal purposes, but not for abnormal ones*'.[72] Atiyah critically examines the issue with reference to *M/S Aswan Engineering Establishment Co v Lupdine Ltd*[73] but then comes to the conclusion that the meaning of 'all' actually includes all those purposes unless '*the seller knows that goods are not fit for one of the purposes for which goods of that kind are commonly supplied, he must make this known to the buyer*'.[74] Despite the literal similarities to the provision under the CRA, it must be questioned whether stacking pails six high in that heat should be regarded as a 'usual purpose'. With usual purpose becoming more important, when the statute makes 'all' usual purposes an aspect of satisfactory quality, it might be more narrowly understood than it was in *Aswan Engineering*, where they could view such use as usual, or common, without finding the goods unmerchantable.

This, then, naturally leads to the question of what should be regarded as 'usual purpose'. In the context of e-commerce, this is particularly important since

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70 *Cammell Laird & Co Ltd v Manganese Bronze and Brass Ltd* [1934] AC 402, 430.
71 *Henry Kendall & Sons v William Lillico & Sons Ltd* (1968) 2 All ER 444, 451.
72 MG Bridge (ed), *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell 2016) para 11-038; see also Ewan McKendrick (ed), *Goode on Commercial Law* (5th edn, Penguin Books 2016) para 11.77.
73 (1987) 1 All ER 135.
74 Twigg-Flesner, Canavan and MacQueen (n 1) 150.

consumers generally do not, and may have no opportunity to, communicate their purpose in purchasing an item. What must be considered is how one can determine the usual purposes of digital content and also how to deal with products which have just been released on the market.

For certain types of digital content, the determination of usual purposes might prove no challenge at all. The assessment of, for instance, audio and video files does not pose any difficulty as they are developed for the specific purposes of home entertainment which, in addition, is also determined by the license agreement attached to the product. Of course, this is to look at it as having one 'usual purpose', with whether it is fit for that, and whether the reasonable person would regard it as satisfactory, being a matter considered against its price and description. On the other hand, it could be seen as split into its many individual facets, with those which can be regarded as 'usual' for it, being determined by price and description. There would seem to be no need for too much concern that a case like *Aswan Engineering Establishment v Lupdine* now inevitably leads to conclusions of unsatisfactory quality when the digital content fails in one way, or does not perform a particular task well. If the view of a single broad purpose is taken, the requirements which a product has to satisfy should be easy to state and, with regard to film and music, would demand reasonable quality for home entertainment purposes in relation to image resolution and sound quality. However, whether the product is conform to the necessary quality will, of course, also depend on its description. Picture quality of videos, for example, is usually described by reference to 'standard definition' (SD), 'high definition' (HD) or 'ultra-high definition' (UHD).[75] None of these descriptors are clear as to the exact quality, but they are, at least, indicative of what might be acceptable, or unacceptable.

The same appears to be true for most software products in so far that they usually have a specific purpose as the purpose in relation to which they are usually supplied. The usual purpose of an online banking product, for instance, would be to control and manage bank accounts and banking activities. If the software is also viewed as having one broad purpose, and the problem only relates to a small part of it, the digital content may still be fit in relation to the broad task (purpose), and of satisfactory quality. If the purpose of the software is divided into many small

[75] 'High definition', for example, is often also expressed as 1080p. The number describes the vertical resolution of the screen and, assuming a widescreen ratio (16:9), it would relate to a 1920x1080 pixels, roughly 2 mega-pixels. For 'ultra high definition', this could also be described as 2160p, resulting in a resolution of 3840x2160 pixels, roughly 8 mega-pixels.

purposes, those it is not fit for, may not be 'usual'. Due to the aforementioned product amalgamation, this, more detailed, approach might provide a level of subdivision necessary for the analysis of those products. Considering an example of a game with internet browsing capabilities, one usual purpose of such a product would relate to its capabilities as a game but its browsing capabilities might indicate the existence of another 'usual purpose'. The product would have to be suitable for '*all purposes which digital content of that kind is usually supplied for*',[76] and a literal interpretation, particularly where the main aspect of the product is a game, might exclude the browsing capabilities from the scope. Consumers would probably acquire the product to play the game, while the browsing function is probably negligible as they would not buy the product mainly because of its browsing capabilities.[77] Arguably, this would suggest that, even though a game might offer browsing capabilities, this is not what the product is 'usually' supplied for. What we must remember is that, first, the answer might be less obvious where the product is not a game but, for instance, an e-mail client and, second, a purpose does not have to be the dominant purpose to be considered as 'usual'.

The problem that such an approach causes is that functionality is looked at very broadly. This supposes that all products of a type, for example games, are comparable which is only true for the major aspects. Instead, one should consider the purpose of the individual functionality and consider whether the 'feature' itself works satisfactorily. For a game which contains an internet browser, the test should not compare how product performs against 'internet browsers', but consider what the 'usual' purpose of the 'browsing' function is and whether it enables the user to do that.

Another way of determining standards against which functionalities could be tested, could be by looking at applicable industry standard or legal requirements. Consumer who want to do online banking might want to use a product providing such functionality, and these might be available from their bank or third party providers. A product that does not rely on such standards might, for instance, not use the required communication protocols or not support the typical functions, for example, setting up standing orders. Communication protocols for banking are typically standardised formats which software providers must follow to interact with the banking servers.[78] Consumer might rely on the implementation of such recognised standards as otherwise proper functioning of the software cannot be

[76] CRA, s.34(3).
[77] The same test would apply to phone apps as they are merely a different software format.
[78] See 'Ebics.Org' <http://www.ebics.org/home-page/> accessed 4 November 2017.

guaranteed. This is also the case where the law prescribe certain formal requirements.

In other cases, documentation offered by the producer might indicate what the purpose of a functionality is. Contractual terms and an 'end user license agreement' (EULA) can frame the range of functions a product provides in that those instruments restrict certain uses which implies that restricted functions may not be included or available. Even at the pre-contractual stage, information provided at various places does not only form part of what the trader has to provide under a contract, but can also establish what the product's functionalities are intended for. For example, by including a price table outlining different 'access levels' of a product could have the effect that the reasonable person would not expect to have access to functionalities which are not available to them because of the low 'access level' that they purchased. Expectations as to the purposes of those products are, therefore, largely determined by contractual terms and license agreements information provided in relation to the product, all of which is under the control of traders. This lowers the traders' risk of 'unintended usual purposes', and basing the test on traders' intentions might give them too great an influence in shaping what the reasonable person would expect.

While this might give traders some control over the purpose, it seems an appropriate factor for determining 'usual purposes'. However, it might cause problems, where the product is controlled by Digital Rights Management (DRM) systems. DRM is a technological means by which the use of a product is controlled or monitored. These systems can be a separate piece of software or implemented into the product itself. The Government recognises the use of DRM to protect the copyright owner and offers only a limited number of exceptions, such as non-commercial research and private study, teaching, etc.[79] In those situations there has to be 'fair dealing', i.e. it must not cause the owner to lose revenue, and the amount taken must be reasonable and appropriate. Regardless of how this should be interpreted, what is of interest here is the impact that DRM can have on those exceptions. An example would be an online platform for digitised and electronic books, and a DRM system could prevent consumers from doing anything other than reading the text, such as marking or copying. Assuming the consumer's intended use of the contents would be covered by any of the exceptions, the technology would curtail him or her of something which would have been possible and legal otherwise,

[79] See 'Exceptions to Copyright' (*GOV.UK*, 18 November 2014) <https://www.gov.uk/guidance/exceptions-to-copyright> accessed 11 August 2017.

for instance, if it was a physical book. This might have an impact on some of the 'usual purpose' for which the product is used and, as a result, might impact on its assessment of 'satisfactory quality'.

Freedom from minor defects

'Freedom from minor defects' is also identified as an aspect of the quality of digital content 'in appropriate cases'.[80] For visual and audio contents, such as films and music, this might relate to some minor problem with resolution or background noise. However, a regular problem with computer software is that it is virtually never free from so-called bugs. Software providers have always had to face the challenge of testing their products extensively to reduce the number of errors, but computer systems are so complex that testing every hardware-software configuration is impossible.[81] Undoubtedly, there are unique defects in particular copies, like a scratched disk, that '*can be adequately remedied by giving the consumer a replacement copy [or] a refund*',[82] but the more common situation would be '*where the software fails to function properly, because of an inherent defect in the program itself*'.[83] Where the problem is severe, so that the software does not function over a significant part of what it is claimed to do, it can readily be concluded that the program is in breach of the term as to satisfactory quality, and the CRA sets out appropriate remedies. However, the Department for Business, Innovation and Skills has acknowledged '*it is the norm to encounter some bugs in a complex game or piece of software on release so a reasonable person might not expect that type of digital content to be free from minor defects*'.[84] This suggests that consumers have a general tolerance threshold for bugs in certain types of digital content, the quality might not be considered sub-standard unless the limits of such tolerance are exceeded.

Under the premise of a certain level of tolerance, it must be asked how to establish the level of tolerance and whether traders are under an obligation to remedy bugs, when the quality lies within the 'tolerable margin'. It will not, of course, be a simple test of, for example, the presence of a specific number of bugs. By

[80] CRA, s.34(3).

[81] The reason for that is the Butterfly Effect which states that in dynamic system the outcome is highly depended on the initial conditions. See on chaos theory in IT, Ian J Lloyd, *Information Technology Law* (6th edn, Oxford University Press 2011) 486.

[82] Bradgate (n 6) 25.

[83] Bradgate (n 6) 25.

[84] 'Consumer Rights Bill - Explanatory Notes' (Department for Business, Innovation and Skills 2014) para 172.

considering, and appropriately weighing, relevant factors, it may be possible to formulate a test that can indicate whether minor defects, in the form of bugs, in a given digital product exceed the tolerance margin. As a starting point, we should understand 'tolerance' as relating to the overall usability of the product. Consumers are more likely to tolerate working with a product containing bugs of lesser impact on the 'workability' of the product. We should consider the relative importance of flawed functions to the overall functioning of the product and that will encompass such matters as how often does the bug, or bugs, occur, the significance of the function which is affected, the significance of the flaw (the effect of the bug on the usability of the product, for instance: a bug may only cause an annoying sound as opposed to causing intense flickering of the screen), and the time that has passed since the producer has become, or should reasonably have become, aware of the bug.

Besides the severity of a bug, the assessment also depends on the number of different bugs. With every bug in the product, its use will become more inconvenient for the consumer, and eventually reach the point where the reasonable person no longer considers the product to be workable due to the inconvenience caused by bugs. At that point the product should be viewed as falling below the level of tolerance and not free of minor defects. This threshold has to be based on the product type, i.e. the complexity of the product, and its development stage. The longer a product is on the market, the lower the tolerance for minor defects and the more bugs would have been expected to come to light in use, and to have been fixed. Of course, the more complex a piece of software, the longer it would take for a largely flawless version to have been produced.

A development strategy, often favoured particularly by small game developing enterprises, is to publish pre-release and early access versions of digital products. Buyers gain access to the incomplete product at a sometimes very early development state which comes with a number of bugs of minor and also major severity. Such early access, and pre-release versions, might well be cases in which it would be apt to invoke the limitation on the relevance of the statute's stated 'aspects of quality' that they are such 'in appropriate cases', so that 'freedom from minor defects' was not brought into play. Of course, it would have to be clear that the particular digital content was an early access, pre-release, or testing version, and there could be issues over the length of time during which such labels were applied, if they began to be used simply as a means of avoiding a more rigorous standard being applied.

The 'tolerance level' of the reasonable person should be regarded as one factor in determining whether the bugs could result in a breach of satisfactory quality and, ultimately, this is the case when the reasonable person would no longer consider the product to be satisfactory.[85] However, where this level is exceeded and the bugs are such as to need remedial treatment, rather than just being an a minor, occasional, tolerable annoyance, this might already affect the quality of the product enough that it would mean there is a breach of satisfactory quality. In contrast, a product within the 'tolerance level' might not fall below the standard of satisfactory quality only because it is not free from minor bugs. This, however, might pose a question in relation to bugs, as to whether the purchaser is simply left with no rights in relation to them because they are within the margin of tolerance. There might be bugs, such as small cosmetic imperfections, which may not be pleasant to work with but do not pose any problem and are generally acceptable to work with, even without a subsequent fix. For other not-insignificant bugs, there might be an express term dealing with the remedying of such bugs but, subject to that, *prima facie*, the buyer is simply left with the bugs.

If the concept of 'satisfactory quality' was treated so narrowly as to create a gap in which bugs can exist without triggering a breach under s.34 CRA, the common law might provide a term implied in law to repair bugs which would not in themselves amount to a breach of the statutory implied term as to satisfactory quality. The courts have used terms implied in law as a mechanism of setting general standards as for example in the case of *Liverpool City Council v Irwin*.[86] Except where there is an express contrary term, terms implied in law are independent of the parties intentions and must therefore not be confused with an implied term in fact where '*[...] the courts are spelling out what both parties know and would, if asked, unhesitatingly agree to be part of the bargain*'.[87] The case of *Irwin* was concerned with a landlord-tenant relationship in a multi-occupancy high-rise dwelling house. The tenants argued that the landlord was obliged to reasonably maintain the necessary communal areas (i.e. stairs, lifts, rubbish chutes). The House of Lords found unanimously that such an obligation should exist, in this type of contract, in the absence of any express terms dealing with it. Two requirements for the implication of a term in law can be identified.

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85 CRA, s.34(2).
86 (1976) 2 All ER 39 (HL).
87 *Liverpool City Council v Irwin* (n 86) 43.

The first requirement can be taken from Lord Cross' judgement in *Irwin*. His Lordship stated that '*when [the law] implies a term in a contract the court is sometimes laying down a general rule that in all contracts of a certain type [...] some provision is to be implied unless the parties have expressly excluded it*'.[88] From this it can be deduced that a contract type must be identified where all the specific contracts share the same relevant incidents. It must be a type of contract, and not simply a particular contract which is in question so the contracts must not be '*too unique that [they would] not come within a particular sub-category of contract*'.[89] There should be no difficulty identifying a type, or types, of contract, under which digital content, in the form of software is provided. From this, it can be said that the relevant type dealing with software bugs should cover 'all contracts for supply of digital content which are concerned with the provision of software'. The finding of a recognised type will be uncomplicated since contracts, for the supply of digital content are recognised under the CRA. Then, the sub-category of software products must neither be too narrow nor too wide to be admissible.

The second requirement, for a term implied in law, often stated as 'necessity'. In *Irwin*, Lord Wilberforce stated: '*[S]uch obligation should be read into the contract as the nature of the contract itself implicitly requires [...]; a test in other words of necessity*'.[90] The use of the word 'necessity', to express the second requirement, emphasises that such terms will not be readily found, but it does not correspond with the use of the word in implying terms in fact where, as was made clear in *The Moorcock*,[91] implying terms in fact is a matter of what is 'necessary' to produce 'business efficacy'. Scholars have argued that, in relation to terms implied in law, the focus is actually not on the requirement of 'necessity', but rather on 'reasonableness'. In *Crossley v Faithful & Gould Holdings Ltd*,[92] Dyson LJ adopted the argument of Peden in explaining '*that rather than focus on the narrow concept of necessity, it is better to recognise that to some extent at least, the existence and scope of standardised implied terms raise question of reasonableness, fairness and the*

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88 *Liverpool City Council v Irwin* (n 86) 46 (emphasis added).

89 Elizabeth Peden, 'Policy Concerns behind Implication of Terms in Law' [2001] L.Q.R. 459, 462 Recognised types of contract are for example employment contracts, leases, or contracts between banker and client (see Elizabeth Macdonald and Ruth Atkins (eds), *Koffman and Macdonald's Law of Contract* (8th edn, Oxford University Press 2014) para 7.32). Sub-categories are filters limiting the scope of the term to a particular sub-type.

90 *Liverpool City Council v Irwin* (n 86) 44.

91 (1889) 14 PD 64.

92 (2004) 4 All ER 447 (CA (Civ Div)).

balancing of competing policy considerations'.[93] A comprehensible explanation is offered by Macdonald. She describes the situation as follows:

> 'A term implied in law is based on an 'ought': it is a matter of what should be present in the 'type' of contract [...]. If that 'ought' means that a term should be present, then the term is necessary to effectuate the 'ought'. [...] What is important is the difficult question of determining the 'ought', which will vary from one 'type' to another [...]. It is not surprising that the generation of the 'ought' is expressed in vague terms such as "fairness, reasonableness, and competing policy considerations"'[94]

The 'ought' must be considered in contracts for the supply of a software product. To start with, it might be helpful to draft a preliminary term and develop it by analysing the factors and their implications. For a first draft the term could obligate producers of software products under contracts for supply of digital content to remedy relevant bugs within a reasonable time frame. Such term has to examined as a whole in terms of reasonableness and fairness as proposed by Dyson LJ.

A term can only be held to be reasonable if the obligation on one party can be aligned with any adverse effects, caused by a lack of the obligation, on the other party. Bugs in question will be of minor magnitude, and publishers can repair such bugs quickly and with minimal effort and costs. From a consumer perspective, the lack of such an obligation would leave them without redress against the producers when they have received the product under the contract in a sense, not working 'properly'. The lack of any such remedy could also incentivise schemes whereby producers offered patches for purchase to eliminate these bugs. It could lead to producers making no meaningful effort to remove bugs to generate money post-release. Product quality is a desirable pursuit by the law, and an obligation to remove these bugs appears to be a reasonable one. In terms of fairness, this obligation would confer benefits on both parties. Consumers need not be concerned with minor bugs as producers are obligated to remove them, while producers are given a margin for minor bugs which allows them to work more efficiently.

A term like this seems desirable, but it must be borne in mind that in the past the courts have found themselves unable to implement desirable policies due to their complexity; such a situation arose in *Reid v Rush & Tompkins Group plc.*[95] in relation to an alleged implied term into an employment contract. In *D & F Estates Ltd v Church Commissioners for England*, Lord Bridge stated that '*[a]s a matter of legal principle, however, I can discover no basis on which it is open to the court to*

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93 *Crossley v Faithful & Gould Holdings Ltd* (n 92) 459.
94 Macdonald and Atkins (n 89) 7.43.
95 (1989) 3 All ER 228.

embody this policy in the law without the assistance of the legislature and it is again [...] a dangerous course for the common law to embark on the adoption of novel policies which it sees as instruments of social justice but to which [...] it is unable to set carefully defined limitations'.[96] However, a policy expecting the producer of a software product to correct minor flaws is a much simpler matter and implementation is achievable. Looking at the CRA it might also be possible to find some support for such a policy. Although the law has to accept that software products commonly contain bugs, if 'free of minor defects' is applicable under those contracts, then a literal interpretation of it could be taken as in indication as to the desired end result. Implying a term, which eventually brings the product closer to the ideal, is potentially not more than a coping mechanism which enforces the rule in a situation unaccounted for under the CRA.

In cases where the bugs are not so severe to constitute a breach of satisfactory quality itself, and not so insignificant that a fix would not reasonably be expected, this would allow for an implied term in law into all contracts for supply of digital content which are concerned with the provision of software. This term would require producers to remedy those minor bugs within reasonable time, and would offer effective redress for consumers who experience a tolerable amount of minor bugs.

Safety

Most digital content on the market which consumers obtain is unlikely to pose a real danger to their health and life. However, 'intelligent vehicles' are the notable exception to this. These cars use autopilot sensors and artificial intelligence to make driving decisions to transport passengers to their destination. Obviously, 'safety' is the aspect of paramount importance to establish whether the reasonable person would regard the product as satisfactory. Failure to function properly could result in injury or even death.[97] Of course, one must appreciate that a car is a mixed product and it is not necessarily the software that is at fault. Moreover, drivers of other vehicles might be a significant variable which cannot be ignored, but where the digital content is not developed to a standard that it reasonably ensures passenger safety, this would impact on the assessment of satisfactory quality.

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[96] *D & F Estates Ltd v Church Commissioners for England* (1988) 2 All ER 992, 1009.

[97] See Danny Yadron and Dan Tynan, 'Tesla Driver Dies in First Fatal Crash While Using Autopilot Mode' *The Guardian* (7 January 2016) <https://www.theguardian.com/technology/2016/jun/30/tesla-autopilot-death-self-driving-car-elon-musk> accessed 31 July 2017.

A similar technology, HGV Platooning, will be trialled on UK road. A 'platoon' is a cohort of lorries with 'vehicle-to-vehicle communication' allowing them to operate as a single unit. This project received green light by the Department for Transport, for an on-road trial, though it has been indicated, that safety is, of course, of utmost importance.[98] Here, the importance of 'safe' software is even greater because of the likelihood of causing severe crashes with casualties if, due to an error in the software, a unit of the platoon, or the entire platoon, get out of control. As it stands, this technology is only of interest for commercial entities whose contracts are not covered by Chapter 3 of the CRA, but it does not seem unlikely a similar test will be used in relation to non-consumer contracts.

The other point to consider was mentioned in a report on the safety of children in a digital world. Bryon points out risks to which children are exposed, particularly online and in digital games.[99] Products that can provide access to contents that are inappropriate, for example, for children, might need to provide certain safeguards and parental control options. As far as reasonably possible, the product could warn from harmful contents, or websites, and allow parents to limit and control access. This aspect might not be part of most types of digital content, but particularly those designed for children or where the trader would reasonably expect children to have access to the product, the reasonably person might expect the product to be safe for children.

If a test considering 'safety' of digital content was adopted in a commercial context, it will be a crucial aspect with regard to hospital equipment. In many situations, the medical sector makes use of modern technologies, be it remote, or computer-guided surgery, archiving of medical records or controlling intravenous fluids via electronic drips. Substandard quality of digital content in the medical sector can easily pose a risk to the patients' health and lives and, depending on the likelihood of causing harm to a person, the reasonable person's 'tolerance level' for any malfunction of software, and hardware alike, would be, at best, very low.

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98 'Government Gives Green Light for First Operational Vehicle Platooning Trial' (*TRL - The Future of Transport*, 25 August 2017) <https://trl.co.uk/news/news/government-gives-green-light-first-operational-vehicle-platooning-trial?t=1&cn=ZmxleGlibGVfcmVjcw%3D%3D&refsrc=email&iid=3e48a4d3ac3c46ffaa0d6dc1c989010d&uid=2258240976&nid=244+272699400> accessed 28 August 2017.

99 Tanya Bryon, 'Safer Children in a Digital World' (Department for Children, Schools and Families, and the Department for Culture, Media and Sport 2008) <www.dcsf.gov.uk/byronreview> accessed 31 July 2017.

Durability

Considerations should also be given to the aspect of 'durability' and related to the 'lifespan of digital content'.[100] In other words, digital content might not be of satisfactory quality if its lifespan is shorter than the reasonable person would expect, and a simple example might be a new piece of software that is developed for a particular operating system that is at the end of its lifespan. As a result, the consumer would end up with a product he or she cannot use, or only under impeding circumstances, as there may, for example, be no support for the operating system. Of course, after some time, it is expected that a new version is released or the product is discontinued and this must depend on the type of product in question.

For video and audio products, the aspect of 'durability' would probably not apply directly as these types are typically not maintained by producers. This might, however, be different where the product was bought on a video or audio platform, such as Netflix or Spotify. The reasonable person would expect to have access to it for a reasonable length of time which might depend on whether, at the time it was purchased, it was a promotional offer and only available for a limited period or the agreement was for the 'hire' of the product. In absence of those special cases, expected availability might be significantly longer.

Where the product is a piece of software, the lifespan might be more limited. Due to dependencies on other components, such as operating systems or hardware, a shorted lifetime could be expected. An unduly quick depreciation of a product could, arguably, be prevented by releasing necessary updates, or implementing 'downwards compatibilities'. The latter is an important aspect for operating systems and ensures that software which worked on one version of the operating system also works on later versions. Particularly for products which are typically intended to be used regularly and over many years, such as operating systems or office software, producers might need to make a reasonable effort to maintain the product for a reasonable amount of time, and if a product falls short on this, it may not be of satisfactory quality.

Here, the issue for consumers relates to making a claim. Lack of durability will only become apparent after it no longer works, which could be after years and the question arises as the time frame. In relation to goods, in the case of *Lambert v Lewis*,[101] Lord Diplock examined the implied term of what was then 'merchantability'

[100] 'Consumer Rights Act 2015 - Explanatory Notes' (n 31) 179.
[101] *Lambert v Lewis* [1982] AC 225 (HL).

in relation to durability, and came to the conclusion that duties as to 'merchantable quality', as imposed by the Sale of Goods Act 1979, would continue 'for a reasonable time after delivery'.[102] In addition, it has to be noted that this case was, in fact, between a trader and consumer and it would allow consumers to bring a claim if a product is no longer supported and that is due to a shortcoming in the product.

Limits and exceptions

The factors upon which the assessment of 'satisfactory quality' is based have been explained, but consideration now needs to be given to the situation in which a problem, which might otherwise render the digital content of unsatisfactory quality is disregarded under the Act. Section 34(4) CRA states:

> '[The term of 'satisfactory quality'] does not cover anything which makes the quality of the digital content unsatisfactory—
> (3) which is specifically drawn to the consumer's attention before the contract is made,
> (4) where the consumer examines the digital content before the contract is made, which that examination ought to reveal, or
> (5) where the consumer examines a trial version before the contract is made, which would have been apparent on a reasonable examination of the trial version.'

Here, we have ways in which the supplier is not liable because the consumer has purchased in situations where he or she should have been aware of the problem before the purchase. It is not then appropriate for the consumer to be able to rely on such problems to argue that he or she acquired digital content of unsatisfactory quality. This is a balancing of the interests of consumers and traders. Consideration will first be given to s.34(4)(a) CRA and issues which are 'specifically drawn to the consumer's attention before purchase'.

Notice as to defects

Suppliers can take a defect in their product outside the scope of what is required for satisfactory quality by making these issues known to the buyer prior to the purchase. The CRA makes it clear that digital content will not be in breach of the implied term as to satisfactory quality by any problem with it '*which is specifically drawn to the consumer's attention before the contract is made*'.[103] The question arises as to what is necessary to 'specifically drawn to' someone's attention a defect. It seems clear that a general term stating that digital content might be flawed will not be enough, so that

[102] *Lambert v Lewis* (n 101) 276.
[103] CRA, s.34(4)(a).

traders need to provide information on particular issues affecting quality. In fact, any attempt to acquire such general immunity might not just be regarded as ineffective to bring s.34(4)(a) CRA into play, it could be regarded as an exemption clause, and an unfair term under s.62 CRA, making the term not just ineffective against the consumer, but potentially triggering the use of the 'enhanced consumer measures' added to the Enterprise Act 2002, by the CRA. Of course, in e-commerce it is usually not possible for the trader to address the buyer in person to explain deficiencies. *Prima facie*, the obvious approach for the trader to take is to provide a comprehensive list of identified bugs and to display it during the contracting process; an approach reminiscent of the incorporation of 'Terms and Conditions' into electronic contracts.

The matter of incorporation of terms has been addressed above and bringing defects in a product to consumers' attention might follow the same rules of 'reasonably sufficient notice'[104] and Denning's 'red hand rule'.[105] Effectiveness to incorporate terms by 'reasonably sufficient notice' depends on the wording, positioning, format, design, availability and accessibility of the information. However, the way in which standard terms can be incorporated into contracts has led to issues with the idea of consent as the basis of contract,[106] because terms can be readily incorporated without their content being known to the consumer, or even being such that the reasonable person would know it. Of course, the 'red hand rule', which is generally seen as requiring more attention to be drawn to unreasonable or unusual terms, has been stated more generally as being that a trader must show '*that his intention to attach [a] condition of that nature was brought to the notice of the other party*',[107] and that might be seen as requiring more attention to be drawn to terms dealing with matters (otherwise) making digital content of unsatisfactory quality. Nevertheless, fulfilment of such rules, in itself, seems insufficient to satisfy s.34(4)(a) CRA. The general requirement of reasonably sufficient notice does not relate to the content of the terms, merely their existence, and even the red hand rule does not seem to relate to their content with sufficient specificity for the purposes of s.34(4)(a) CRA, as it relates to the type of term. Section 34(4)(a) CRA deals with '*anything which makes the quality of the digital content unsatisfactory […] which is*

[104] *Parker v South Eastern Rly Co* (1877) 2 CPD 416.
[105] *J Spurling Ltd v Bradshaw* (1956) 1 WLR 461 per Denning LJ (orbiter dictum).
[106] Karl N Llewellyn, *The Common Law Tradition: Deciding Appeals* (1st edn, Little, Brown & Company 1960) 370; Randy Barnett, 'Consenting to Form Contracts' (2002) 71 Fordham L Rev 627.
[107] *Thornton v Shoe Lane Parking* (1971) 2 QB 163, 172; *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433, 439.

specifically drawn to the consumer's attention'. The reference to 'specifically' would seem to make it clear that it is not merely that there are defects, which must be drawn to the consumer's attention, but what they actually are. Obviously, whether the consumer's attention has been drawn to a defect will depend upon the same type of factors as are relevant to incorporation, but much more rigorously applied than under the basic requirement of 'reasonably sufficient notice', or the 'red hand rule', so that what is done to draw attention to the actual content of any written notification of a problem with the software is addressed.

It is worthwhile considering whether a trader's notification as to an existing problem might have on a particular purpose under s.35 CRA which a consumer might have made known to the trader, and two factors have to be noted. First, if the consumer has made known his or her purpose to the trader, a contract will only be treated as '*[not] including a term that the digital content is reasonably fit for that purpose*',[108] if the circumstances show that '*the consumer does not rely, or it is unreasonable for the consumer to rely, on the skill or judgment of the trader*'.[109] Where there is sufficient notification of a problem to trigger s.34(4)(a) CRA, it would be very difficult to argue there should be scope for successfully contending that there is a breach of s.35 CRA because of that problem. Basically, it will not have been reasonable for the consumer to rely on the trader's skill or judgment that the digital content is fit for any purpose for which it is not fit because of the particular problem.

Examinations by consumers

Besides giving notice as to defects, traders will find themselves protected from some defects which would otherwise make digital content of unsatisfactory quality, where consumers examine the digital content or a trial version. The two methods, i.e. examination of the actual content and trial version, are not entirely dissimilar and those aspects must be looked at. Afterwards, it will be necessary to differentiate between the two and consider how they are different.

Both methods only apply '*where the consumer examines*' the digital content or a trial version.[110] The wording shows that there is no requirement for consumers to conduct an examination. Where consumers do not undertake such examination, its mere availability cannot be utilised to argue that the defect would, or should

[108] CRA, s.35(3).
[109] CRA, s.35(4).
[110] CRA, ss.34(4)(b) and (c).

reasonably, have become known to the consumer, had he or she conducted an examination. In other words, the trader cannot escape responsibility by arguing that the consumer should have examined the product.

In case of an examination being made, the provisions make an important distinction between an examination of the digital content, as such, and a mere trial version. When it is the digital content, itself, that is examined, s.34(4)(b) CRA only seeks to exclude flaws '*which that examination ought to reveal*'. It is the examination which the consumer makes that is significant, not some ideal, or reasonable, examination. This derives from the approach taken by s.9(4) CRA 2015 in relation to a contract for the supply of goods to consumers, and s.14 SGA 1979 in relation to the sale of goods (now to those who are not consumers). In relation to software, in particular, the scope given to the reference to 'that examination' will be very significant. There will commonly be a multitude, if not a near infinite number of variations in the way in which even a particular function of a piece of software can be used. It would seem that 'that examination' should be confined to what was done in the specific examination, if it is not to be unduly restrictive of the protection provided to the consumer by the term as to satisfactory quality. On this approach, s.34(4)(b) CRA will have limited impact in relation to the purchase of software, basically, only having an effect where the examination would have revealed the problem, but for the consumer's lack of attention. It is contended that this restrictive approach to s.34(4)(b) CRA is appropriate. The balance between when bugs will make a piece of software of unsatisfactory quality, and when they will not, should not be significantly impacted upon by an inevitably, relatively, limited examination of such a complex item. That balance is more appropriately made by broad basic test of what the reasonable person would consider satisfactory.

However, s.34(4)(c) CRA, on the other hand, deals with a different scenario. It deals with the situation where the consumer exams a 'trial version' of the digital content. It then means that '*which would have been apparent on a reasonable examination*' will not render the digital content of unsatisfactory quality. It is confined to flaws which would have been apparent on reasonable examination of the 'trial version', so problems in sound or visual quality of digital content, which is a film, which are not present in the 'trial' version plainly remain relevant to the basic test of satisfactory quality. The general difference between s.34(4)(b) and (c) CRA is something of a reflection of the burden which is, in effect, placed on the purchaser in relation to making a reasonable examination of goods which are sold by sample, but

it is not so restrictive of the scope of the implied term as to the satisfactory quality of digital content as of goods. If a sale of goods is made to a consumer, or a business, then anything which would have been apparent on a reasonable examination of the sample, cannot make the goods of unsatisfactory quality[111] and, unlike in relation to digital content, that is so whether the consumer has made any examination, or not.

The differences between s.34(4)(b) CRA and s.34(4)(c) CRA as well as that between s.34(4)(c) CRA and s.15 SGA should be considered. The idea of a 'sale by sample' is a very well-established one, with its own implied term of correspondence with sample in s.15 SGA. Section 15 SGA even explicitly states that it is a sale by sample '*where there is an express or implied term to that effect in the contract*'.[112] This is the background to the statement in Atiyah, in relation to the limitation on the scope of satisfactory quality in s.14(2C)(c) SGA that '*[i]n a sale by sample, the seller is entitled to assume the buyer will examine the sample, and the latter can hardly be heard to complain of defects which he could have discovered by the simple process of examining the sample*'.[113] There is no similar category established of 'sale by trial version', or implied term. It seems appropriate that the trader of a trial version of software cannot simply assume that the consumer will test it out, this explains the difference between s.34(4)(c) CRA and s.14(2C)(c) SGA when, under the latter, a problem which would have been apparent on a reasonable examination of the sample, does not make the goods unsatisfactory, even if the buyer made no examination. One question is whether, even when some examination has been made by the consumer, it will generally be viable to determine what would have been a reasonable examination of software. The point is made by the familiar simile likening small differences in usage of software, with only one leading to a major breakdown in the operation of a piece of software, to the hurricane in the US stemming from a particular flap of a butterfly's wing in the rainforest. In relation to a trial version of software, and whether a problem would have come to light on 'reasonable examination' of it, this is illustrative of the type of complexity of the system with which the court may well be concerned. But the matter is far too complex to just consider whether the 'reasonable examination' should have included the particular sequence of key taps, which leads to the hurricane. Often errors are caused because of an attempt to read from the RAM and use that data. If an error

[111] CRA, s.9(4) and SGA, s.14(2C)(2).

[112] The same applied to s.13 CRA where the term as to correspondence with sample is implied where there is a '*contract to supply goods by reference to a sample of the goods that is seen or examined by the buyer*'.

[113] Twigg-Flesner, Canavan and MacQueen (n 1) 146.

relates to a flawed 'read'-instruction, then the effect may be different each time, depending on the contents that were read from the specific location in the RAM. This is impossible to re-create as the contents of the RAM are stored in no particular order and are likely to be different the next time consumer executes the same sequence of actions. Regardless of the consequence, there is likely to be caused an unintended result, and the likelihood of the particular sequence being used in an examination of the trial version would be highly relevant. This will not be a simple matter to determine.

In relation to trial version it should be appreciated that they can take various forms in which they are usually provided. Often producers disables parts of the product so that the consumer can still get a good enough impression of how it works to decide to purchase it. This would be the basic understanding of a trial version. However, the producer might instead provide the actual product but for a limited 'trial period' which, after that period has expired, it can only be used by purchasing a 'product key'. It is clear that the version is intended to be examined by the consumer, and the use of a time limit might distinguish it sufficiently from the actual product. However, this does not mean that all types of 'trial version' are assessed by the same standard. What would have been apparent on a 'reasonable examination' will depend on factors such as functionality and length of availability.

However, it can be contended that this exemption from liability is inappropriate in relation to the supply of digital content. Certainly, in relation to software, it can be strongly argued that if a problem with software would have been apparent on something which can be described as a 'reasonable examination' then there should be no escape from liability by its trader. An absence of liability in such circumstances seems to evoke too much of the spirit of untrammelled *caveat emptor*, and it must be remembered that s.34 CRA is only concerned to imply a term as to satisfactory quality in sales from traders to consumers. Indeed, the argument could be taken further and also be applied to the exemption in s.34(4)(b) CRA, and if the consumer could undertake an examination which ought to have revealed the problem, would it not also then be more appropriate not to have such an exemption? In effect, it is contended that the relevant tests are such that the producer of the software should have carried them out. The trader may not be the producer, but pressure from the trader is one way to encourage producers to carry out appropriate tests.

Fitness for particular Purpose

Section 35 ensures that a product is fit for a particular purpose made known by the consumer, save only where the consumer does not, or cannot reasonably, rely upon the trader's skill and judgement.[114] This reliance is based on the fact that the trader can be expected, by virtue of his skill and judgement, to state the unfitness for a purpose and allow the consumer to continue searching for a suitable product, if he or she can be said to know the consumer's purpose.[115] This approach entails some critical parts which need analysis. Probing the ways in which the consumer can make known the intended purpose and the impact the section has on consumers with regards to digital content will give a better understanding of its usefulness in that context. Before an examination of the ways consumers can make their intended purposes known, it seems unavoidable to look at the meaning of 'particular purpose' to clarify the scope of purposes which are covered under this section.

A purpose need not be extraordinary, far-fetched or very limited to be particular; in fact, even the most basic purpose is covered by the wording. A literal interpretation of the word 'particular' is required[116] which aims at the specification of the intended purpose, i.e. the consumer must, expressly or by implication, make known a 'specific' purpose.[117] If such purpose is successfully brought to the trader's attention, which also means that the trader must have a meaningful opportunity to react,[118] the consumer can rely upon the trader to exert their skill and judgement and give advice. This rule extends to purposes that are covered under s.34 CRA as 'usual purpose', if specifically made known to the trader, and even though there would be no benefit in having such purpose covered under both sections, that way consumers can ensure that the intended purpose is covered without having to assess whether their purpose would be 'usual' under s.34 CRA.

While the effect of 'bringing a purpose to a trader's attention' is clear, there must be some consideration of how this can be achieved. Oral or written, express declarations are straight-forward and will generally be sufficient, unless the trader had no opportunity to react before the contract was made. As explained, consumers can then depend on the trader to inform them that the product is not suitable or might be able to make a claim under the contract, should the product then turn out to be

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114 CRA, s.35(4).

115 John N Adams and Hector MacQueen (eds), *Atiyah's Sale of Goods* (12th edn, Longman / Pearson 2010) 192.

116 'Consumer Rights Act 2015 - Explanatory Notes' (n 31) 182.

117 Adams and MacQueen (n 115) 195.

118 'Consumer Rights Act 2015 - Explanatory Notes' (n 31) 182.

unsuitable. Of course, the consumer must have made known the intended purpose to the trader to be able to rely on s.35 CRA, or s.10 CRA in relation to goods, as the problem arises generally in online transactions and is not confined to contracts for the supply of digital content. Where products are bought in a physical shop, it is easy for the consumer to approach the trader and enquire about the suitability of a product for the intended purpose, but in relation to electronic contracts this poses a problem as there is rarely communication between the parties either before or during the transaction. In some online stores it is impossible, or at least very cumbersome, to make contact with the trader. On Amazon.co.uk, for example, it is possible to direct a question at a trader, but only a small number of consumers will be successful when following the trail of links that leads to such option. More likely, consumers will ask questions about a product directly on the website which are made available to the public, and the trader as well as visitors can comment on them. However, posting a publicly available question generally cannot constitute an official channel of communication with the trader and the consumer cannot know whether the trader has, or reasonably should have, received the information. This should only be taken to satisfy the requirement to 'make a purpose known' if the trader provides and answer to it. With this in mind, the scope of s.35 CRA, and s.10 CRA, in relation to online transactions seems to be small as consumer will generally not be able to make their purpose known to the trader.

Even in traditional transactions for goods, express declaration of a purpose will seldom occur. When the contract is concluded online, this is even more likely as there is typically no communication between the parties. It is not always necessary to expressly make a purpose known to the trader; often a purpose can be implied. Basically, it can be said that the more obvious a purpose, the more likely its implication. Of course, traders can only be expected to advise a buyer as to the fitness for a purpose which the buyer did not state expressly, if an inference can reasonably be made. The point is best illustrated in cases like *Grant v Australian Knitting Mills Ltd*[119] and *Preist v Last*[120] which dealt with goods (underwear and hot water bottles) that only had one 'normal' purpose. The courts found it easy to imply a term that the products had to be fit for the particular purpose(s) they are used for. The reasoning was that the traders must have known the purpose because by buying, as was the case in *Grant*, underwear, the reasonable assumption is that the buyer wants to wear it.

[119] *Grant v Australian Knitting Mills Ltd* (n 48).
[120] (1903) 2 KB 148 (CA).

For products with more than one 'normal' purpose, it must be considered what counts as a particular purpose. In many cases, where the consumer contacts the trader to make known a particular purpose, what is considered by the parties is the overall suitability of the product for a particular purpose. A good example of this is *Henry Kendall & Sons Ltd v William Lillico & Sons Ltd*[121] where the buyer of compound food for poultry, made known to the sellers that it was needed for feeding poultry and pheasants. A toxin in the meal made it unsuitable for pheasants many of which died or were unsuitable for breeding purposes as a result. It was held that, while the meal was generally of sufficient quality for feeding other animals, it was not fit for the purpose that was made known to the seller.[122]

Both cases, *Kendall v Lillico* and *Ashington Piggeries*, considered whether a particular purposes was one within a general, 'normal', purpose, i.e. feeding, and whether this was sufficiently made known to the seller.[123] It can, however, be difficult for a consumer to decide which information has to be communicated to the trader, as can be seen in the case of *Griffiths v Peter Conway Ltd*.[124] The plaintiff bought a coat and, due to her sensitive skin, she contracted dermatitis from wearing it. The coat was of good quality and a '*normal skin would [not] have been affected by [it]*' and it was held that the seller could not have 'assumed to exist'. Sir Wilfrid Greene MR distinguished this case from *Manchester Liners Ltd v Rea Ltd*[125] where the 'bunker coal' was unsuitable for the type of burner, the steamship was equipped with. The buyers had informed the coal merchants of the burner, who should have known that the coal was not fit for the particular purpose.

In the context of digital content, if *Griffiths* and *Manchester Liners* were applied too narrowly, this could cause difficulties for consumer. There are simply too many factors, i.e. hardware components, technical limitations (for example, internet speed) or other digital content which could impact on whether a product is fit for a particular purpose, even though it might generally function correctly. This means that, while consumers might in principle benefit from the term implied by s.35 CRA, in the particular situation, it might involve a 'usual purpose' to an unusual degree. An example might be a 'music management software' which manages and holds all music files on the consumer and allows the user to search, or browse through, his or her collection and play these files back. A consumer might own an incredibly large

[121] *Henry Kendall & Sons v William Lillico & Sons Ltd* (n 71).
[122] See also *Ashington Piggeries Ltd v Christopher Hill Ltd* (n 60).
[123] *Ashington Piggeries Ltd v Christopher Hill Ltd* (n 60) 846.
[124] *Griffiths v Peter Conway Ltd* (1939) 1 All ER 685 (CA).
[125] 2 AC 74 (HL).

collection with which the software cannot cope (when starting up the software or when browsing through the catalogue, it might take minutes for the software responds); the software might be of satisfactory quality and yet not fit for the particular purpose.

It will be for the courts to indicate which point an 'unusual degree' of a 'usual purpose' is too extraordinary to simply be covered by 'usual purpose' so that the consumer needs to make his or her purpose known to the trader. This places some responsibility on the consumer to decide whether the particular purpose is so unusual in degree to fall outside the scope of reasonableness in which case they should make known expressly the particular purpose for which they intend to buy the product to avoid later disappointment. Of course, this position is not novel and existed under the SGA before. The difference is that it was less likely ever to attract great attention in relation to goods. Limitations of goods are easily included in the description and generally intrinsic. In other words, the reason why a product does not perform relates to the product itself and the consumer can often infer from it whether the product is suitable prior to the purchase. The same cannot be said to be true for digital content. Here, there are various extrinsic factors, relating to the consumer's hardware, and software, specifications, the volume of data, broadband speed) which makes it impossible for traders to provide anything more than the broad purpose that the product can satisfy. It seems appropriate to rely on the consumer to enquire if there is any doubt regarding the suitability of the product for the intended purpose.

This still raises the question as to whether a purpose was sufficiently usual so that it was implied under the circumstances. With digital content it will rarely be possible to make use of it in a way that it is not usually used for. Usually, purposes of digital products are determined by their nature,[126] so that these purposes for which consumers buy digital content typically concur with the purposes they were developed for.[127] Therefore, consumer cases will be more concerned with the 'degree of usualness' rather than the purpose itself. The above example falls within that category, as it is not contended that it should support music file management (which is clearly does) but the degree to which it should, is uncertain.

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[126] cf. *Preist v Last* (n 120).

[127] What is very limited in B2C contracts, could be of much more significance in a B2B context. However, there are yet no statutory regulations on digital content in B2B context. The courts could decide to adopt an approach similar to Chapter 3 CRA by analogy, but alternatively it would be possible to argue for a different approach because, if the legislator wanted to same law to be applicable for B2B contracts, they would have designed similar provisions for such situations.

Remedies

For a long time, the remedies available to an injured party, were determined by the statutory classification of the breached term as conditions or warranties, although this over-simplification was relieved somewhat by the insertion of s.15A into the Sale of Goods Act 1979. However, under the Consumer Rights Act, there has been a move to reduce reliance on such classification and a greater focus on the provision of specific remedies tailored to the particular characteristics of the product addressed under each Chapter, i.e. goods, digital content, services, and to those issues arising in relation to them. This provides some relief from a very technical approach to the availability of remedies, in a context in which legal technicality should be restrained i.e. where consumers are involved.

Setting out specific remedies for digital content, goes further than doing away with the old technicalities of the conditions / warranties dichotomy. It has allowed the Law Commissions to try to tailor the remedies which should be present in relation to contracts for the supply of digital content. The Law Commissions decided to omit certain remedies, which are present in relation to other types of contract under the CRA, in relation to digital content and set out new ones which they viewed as more appropriate, so that each Chapter of the Act directly provides its own set of remedies. These remedies will be examined at a later point with particular focus on their effectiveness and how consumers can access them.

General remedies

In case of non-compliance of digital content with the terms implied by ss.34 – 36 CRA,[128] there is generally the right to repair or replacement under s.43 CRA or the right to a price reduction under s.44 CRA. However, only 'repair or replacement' are primary remedies and a price reduction will only become exercisable, if the consumer can require neither repair nor replacement, as both are impossible and disproportionate,[129] or if the trader failed to repair or replace, whichever was required by the consumer, the product within a reasonable time. What constitutes a 'reasonable time' has to be determined by the nature of the digital content and the purpose for which it was obtained.[130]

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[128] CRA, s.42(1).
[129] CRA, ss.43(3) and (4); see also ‘Consumer Rights Act 2015 - Explanatory Notes’ (n 31) 212.
[130] CRA, s.43(5).

Where the consumer requires repair, the trader is given a reasonable time frame to '*bringing the digital content into conformity with the contract*' which can often be done by applying an update to the product.[131] However, where this is not possible, the trader might need to find other ways of repairing it. He or she could, for instance, send out an employee who, at the consumer's home, fixes the issue, but such a time-consuming and expensive undertaking can unlikely be demanded and would probably be disproportionate. Easier would be to establish a remote connection to the consumer's device, where an employee could take control to repair the product. However, the proposed Digital Content Directive reminds us that, on grounds relating to the consumer's privacy, intrusive measures like 'virtual access' should only be used in 'exceptional and duly justified circumstances'.[132] Regardless of whether the UK adopts the Directive after Brexit, the protection of private life is likely to remain relevant.

There is, however, a noticeable difference to the right to repair in relation to goods. After a single failed attempt to repair goods, consumers can exercise their right to a price reduction,[133] whereas no strict limit exists for digital content. The Law Commissions decided not to limit the number of repairs, as this would give an incentive for consumers to report minuscule defects to '*accumulate a target number of "repairs" and thus proceed to a price reduction*'.[134] However, this does not mean that traders are granted an unlimited number of repairs. They are required to remedy breaches without 'significant inconvenience'. This emphasises the point that traders should not simply resort to a solution convenient for them, such as virtual access,[135] but have to consider a solution that causes as little disruption as possible for the consumer. This depends on the complexity of the digital content, so that a music file can quickly be re-delivered whereas a sophisticated piece of software might require more careful planning by the provider to develop a solution. If the trader fails to quickly make a simple product, such as a music file, conform to the contract, this might cause 'significant inconvenience' already after a single attempt.[136]

At any time, the consumer may seek other remedies, such as damages, instead of or in addition to the remedies provided under ss.43 and 44 CRA, '*but not so as to recover twice for the same loss*'.[137] Lastly, it should be mentioned that only where the

[131] 'Consumer Rights Act 2015 - Explanatory Notes' (n 31) 211.
[132] pDCD, Recital 33.
[133] CRA, s.24(5)(a); 'Consumer Rights Act 2015 - Explanatory Notes' (n 31) 136.
[134] 'Consumer Rights Act 2015 - Explanatory Notes' (n 31) 204.
[135] See pDCD, Recital 33.
[136] 'Consumer Rights Act 2015 - Explanatory Notes' (n 31) 204.
[137] CRA, s.42(6).

trader is in breach of s.41 CRA as he or she did not have the right to supply the digital content, the consumer has the right to a refund, i.e. to receive back the price. The amount may however be limited to part of the price, if that breach only affected part of what needed to be supplied under the contract. In this case, s.45(2) CRA explains that only that portion of digital content is to be refunded.[138]

Finally, the Consumer Rights Act 2015 does not allow rejection of digital content, although rejection of goods has always been a major weapon in the armoury of the buyer of goods; arguably even too much, so in commercial contracts, when all the statutory implied terms about the quality of goods, or their correspondence with description were labelled as conditions, thus automatically giving the right to reject on them being breached, no matter how trivial the breach. This approach was taken because, as the Department for Business, Innovation and Skills stated, '*digital content cannot be returned in any meaningful sense*'.[139] In fact, the CRA expressly states that '*[i]t is not open to the consumer to treat the contract as at an end for breach of a term [covered by this Chapter 3]*',[140] and therefore necessitates reliance on the other remedies. In fact, besides the 'general' remedies that have been discussed, the CRA also includes another remedy specifically for digital content, namely a 'remedy for damage to device or to other digital content'. This and other issues relating to 'consumer surplus' and 'liability for damage during transit', which are particular to digital content, will be looked at below.

External Damage

One of the specific remedies that the CRA sets out under contracts for the supply of digital content is a contractual remedy for damage caused by digital content to external devices and other digital content. Defective digital content can cause significant damage to hardware or other digital content. Hardware can suffer physical damage, and other digital content can be corrupted or destroyed. This remedy is not available for any other types of consumer contracts but there is a developed doctrine of 'product liability' under tort law in relation to goods and services. Now, s.46 CRA provides a remedy to consumers who suffered damage to hardware and other digital content caused by digital content. However, this new rule might exhibit certain weaknesses which, if not dealt with, could prevent consumers

[138] 'Consumer Rights Act 2015 - Explanatory Notes' (n 31) 217.
[139] 'Consumer Rights Act 2015 - Explanatory Notes' (n 31) 205.
[140] CRA, s.42(8).

from relying on it. Consideration must be given to those weaknesses, and we should start by looking at its scope as determined by s.46(1) CRA:

> 'This section applies if—
> (1) the trader supplies digital content to the consumer under a contract,
> (2) the digital content causes damage to a device or to other digital content,
> (3) the device or digital content that is damaged belongs to the consumer, and
> (4) the damage is of a kind that would not have occurred if the trader had exercised reasonable care and skill.'

Aspects that need closer examination are the provision of digital content on a contractual basis, the interpretation of reasonable care and skill and causation and damage caused to an item not belonging to the consumer.

Supply under a Contract

Section 46(1)(a) CRA makes it clear that the content has to be provided under a contract. This statement does not relate only to contracts for digital content but extends to all types of contracts under which such content is supplied. The guidance provided by the Department of Business, Innovation and Skills indicates that, unlike under s.33 CRA, this section also encompasses digital content which has not been 'paid for with money' but was free '*as long as it is provided pursuant to a contract*'.[141] Of course, for it to be provided 'under a contract', consideration is required[142] and therefore does not encompass digital content which is truly 'free'. What would seem to be covered is digital content provided without money being paid, but where the consumer provides some other form of consideration such as personal data, the requirement under s.46(1)(a) CRA will equally be satisfied. There are other common scenarios, for instance, 'freeware' providers require the consumer to undertake obligations, such as reporting back on software defects (especially during beta releases) or informing the trader about possible copyright infringements of content. Undertaking such burdens would satisfy the requirement for consideration for s.46(1)(a) CRA, a development which has been recognised by the European Commission who accommodated 'counter-performance other than money' in their proposal for a Directive on certain aspects concerning contracts for the supply of digital content.[143]

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[141] 'Consumer Rights Act 2015 - Explanatory Notes' (n 31) 219.
[142] Unless executed by deed. See Macdonald and Atkins (n 89) 4.2.
[143] pDCD, art.6.2.

Arguably, a contract might also exist where the consumer, in return for digital content, agrees, for example, to forego the right to claim damages under s.46 CRA.[144] Unlike ss.34-36 CRA, s.46 CRA is not mandatory and can be excluded or restricted.[145] The only statutory limitation imposed is that any notice to exempt liability must still be fair under s.62 CRA.[146] While an exemption clause that is 'unfair' cannot bind the consumer, if the exemption was fair, it would bind the consumer and be a 'detriment' under the doctrine of consideration. Traders would need to be careful when designing a clause exempting liability under s.46 CRA because, if phrased without due attention the clause could subject the trader to liabilities greater than what it intends to exempt.

An alternative way of finding a contract, for the purposes of s.46(1) CRA might be suggested to be the interpretation of an end-user license as a contract. The Bradgate Report suggests that licenses constitute unilateral contracts or unilateral offers which the consumer can accept or decline.[147] However, a license is exclusively the grant of a right to undertake an otherwise restricted act. Licenses are usually expressly or impliedly provided alongside a contract. These contracts can also be called license agreements which has potentially led to a confusion of the two instruments. Examining the nature of a license quickly reveals that it is not the license but the agreement which is contractual which, however, still needs to be, and usually is, supported by consideration.

There are certainly situations where a buyer undertakes obligations in exchange for a license, but contractual exchange is the crucial element, and that is lacking in a mere license. Truly free digital content is provided under a non-contractual license which allows its use without any consideration being supplied, and it would be impossible to conclude that it is covered by s.46 CRA. That exclusion does not, however, seem troubling. Even though s.46(1) CRA requires a lack of care and skill by the trader, what is being dealt with is essentially liability in relation to something which was provided under a contract. It does not seem inappropriate that without the presence of some consideration, and a contract, the issue of damage to hardware, or other digital content, should be left to tort.

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144 Sir Percy H Winfield (ed), *Pollock's Principles of Contract* (13th edn, Stevens & Sons 1950) 133.
145 See CRA, s.47.
146 CRA, s.47(6).
147 Bradgate (n 6) 94.

Causation and Duty of Care and Skill

The next significant aspect, which traders might want to invoke, is the obvious requirement of causation.[148] The concept of 'causation' is typically found in tort law which the Act seems to apply. In the view of the Department of Business, Innovation and Skills, this is 'but for' causation, i.e. that the damage would not have occurred 'but for' the other party's negligent act.[149] When the product is digital content, which is software, in particular, this might cause difficulties for consumers, since computer systems are generally very complex.[150] This complexity is best understood when looking at timing and unequivocal attribution. First, the damage caused by using a faulty digital product might not result in a consequence which is immediately discernible. The product might have caused damage to an image saved on the device, but such damage will only become obvious when the consumer tries to display it. Such an attempt could occur instantly, or it might not take place until months or even years had passed. Unless the effect is instantly perceivable, the consumer will not be able to draw a safe conclusion, more likely he or she will not even be able to make a connection between the incident, if perceived at all, and the damage, and all that can be established at that point is the fact that the file is damaged. The situation is likely to be less difficult in relation to hardware damage, because a fault often results in the device shutting down and no longer working, or no longer working as it did before.

The other aspect of causation concerns attribution of an effect to a particular cause. Nowadays, especially, electronic devices run multiple processes at once, many of them in the background, invisible to the user. If the consumer notices damage to other digital content or hardware directly when it occurs, it might still be difficult to identify the process or application that has caused it. Even in cases where, for example the click on a button in an application, seems to have caused said damage, most consumers lack the knowledge to establish such link satisfactorily, and it would be nothing more than a strong indication.

Further, to succeed in a claim the consumer has to show that the damage is of a kind which would not have occurred if the trader had 'exercised reasonable care and skill'.[151] Against the background of the complexity of systems and the possible gap between the consumer's triggering actions and discovery of the damage by the

[148] Section 46(1)(b) CRA.
[149] 'Consumer Rights Act 2015 - Explanatory Notes' (n 31) 220.
[150] cf. Jens Krebs, ''Twixt Cup and Lip: Liability of Traders under Consumer Contracts for Digital Content Damaged in Transit' [2017] JBL 376, 385.
[151] Catherine Elliott and Frances Quinn, *Tort Law* (10th edn, Pearson 2015) 119.

consumer, he or she will rarely be in the position to show the requisite negligence. Clearly a balance is needed between the consumer's rights and the liability of the trader for damage to devices or other digital content, but it is not clear that concepts so wholly derived from the pre-digital content world adequately provide it, without further contextual adaptation.

It is therefore worth considering whether a different test can be found which better balances the interests of consumers and traders. The need for adaptation of causation tests where there are particular complexities is not unknown. Consideration can be given to the approach taken in a series of cases in tort concerned with mesothelioma. The most famous case, *Fairchild v Glenhaven Funeral Services Ltd*[152] dealt with employees who, throughout their employment with different employers, had been negligently exposed to asbestos which, when inhaled, carries a chance of provoking the fatal disease - mesothelioma. An important factor was that each single exposure was potentially enough to bring about the disease, due to inhalation of a dangerous fibre, but which would manifest at some future time. At that point, it was impossible to tell which exposure under which employer was the trigger. This evidential gap made the House of Lords deviate from the traditional 'but for' test.

> '[I]t could not be held that [the claimant] had proved against [employer A] that his mesothelioma would probably not have occurred but for the breach of duty by [employer A], nor against [employer B] that his mesothelioma would probably not have occurred but for the breach of duty by [employer B], nor against [employer A] and [employer B] that his mesothelioma would probably not have occurred but for the breach of duty by both [employer A] and [employer B] together.'[153]

Although *Fairchild* deals with a very specific issue in a narrow area of law, the issue in relation to the evidential gap has some elements which are comparable to a scenario involving s.46 CRA and digital content. A consumer suffers damage which is caused by the negligence of the trader, the result of which typically becomes apparent at a later point in time when it is impossible for the consumer to attribute it to a certain product or act.

In *Fairchild,* their Lordships devised a more relaxed test to establish causation, based on the increased risk of contracting the disease. Both employers were in breach of duty (i.e. not to expose their employees to a known health risk) which led to a substantial increase of risk of contracting it. This was sufficient for Lord

[152] (2003) 1 AC 32.
[153] *Fairchild v Glenhaven Funeral Services Ltd* (n 152) [2] per Lord Bingham.

Nicholls to establish causation in relation to both employers,[154] and for the House of Lords to opt for joint and several liability so that the injured party can sue any of the defendants in breach who in turn have to compensate for the full amount. The policy behind this was justified by Lord Nicholls as he explained:

> 'The unattractive consequence, that one of the [defendants] will be held liable for an injury he did not in fact inflict, is outweighed by the even less attractive alternative, that the [injured party] should receive no recompense even though one of the negligent [defendants] injured him.'[155]

This would provide a means of dealing with the problem of traders who supplied software which might have been the cause of the relevant damage, but it still leaves the problem for the consumer of establishing that the relevant traders were negligent in relation to the digital content. It would seem to go too far in altering the balance between consumer and trader where traders had to disprove their negligence. Indeed, it could well be regarded as going too far to extend even the approach taken in the mesothelioma cases, to the situation of damage deriving from digital content. The level of harm caused by the established negligence of at least one of a number of defendants, all of whom had been proven to be negligent in a way which would lead to such great harm, may have provided the background to acceptability of the change in the balance between tortfeasor and victim in that case.

Personal Belongings

Section 46(1)(c) CRA limits the award of compensation for external damage to content and hardware that 'belongs to the consumer'. However, as will be shown below, it may not be the consumer him- or herself who suffered the damage but a family member or friend. There are different ways of understanding this phrase and depending on the accepted interpretation the scope of the protection might vary significantly. The issue needs further exploration as neither the Consumer Rights Act 2015 nor the explanatory notes give an indication as to the correct meaning. Analysing the phrase literally, Black's Law Dictionary states that 'belonging to' connotes '*a person has legal ownership of something*'.[156] Applying the principle of ownership to hardware is easy and coherent with the basic principle in tort law.[157] It means that the consumer can sue under the contract if his or her property suffered

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[154] *Fairchild v Glenhaven Funeral Services Ltd* (2003) 1 AC 32 [42].
[155] *Fairchild v Glenhaven Funeral Services Ltd* (n 154) [39].
[156] 'Black's Law Dictionary Online' (*The Law Dictionary*, 25 July 2014) <http://thelawdictionary.org/belonging-to/> accessed 25 July 2014.
[157] cf. *Stennett v Hancock and Peters* (1939) 2 All ER 578.

damage, but damage to property owned by a third party will only be recoverable under a claim for negligence.[158]

However, applying this concept to digital content, or data, is more complex. What the drafters might have had in mind when phrasing the section was to cover data files like pictures or text documents which could, in the widest sense, be said to 'belong' to the consumer. Actually, the consumer holds the copyrights in the works (rather than ownership).[159] Copyrights are in many ways an image of ownership rights in terms of their absoluteness and exclusive nature;[160] therefore, it could be argued that they are the digital counterpart. The other part of digital content which can be damaged is of the kind to which the consumer does not hold copyright, for example music or video files. Clearly, the consumer does not own the material but merely a license to operate the content. It seems, however, plausible that damage to such content is also intended to be recoverable under the section. Since a narrow definition of 'belong' does not accommodate those products, a relaxed definition should be applied to also cover digital content, whose copyrights are with a third party, but which 'belongs' to the consumer by virtue of a license. It could be argued that existence of a provider's, or trader's, license to operate the product would entitle consumer to make a claim as damage to the digital content results in the license being unusable.

Further, it might be possible to refer to another area of law which has developed a less rigid definition. Section 5(1) Theft Act 1968 explains that 'belonging to' relates to '*any person having possession or control [...], or having [...] any proprietary right or interest*'. It could encompass the entirety of digital content 'belonging' to the consumer but must be understood to be applicable only to digital content. Even then, it would require limitations because as it stands it would be wide enough to include digital content owned by third parties which, however, might be advantageous in cases where family members' or friends' contents are damaged.

For that reason, the scope of 'consumer' needs further elucidation as damage might also be caused to digital content or hardware components which do not belong to the consumer. Consider the following scenario:

> In a consumer household a single electronic device, such as a computer, is shared between all family members, all of which store their contents (videos, music, pictures, data) on it. Furthermore, that consumer brings home other digital content transported

[158] See *Donoghue v Stevenson* [1932] AC 562.
[159] Copyright, Designs and Patents Act 1988, s.11(1).
[160] On copyrights see Michael Bridge and others, *The Law of Personal Property* (1st edn, Sweet & Maxwell 2013) para 2-025(1).

> via a USB storage device borrowed from a friend who also keeps contents stored on it. The malfunctioning of a digital product, then, causes damage or deletes files at random affecting some of the consumer, family members and those on the USB storage device.

A question arises as to the extent to which any of the injured parties can make a claim against the trader under s.46 CRA. The Consumer Rights Act defines a 'consumer' as '*an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession*'.[161] This is the well-known definition used by other statutes and previous cases, and the main focus is on drawing a line between a 'private' individual and a business.[162] However, under s.46 CRA, in particular, the use of word 'consumer' is capable of not merely making that distinction, but also differentiating between the individual who is party to the contract for the supply of the digital product in question and other individuals. *Prima facie*, the term solely relates to the buyer of the product, but as the above scenario shows, this might leave other injured persons exposed.

However, the main problem with widening the scope, and allowing other individuals, such as household members, to make a claim under s.46 CRA, seems to be the limitation imposed by the doctrine of privity of contract which only allows the parties to a contract to make a claim under it.[163] Although s.46 CRA is somewhat independent from the rest of Chapter 3, it still requires the existence of a contract,[164] subjecting it to this doctrine. This will bar claims by any person who is not the purchaser, at least, under the contract. Certainly, individuals may wish to make a claim against the producer for 'negligence' in tort, but such an action carries with it a number of complications, such as proving a duty of care and its breach, and is outside the focus of this thesis. The other possible action might relate to product liability under the Consumer Protection Act 1987 (CPA). Such a claim can be brought by the buyer or any other person (who suffered damage) against the producer[165] of the product.[166] There are, however, some drawbacks: the pursuer has to have suffered damage and he or she must be able to prove that the damage was caused by the defective product. Pursuers will face the same difficulties proving

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[161] Section 2(2) CRA.

[162] For example *R&B Customs Brokers Co Ltd v United Dominions Trust Ltd* (1988) 1 All ER 847.

[163] In their report, the Law Commission provided a narrow exception to the rule where a product is bought as a gift for a third party and the seller, being aware of this, promises to confer the benefit of the contract onto that third party (see 'Privity of Contract: Contracts for the Benefit of Third Parties' (Law Commission 1996) No. 242, Cm. 3329 para 7.41).

[164] CRA, s.46(1).

[165] Section 2(2) CPA lists, beside the producer, any person who, by putting his name on the product, has held himself out to be the producer as well as any person who has imported the product into a Member State of the European Union.

[166] Twigg-Flesner, Canavan and MacQueen (n 1) 540.

causation and there are other elements required by the Act which might make recovery more difficult, or even impossible.

The scope for claims under the CPA must be looked at, and s.5 CPA, '*damage means death or personal injury or any loss of or damage to any property (including land)*'. This definition suitably covers any hardware, but 'property' seems to point to tangible goods, potentially excluding cover of intangibles, such as digital content, in which case it will not be possible to utilise the CPA if what was damaged, or lost, was digital content. Even if the definition of 'property' was extended to digital content, we would return to the problem of most digital content not owned by, but only licensed to, the consumer, still falling outside the scope. For all property that is covered, be it hardware or digital content owned by the pursuer, s.5(4) CPA preclude success of claims where the amount awarded does not exceed £275. With regard to hardware, there are, of course, components which exceed that value, but this will be the minority. More importantly, establishing the value of digital content, particularly of a digital piece of art which no longer exists as it was damaged or deleted, will be problematic and in almost all cases below the threshold.[167] Considering those limitations, if there is scope for claims at all, it will only be available in individual cases.

It seems that, even though digital content can easily cause damage to devices and other digital content that does not belong to the consumer, only the consumer will be able to utilise s.46 CRA, and recover for any damage cause by it.

Consumer Surplus

Origin of the Doctrine

Contract law aims to provide appropriate compensation when a contract has been breached, and the amount awarded usually matches the economic loss suffered by the damage. In the 90s, cases emerged with claims for compensation for non-pecuniary losses. This term has developed to include, *inter alia*, mental distress, disappointment, and loss of amenity, and this is what we are is considered here. One aspect of the significant modern case law stems from *Watts v Morrow*[168] which was

[167] The value of digital art that is used commercially will be significantly higher, but both, the Consumer Rights Act and the Consumer Protection Act, obviously, deal exclusively with cases that fall outside the commercial realm.

[168] (1991) 4 All ER 937.

subsequently extended by *Farley v Skinner*.[169] From *Watts v Morrow*, such losses were seen as recoverable '*[w]here the very object of a contract [was] to provide pleasure, relaxation, peace of mind or freedom from molestation*'.[170] Farley relaxed this limitation, so that it is sufficient if enjoyment or relaxation are a major or important part of the contract.

However, the courts had also developed a different line of case law which is relevant here. In *Ruxley Electronics and Construction Ltd v Forsyth*,[171] the contract was for the construction of a pool of a certain depth. The plaintiff builders built a pool but it was not of the required depth. The actual depth constructed did, however, exceed the minimum depth for the pool to be safe to dive into and there was no difference between the economic worth of the pool as constructed, and as it would have been had it met the contract specification, so that no economic damage had occurred. Unfortunately, the extra depth had been specified to make it a pool which the defendant would feel safe diving into. The courts acknowledged that the builders were in breach of contract and the defendant was deprived of a part of the enjoyment the pool was intended to provide, i.e. a pool which he would feel safe to dive into. Two potential financial analyses of the situation were contested. The difference between the economic value of pool as built and as contracted for, which was nil. The cost of curing the defect in the pool, which would have required it to be removed, deepened, and constructed again. If either of these measures of financial loss were followed, the court took the view that Mr Forsyth would be wrongly compensated. He was viewed as being under-compensated by the first approach as he would receive nothing, even though he had lost some enjoyment, and over-compensated by the second. The other possibility was to move away from sticking to a loss derived purely from some financial measure, and to seek to directly compensate for the loss of enjoyment. The trial judge gave judgement for the plaintiffs for the outstanding balance to be paid, but awarded the defendant the sum of £2,500 for the loss of enjoyment. On appeal, Lord Bridge, in the House of Lords, took the line that this was appropriate where the buyer has lost something in terms of convenience or aesthetic satisfaction, which is not reflected in the difference in economic worth of what is provided, and cost of cure is so high that it would be unreasonable to incur it.[172]

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[169] (2002) 2 AC 732.
[170] *R&B Customs Brokers Co Ltd v United Dominions Trust Ltd* (n 162) per Bingham LJ.
[171] (1995) 3 All ER 268.
[172] *Ruxley Electronics and Construction Ltd v Forsyth* (n 171).

It cannot be said that either of the approaches to non-financial losses, which are basically losses of enjoyment is entirely clear, or entirely straightforward. There has been an underlying concern in the courts that awarding damages in relation to such non-financial losses, will be too large (there being no financial measure to confine them) and that the floodgates will open so that even basically commercial claims would have such a non-financial element added. However, when such awards have been made, they have been generally modest,[173] and the floodgates argument is not persuasive. Consumers do not generally litigate, and commercial parties would find it difficult to argue that a basically commercial transaction led to sufficient disappointment. In the commercial context, any such disappointment will generally be short lived, because of the duty to mitigate.[174]

However, what needs to be considered here is basically the loss of enjoyment, or the distress caused, by damage to digital content. The destruction of generic music files or content which can be replaced easily would only allow for compensation amounting to the cost of replacement. There is generally no difficulty in relation to such losses. The issue lies with digital content, or data, which is irreplaceable are, such as, files containing musical or artistic data that was composed by the consumer.[175] A conceivable scenario would be:

> A consumer buys a software product which offers improvement of the system performance by reorganising the registry and hard drive. Once the user executes the software it erases various personal files (which include musical compositions and digital paintings created by the user) from the hard drive beyond repair.

This type of scenario does not involve the difficulties of causation which were discussed above. What requires consideration are issues of remoteness and mitigation.

Remoteness of Damage

The next point that has to be considered is whether consumers can make a claim for damages for the loss of enjoyment under a contract for the supply of digital content or whether such losses generally, or some of them, are too remote to be recoverable. The general rule on remoteness comes from the case of *Hadley v Baxendale*[176] where Alderson, B. stated that

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[173] *Anglian Windows Limited v Balachandra* [2013] EWCA Civ 172 [7].
[174] Macdonald and Atkins (n 89) 20.111.
[175] Bradgate (n 6) 27.
[176] (1854) 156 ER 145.

> 'the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it'.[177]

The test divides recoverable losses into those which would arise naturally and those that have been within the reasonable contemplation of the parties at the time the contract was made. This general approach had been used exclusively, until in 2008, the House of Lords introduced another test in *Transfield Shipping Inc v Mercator Shipping Inc; The Achilleas*,[178] looking at whether the party reasonably assumed responsibility for some, or all, of the reasonably contemplatable losses,[179] caused confusion. This confusion was somewhat alleviated by the judgement of Hamblen J in *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd (The Sylvia)*.[180] Hamblen J significantly reduced the applicability of the approach in *The Achilleas* and explained:

> In the great majority of cases it will not be necessary specifically to address the issue of assumption of responsibility. Usually the fact that the type of loss arises in the ordinary course of things or out of special known circumstances will carry with it the necessary assumption of responsibility.[181]

Only in the minority of cases where the traditional approach does not yield satisfactory results and '*the application of the general test leads or may lead to an unquantifiable, unpredictable, uncontrollable or disproportionate liability*',[182] it will be necessary to look at both approaches.

Under *Hadley v Baxendale*, losses will only be recoverable if they arise naturally or are within the reasonable contemplation of the parties, and for losses to arise naturally, there must, at the time of contracting, be a 'serious possibility', 'real danger' or 'very substantial probability' of their occurrence.[183] Considering that the consequences of defects of digital content, and particularly software, are generally, due to the complexity of the devices, are unpredictable, it is unlikely that the loss of a randomly deleted file would 'arise naturally' as consequence of a breach. A similar problem arises when trying to argue that such losses are 'within the reasonable contemplation of the parties'. In *Hadley v Baxendale*, as well as in the case of *Victory*

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177 *Hadley v Baxendale* (n 176) 151.
178 [2008] UKHL 48.
179 Macdonald and Atkins (n 89) 20.33.
180 [2010] EWHC 542 (Comm).
181 *The Sylvia* (n 180) [41].
182 *The Sylvia* (n 180) [40].
183 *Koufos v Czarnikow Ltd (The Heron II)* (1969) 1 AC 350, 414–415; see also Ewan McKendrick, *Contract Law* (12th edn, Palgrave 2017) 389.

Laundry (Windsor) Ltd v Newman Industries Ltd,[184] the courts were unable to award damaged for all losses that were claimed because those losses would only have been within the contemplation of the parties, if the claimant had informed the defendant for the possibility of those losses at the time the contract was made. At the time of contracting, it will be very difficult to foresee which losses a breach may cause, particularly since they do not arise naturally. However, Macdonald explains that it is not necessary for the parties to consider possible breaches, but the performance of the contract. It is the conclusion of the reasonable person, in the position of the parties, had they considered the question, that is of interest.[185] In order to establish which losses the reasonable person would consider recoverable, we need to look at the decision in *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd*[186] and the difference between different types and degrees of loss.

In the case, the plaintiffs bought a hopper for storing pignuts. During the installation, the seller forgot to open the ventilator which resulted in the development of mould. This caused an outbreak of an infection, killing 254 pigs. When the plaintiffs claimed for damages, the question arose whether the losses were too remote. When considering *Heron II*, Scarman LJ explained that an important question was '*what is meant by "serious possibility" or its synonyms: is it a reference to the type of consequence which the parties might be supposed to contemplate as possible though unlikely, or must the chance of it happening appear to be likely?*'[187]

He explained:

> 'It does not matter [...] if they thought that the chance of [loss] was slight, or that the odds were against it, provided [the parties] contemplated as a serious possibility the type of consequence, not necessarily the specific consequence, that ensued upon breach'.[188]

Applying this to digital content and a loss of enjoyment where files have been deleted due to a defect, the answer may depend on the intended functioning of the software. When a product never accesses personal files to write or erase data, it would be highly unlikely that data would be compromised, and the reasonable person would place this type of damage outside of what is recoverable. However, in cases where personal data is accessed, it seems plausible that the reasonable person

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184 (1949) 1 All ER 997.
185 Macdonald and Atkins (n 89) 20.38.
186 [1978] QB 791.
187 *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* (n 186) 807.
188 *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* (n 186) 813.

would contemplate that such files might be affected by a defect. This typically happens because the functionality was part of the program and has been executed incorrectly (e.g. wrong data path), and such damage should be recoverable. The matter becomes more difficult, when the damage happens incidentally. This could be the case when a computer program accesses the computer RAM at an incorrect position and modifies the RAM's state which causes a file to become corrupted. It is only possible to foresee an incorrect access of the memory but due to the random state of the module the program could access any part of the RAM and any data could be allocated to that section, making the occurrence of this loss unlikely. However, the type of damage here, is the same as in the previous example where, due to an incorrect data path, files were deleted. The difference is the likelihood, or degree, of its occurrence and, as has been shown in *H Parsons*, this is irrelevant as long as the type of damage is within the parties' contemplation.

It seems therefore possible that losses of that type are recoverable under a contract for the supply of digital content, given that there is a 'serious possibility' that the parties would contemplate that files might be damaged. This will depend on the digital content in question and how it is designed to operate.

Mitigation

In *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* Viscount Haldane L.C. establishes that '*[mitigation] imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach*'.[189] While a backup of private files prior to the installation could be a feasible method of prevention, it must be borne in mind that '*[i]t is not until there has been a breach of contract that there arises a duty on the party not in breach to mitigate damages*'.[190] This means that at the point in time where the user could create a backup, he is under no duty to do so since no breach has occurred.

The relevance of the duty to mitigate here is that if a file, which is damaged, is commercially available, then the consumer would have to replace it, rather than getting damages for being upset because he had lost it, and where this is possible, it seems likely that this is what the consumer would do anyway. In cases where what was damaged is not commercially available, for example, a live recording of a piece performed by an artist in a particular club, it might raise difficult issues of what is

[189] *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* (1912) A.C. 673, 689.
[190] *White and Carter (Councils) Ltd v McGregor* [1962] AC 413, 424.

reasonable to do in mitigation. To music enthusiasts, such a recording may be irreplaceable because of some differences to commercially available, recorded versions, and the question would be whether consumers would have to accept having this replaced with another recording of the same piece by the same artist. Here, it might be argued that the commercial recording might be an acceptable replacement, if supplemented by a sum reflecting the extra enjoyment that is lost as it is only a standard recording. An analogy to the situation in *Ruxley v Forsyth*, where the defendant received compensation for the loss of enjoyment he suffered for not feeling safe when diving into the pool, seems appropriate.

Trader Liability during Transit

Having discussed the specific remedies which consumers enjoy in case of a breach of contract, it is also important to consider the trader's obligation to supply the digital content under the contract and the resulting rights for consumers. Regardless of the type of product, the question of liability arises when the product is damaged in transit. For sales of goods, the trader's liability ceases at the point when risk passes to the buyer, but when considering liability which traders face when supplying digital content, a different approach was adopted in the Consumer Rights Act 2015. Section 39 CRA focuses on the determination of when digital content is supplied, and it is this test which operates as the equivalent of 'passing of risk' in relation to the sale of goods under the Sale of Goods Act 1979 (SGA). Both determine when traders have fulfilled their contractual obligation to supply products of the requisite standard. For the supply of digital content, this occurs if one of two possibilities under s.39(2) CRA is satisfied: when digital content (a) reaches the consumer's device, or (b) when it reaches a 'trader chosen by the consumer' via whose service the content reaches the consumer's device. At first glance the focus seems to be on the supply to the consumer's device. However, the Explanatory Notes make clear that supply to such a 'chosen trader' is, in reality, of much greater importance.[191] 'Chosen trader', as envisaged under (b), includes, for example, the consumer's ISP, which provides the consumer with connectivity to the internet. By that definition the focus completely shifts from (a) to (b) because virtually all transactions, except those between a consumer and their chosen ISP, have to pass the internet service provider (ISP) to reach the consumer's device. Therefore, in most cases traders have fulfilled their

[191] CRA, s.39(2)(b); cf. 'Consumer Rights Act 2015 - Explanatory Notes' (n 31) 192.

obligation before the product has even reached the consumer's modem. Should, however, a situation fall within the scope of (a), the opposite would apply and the consumer would virtually never have to bear the risk of damage during transmission. The Act only offers these two fairly extreme positions both of which need elucidation to reveal to full extent of the situation.

Under a scheme of early fulfilment, i.e. s.39(2)(b) CRA, consumers become responsible for the transmission of the content when it is within the charge of the ISP. The Department for Business, Innovation & Skills (BIS) explained that traders would not have to face liability for events which they cannot control.[192] The reverse conclusion would be that the risk is better placed with the consumer for an event which is, in practical terms, as much beyond their as the trader's control, albeit they have chosen the ISP. In such cases, the consumer may be able to rely on the duty of the ISP under the term implied by s.49 CRA which requires a service contract to be performed with reasonable care and skill. This obligation is mandatory and cannot be excluded by the ISP.[193] However, it is only an obligation to take 'reasonable care and skill', unlike the trader's strict liability in relation to the quality of the digital content, and the only viable option it gives to the consumer is a claim in damages,[194] whereas they are likely to be far happier with a swift re-supply from the trader, and very unlikely to feel able to take action against the ISP.

In fact, an approach to the opposite effect might result in better outcomes. Completing supply, and with it the trader's liability for damage, at a late stage, as under s.39(2)(a) CRA, would be favourable for consumers. They would only have to bear the risk of damage once the digital contents reached their end-user device, and traders would remain liable for any damage until that point. This would mean that traders remained liable for events which are beyond their control, but traders are generally in a stronger position to carry such burden, and re-supplying the product is a low-cost (or very low-cost) remedy which would solve the consumer's problem in many cases. If the problem is persistent, traders might have to find an alternative means of supply (such as a copy on a physical carrier), or try to put pressure on the ISP to resolve the disruption. Eventually, if the problem does originate from a source which is beyond a trader's control, and there is no practicable alternative means of supply, there would be a point at which continuance of the trader's liability, after trying to resend the digital content, might be viewed as unreasonable, but it is

[192] CRA, s.39; 'Consumer Rights Act 2015 - Explanatory Notes' (n 31) 194.
[193] CRA, s.39; 'Consumer Rights Act 2015 - Explanatory Notes' (n 31) 194.
[194] See CRA, s.54(7)(a).

arguably much less so than leaving all the risk on the consumer, once the digital content has reached the consumer's ISP. In any event, in order to allocate the risks fairly, a much more discriminating approach is required.

Possession and ownership

As a starting point, consideration is given to the approaches which the law takes in relation to other types of product, such as goods. In the consumer context, the CRA applies and s.29(2) CRA states that, in relation to consumer contracts, risk passes with physical possession of the goods[195] while, in business transactions, where there is no express agreement to the contrary, the Sale of Goods Act 1979 aligns fulfilment of the obligation to supply with transfer of ownership.[196] There are obvious problems in adapting to the context of digital content any rule which focuses on physical possession moving from one party to another. The lack of physical form where the product is digital has been discussed before and makes it impossible to apply such rule in analogy.[197] It is therefore plain to see that the rule under s.29 CRA is unsuitable when the product in question is digital content.

The focus under the Sale of Goods Act 1979, on the other hand, is on 'ownership' rather than 'possession' and avoids problems associated with physical possession. For business transactions in goods, s.20(1) SGA states that: '*Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer […]*'. Transfer of 'property', in turn, means that '*there will be transferred to him a title to an absolute legal interest in the goods sold [(ownership)]*'.[198] However, therein lies the core difficulty when trying to transpose the traditional rules from the Sale of Goods Act 1979 to the context of digital content. In transactions relating to digital content, acquirers, especially consumers, virtually never obtain an absolute legal title in the product.[199] Ownership commonly remains with the producer, and consumers pay for a licence to exploit the contents in question. Such licences are not 'transferred', but rather come into existence at the time of purchase.

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[195] Section 29(2) CRA reads: '*The goods remain at the trader's risk until they come into the physical possession of (a) the consumer […]*'.

[196] LS Sealy and RJA Hooley, *Commercial Law: Text, Cases, and Materials* (4th edn, Oxford University Press 2009) 70–71.

[197] See p.89; see also Krebs (n 150) 379.

[198] Bridge (n 72) 5-003; also Ewan McKendrick (ed), *Goode on Commercial Law* (4th edn, Penguin Books 2010) 267.

[199] The only exception would be a purchaser who commissioned the development of a particular product. In such a situation it is potentially intended that the developer transfers not only a copy of the content, but the entire source code, a compiled version and all rights attached.

Therefore, neither approach offers a feasible solution which could simply be adopted. There is nevertheless one desirable aspect of the CRA which should be emphasised: s.29 CRA, and s.39 CRA equally, are not at the mercy of the normally superior bargaining power of a commercial seller because, apart from a very few exceptions, the rule is unaffected by express agreement and intention to the contrary. This feature should be carried over to the final rule.

Control over digital content

Next, another alternative approach to dealing with the problem of liability should be considered. In 2011 the European Commission put forward an approach in their Proposed CESL.[200] Article 142.2 addressed the 'passing of risk' in consumer contracts for digital content and stated:

> 'In a contract for the supply of digital content not supplied on a tangible medium, the risk passes at the time when the consumer or a third party designated by the consumer for this purpose has obtained the control of the digital content.'

Just like s.39 CRA, this provision avoids the problematic concepts of 'possession' or 'ownership', yet it adopts a different approach from that of the CRA. Of course, it also raises the question of the meaning of '*a third party designated by the consumer*', and if this phrase is understood also to extend to the consumer's ISP, the approach has the same problems as s.39 CRA.[201] However, this approach would seem to have been intended to require the consumer to actively 'designate' another party who is to receive the digital content (i.e. a true agent for such receipt). Whether or not it is correct, as an interpretation of the proposed art.142.2, it is an approach which provides a useful contrast. It could circumvent those limitations encountered under s.39 CRA and be advantageous to consumers, as the following will show, but it does depend strongly on the notion of 'control'. *Prima facie*, this concept exhibits greater

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[200] The proposal has to be treated with care as it was withdrawn in its entirety on 16 December 2014 owing to the idea of producing a '*[m]odified proposal […] to fully unleash the potential of e-commerce in the Digital Single Market*' (European Commission, 'Commission Work Programme 2015', Annex 2, Item 60). The Commission has since launched a much larger campaign: European Commission, 'Digital Single Market' (28 September 2015) <http://ec.europa.eu/priorities/digital-single-market/> accessed 18 May 2017. As part of this broader work on the Digital Single Market, the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content (n 33) has been brought forward. Nevertheless, the potential of what was proposed in CESL as a model should still be considered.

[201] The proposed Digital Content Directive mirrors s.39 CRA in its impact (see art.5 and Recital 23). It could be questioned as to whether this is a reaction to the approach taken to 'control' by Blázquez (see text below), under which two extreme positions, but this time favouring the consumer, in relation to the point of liability of the trader would again have been generated. The suggestion being made here is for a much more discriminating approach, more appropriately dividing the burden of damage in transit between trader and consumer.

similarities to the pragmatic concept of possession than the more esoteric concept of ownership, and might be seen to reflect the reasonable expectations of consumers. Furthermore, it was designed to be '*mandatory in nature; which means that the parties may not, to the detriment of the consumer, exclude its application or derogate from or vary its effects*'.[202] Thus, it should not be subject to change through the greater bargaining power of the trader which has been identified as an important feature.

Blázquez has considered the concept of 'control', explaining his views by reference to the idea of 'full control'. In this case, consumers would take 'control' of the product once it has reached a location where it would reasonably be used as intended by the consumer. In other words, even though digital content could potentially be manipulated within the consumer's network while in transit, this would locate 'control' on the consumer's end-user device. Only when the intact product arrived at such a device would the trader be released from their obligation to supply. Blázquez asserts that art.142.2 CESL aims to achieve this and the correct interpretation of the provision would be that '*risk is [only] borne by the consumer when he has obtained full control of the digital content*'.[203] Of course, 'full control', as suggested by Blázquez, would be identical to the position under s.39(2)(a) CRA and suffer from the same weaknesses. Placing liability on the trader for the entire transfer is certainly not ideal but would be better than placing the entire burden on the consumer at a much too early stage; but 'control' need not be treated in this way. A much more discriminating approach could be taken to it.

First, consumers could be regarded as in control of the content once it has passed the home router (or modem),[204] which would mean that consumers have to bear the risk of any interference within their internal network, but this should also be seen as too blanket an approach, and heed has to be paid to the possible complications which may arise once the digital content has passed the consumer's modem in order to address the point at which risk should lie at the consumer's door.

Along the way from the modem to the point where the content is accessible, a multitude of events can occur which might compromise the product. Consumers might, for instance, utilise demilitarised zones (DMZ) or proxy servers, technical

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[202] Francisco Oliva Blázquez, 'Passing of Risk' in Javier Plaza Penadés and Luz M Martínez Velencoso (eds), *European Perspectives on the Common European Sales Law* (1st edn, Springer 2014) 201.

[203] Blázquez (n 202) 201.

[204] Most domestic networks will now use a router with an integrated modem to connect their devices to the internet. Yet the modem must be understood to be the interface between the two spheres.

facilities which perform security tasks within a private network. Much more common are anti-virus scanners and software firewalls which operate on the consumer's laptop, tablet or phone and, in some cases, are even built into the operating system.[205] The risks in relation to transmission between modem and end-user device are too diverse for a blanket solution thereafter and it needs to be looked at what this should turn upon.

An event-based approach might be more appropriate, where 'control' over digital content depends on the component of the consumer's system which causes the damage. It is contended that we should look at what can be technologically expected of the 'average consumer' to distinguish these events, and determine where risk should lie in relation to them. The average consumer will normally employ certain components for the reasonable protection of his or her private network, such as firewalls and anti-virus scanners;[206] other components are implemented as a more particular choice of the individual consumer, in the form of more advanced technology to enhance the security of their private network, the use of which exceeds the knowledge and abilities of the average consumer. If not carefully set up, such means carry an increased chance of damage to otherwise flawless content. The components typically falling within this group are DMZs and proxy servers. Generally, consumers who decide to enhance their network protection beyond the average consumer's standard are aware of the technical risks involved and proceed in contemplation of them. Thus, a distinction could be drawn, making traders not liable for damage arising from such components, but relieving consumers of bearing the risk of interfering events which are caused by components that the average consumer would employ. The view can be taken that traders are aware of the use of anti-virus scanners and firewalls, and their products should be developed to a standard that would not cause problems with the security components used, knowingly or otherwise, by the average consumer. Of course, not only the type of component, for

[205] Since Microsoft's Windows 10, the Defender software provides an in-built package performing various protection and security tasks (Microsoft, Windows Defender); Microsoft Corporation, 'Windows Firewall' (*windows.microsoft.com*, 28 September 2015) <http://windows.microsoft.com/en-gb/windows-8/windows-firewall-from-start-to-finish> accessed 28 September 2015; Microsoft Corporation, 'Windows Defender' (*windows.microsoft.com*, 28 September 2015) <http://windows.microsoft.com/en-gb/windows/using-defender> accessed 28 September 2015.

[206] Software firewalls and anti-virus applications can be deactivated temporarily or even removed, but it would be unreasonable to set the threshold at such a high level, where consumers need to have in-depth knowledge, especially when it is recommended for the protection of the consumer's data to keep such means active at all times. Furthermore, the supply of digital content can occur in so many different forms (via e-mail, downloads, web access, cloud access, etc.) that the recurring need to deactivate the protective measures would compromise the system's security.

example an anti-virus scanner, but also its quality must be such that the average consumer would employ it, depending upon such factors as price, producer's reputation and, naturally, market share, if the trader is to be liable.

Obligation to re-supply

It has been argued that the point at which liability is likely to pass should depend on the type of event causing the damage, and this should be based on what the components that traders can expect to find on the average consumer's network or device. Regardless of when the product is supplied, it has to be considered whether an obligation to re-supply a digital product which was damaged in previous attempts of supply should continue for a time after that has occurred.

First, such obligation might come from the implied term that digital content should be of 'satisfactory quality'. Besides the various elements that form part of the test under s.34 CRA, such as freedom from security holes as well as freedom from technical flaws and defects,[207] the applied standard also encompass the aspect of durability as part of the product's quality.[208] In relation to goods, in the case of *Lambert v Lewis*,[209] Lord Diplock examined the implied term of what was then 'merchantability' in relation to durability, and came to the conclusion that duties as to 'merchantable quality', as imposed by the Sale of Goods Act 1979, would continue 'for a reasonable time after delivery'.[210] An argument might be encountered that 'durability' imposed a duty for traders to supply a product which would continue to be of satisfactory quality for a reasonable time. It would then cover those incidents affecting digital content after the point when it has been supplied. However, such an argument should be quickly dismissed as durability is only concerned with a problem which was part of the product before the supply, but which simply did not manifest itself until after that point.[211] In the given scenario, on the other hand, damage resulted from a misbehaving component, hardware or software, and is not inherent to the quality of the digital product.

Consideration should thus be given to a more holistic possibility for an obligation to re-supply, also covering cases where a problem occurred after the 'supply' of the

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[207] Helberger and others (n 21) 106.
[208] CRA, s.34(3)(d).
[209] *Lambert v Lewis* (n 101). Lord Diplock's analysis of this case is of particular interest as the agreement was between a trader and a consumer.
[210] *Lambert v Lewis* (n 101) 276; see also Bridge (n 72) 11-057.
[211] cf. *Mash & Murrell Ltd v Joseph I Emanuel Ltd* (1961) 1 WLR 862 (CA).

digital content, but before it reached the device on which the consumer would use it. The significance of licences for the supply of digital content must be addressed.

As was explained before, consumers usually do not purchase the digital content (or the copyright in it) but a licence that permits its use.[212] In online transactions, the licence agreement is commonly presented to the consumer during the contracting process, as click-wrap licence.[213] If the digital content is damaged in transit, then *prima facie* the consumer has a licence but nothing usable under it. The existence of such a licence gives rise to an argument for an obligation to re-supply. What needs to be looked at is whether, in such circumstances, traders impliedly agreed to re-supply (or make available) the contents after the purchase. In a somewhat different context this type of idea was considered by Jacob J in *Sony Computer Entertainment Inc v Owen*,[214] a case involving digital content provided on a physical carrier. In his judgement, Jacob J explained that

> 'if you got your licence and your [product] would not work, you would still have a licence, but you could not operate your licence'.[215]

The tenor of his statement suggests that there ought to be something in the contract allowing the consumer to make use of this licence. This could be seen as an appropriate situation for an implied term, and one implied in law, as suitable to all contracts of a given type, rather than in fact, i.e. just on the basis of the intention of those particular parties. Implying terms in law requires identification of a type of contract, and here it would seem to be consumer contracts for the supply of digital content. The other requirement for such an implication has been stated as one of 'necessity'.[216] However, as much analysis has shown,[217] and the courts are beginning to recognise,[218] this would be better stated simply as a matter of 'reasonableness, fairness and the balancing of competing policy considerations'.[219] It then becomes a question of whether the consumer should be left with a useless licence, or whether there should be some obligation on the trader to make some attempts to re-supply on the consumer's request.

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[212] Simon Stokes, *Digital Copyright* (4th edn, Hart Publishing Ltd 2014) 140.
[213] See Chapter 2, p.29.
[214] *Sony Computer Entertainment Inc v Owen* [2002] EMLR 742 (Ch D).
[215] *Sony Computer Entertainment Inc. v Owen* (n 214) 748.
[216] *Liverpool City Council v Irwin* (n 86) 44 per Lord Wilberforce.
[217] Peden (n 89) 466–467.
[218] *Crossley v Faithful & Gould Holdings Ltd* (n 92) [36].
[219] Edwin Peel, *Treitel on the Law of Contract* (14th edn, Sweet & Maxwell 2015) para 6-035; Macdonald and Atkins (n 89) 7.43; PS Atiyah and Stephen A Smith, *Atiyah's Introduction to the Law of Contract* (6th edition, Oxford University Press 2005) 161.

Of course, in arguing for such an implied term, it should be asked whether an obligation to re-supply would place an unreasonable burden on traders. There are two factors to be taken into account, which are 'effort' and 'cost'. When considering 'effort', one must look at the period during which the obligation would persist and the number of attempts the trader might have to make. Traders might think it unreasonable for such an obligation to persist over the entire period during which the licence is valid, but consumers who cannot make use of their licence because they never received a working product might expect there to be such an obligation. On the other hand, if, after numerous attempts, the consumer cannot resolve the problem with their system in order to allow a successful supply, a trader might argue they should be regarded as having fulfilled their contractual obligation. It becomes a question of balancing the amount of effort a trader reasonably has to put into attempts to re-supply, against the expectations of the consumer. In many instances, human intervention would not be required at all on the part of the trader. If the digital content is accessible online by the consumer, it could eliminate the need for action by the trader completely. Consumers could request the product from a server numerous times until it eventually reached the end-user device unharmed. This constant availability of digital content obviously also helps in relation to the costs for this 'service'. Unlike goods, digital content can simply be sent, or downloaded, at a negligible cost.

Under an implied term to re-supply, the obligation should be maintained for a reasonable time, but as it can be a low 'effort' and 'cost' obligation, the time frame should be applied generously to enable, at least, the initial operation of the consumer's product licence. Imposing such an obligation, even extensively, does not appear to burden traders in a significant manner, but it might raise concerns of susceptibility to abuse by consumers. However, technological limitations can be imposed to prevent consumers who received their original supply without problems from taking advantage of re-supply to try to obtain a second useable copy. We are familiar with the use of digital rights management (DRM)[220] systems allowing traders to control the use of digital content by limiting or monitoring access, including attempts to duplicate,[221] and the same could be used here. Moreover, products are often 'unlocked' or 'redeemed' on a user account for an online service via which digital content can be accessed for the licence duration. Should consumers

[220] For further analyses on DRM, see Chapter 5, p.204.

[221] Christopher May, *Digital Rights Management: The Problem of Expanding Ownership Rights* (1st edn, Chandos Publishing (Oxford) Limited 2007) 67–69.

then try to acquire a second copy, DRM would restrict access to prevent simultaneous or unauthorised use. The potential for abuse is not a significant argument against the law imposing an obligation to re-supply digital content on traders.

Burden of proof

The final issue regarding the liability of traders, which is considered here, must be addressed and that is in relation to the burden of proof. As is generally the case, especially for the ordinary person, it is difficult to provide evidence of a causal link between technological mishaps and the damage in question. Being unable to establish this link is likely to leave consumers without the possibility of enforcing their rights when traders deny responsibility. In the light of this, the burden of proof should be placed on traders who are, in any event, likely to have superior technological expertise or resources.[222] If damage occurs, the trader should have to show that either the faulty component is one which deviates from the standard of the average consumer, and hence is regarded as within the consumer's 'control', or, at least, that none of the other components in relation to which the trader would be liable, if those components were responsible, has caused the damage. In other words, effectively the trader's liability is presumed, but can be rebutted by identifying the faulty component as one for which the consumer is responsible, such as one not used by the average consumer, or eliminating the components for which the trader is liable, such as one used by the average consumer. The recently proposed Digital Content Directive[223] suggests this approach with regard to the conformity of digital content,[224] which also relates to failure to supply.[225] Of course, there is an issue in relation to the trader having access to the components which are within the consumer's system. The consumer may be unwilling to co-operate with an investigation by the trader or, as is more likely, unable to provide the assistance which the trader needs to do so. Such a scenario is also considered by the proposed Directive.[226] It provides for the burden not to fall on the trader where, after having made 'necessary efforts', the trader cannot obtain the required access to components. The proposed Directive provides guidance as to the extent to which traders are

[222] Proposal for a Directive on certain aspects concerning contracts for the supply of digital content (n 33) (pDCD), Recital 32.
[223] pDCD. See further fnn.2 and 1.
[224] pDCD, art.9.
[225] pDCD, art.10(1).
[226] pDCD, art.10(3) and Recital 32.

required to act. 'Necessary efforts' can be understood to require some form of positive action which must be proportionate to the situation, the product and the method of delivery.[227] As such, it would be reasonable to contact the consumer in order to obtain information about the set-up of the network and its components, but, to safeguard the consumer's privacy, a trader's first response should not be direct remote access to the consumer's device, and Recital 33 states that the consumer '*should cooperate […] in order to allow the [trader] to ascertain the consumer's digital environment*'. Having made those efforts, if the trader shows that all the components which are accessible to the trader, for which they are liable, have not caused the damage, they will not be responsible, unless the consumer provides evidence to the contrary.

Conclusion

Initially, problems of fitting digital content under the existing categories of 'goods' or 'services' were looked at and revealed that, in order to provide a suitable level of protection under contracts for the supply of digital content, a *sui generis* type of contract was needed. This need was met with the introduction of the Consumer Rights Act 2015, Chapter 3 of which now provides rules specific to such contracts. However, particularly the definition of 'digital content' and the requirement of a 'price to be paid' place constraints on what is covered by the Act, and potentially exclude cloud storage contracts and contracts which are paid for by information from the Act's scope. Here, it was suggested that those definitions could be widened to match those under the proposed Digital Content Directive, offering a more contemporary understanding.

In contracts for the supply of digital content, the Consumer Rights Act 2015 implies 'quality' terms relating to the description of the product, satisfactory quality and fitness for particular purpose into such contracts. These terms are similar in design to those in relation to consumer contracts for the sale of goods, and the well-known implied terms of ss.13 – 14 SGA, but ss.34 – 36 CRA take into account the special characteristics of digital content. These sections were looked at and their general application was found to be identical to those in relation to goods.

It was shown, that the implied term on description under s.36 CRA was generally applicable and not only in situations where supply was 'by description'. In this

[227] pDCD, Recital 33.

context, it matches the way in which digital content is typically sold and sensibly adjusted the term on 'description' accordingly. It was also noted that such term cannot be abused by buyers to terminate contracts, where there are insignificant deviations from the description, as the CRA does not provide remedies based on the classification of terms into conditions and warranties.

There are differences in terms of how some of the requirements, for example satisfactory quality, must be interpreted. Particular attention was given to the correct identification of 'usual purpose' which, due to product amalgamation' might require analysis of the purpose of individual functions rather than the product as a whole, that was provided at the time when the contract was made. Similarly, the effect of bugs as 'minor defects' was assessed and, since their general existence is unavoidable in, for example, software products, this needed more careful consideration as to their remedial treatment. It was suggested there be a term in the contract implied in law which requires repair of those bugs within a reasonable time. Failure to do so would be a breach of that implied term.

With regard to implied terms on fitness for particular purposes, it was found that consumers are less likely, and usually unable, to communicate such particular purpose. However, a purpose need not be extraordinary, far-fetched or very limited to be particular, and in situations where traders can be expected to know what the purpose is, usually because the product only has a single purpose, such purposes would be covered as well. On the other hand, where a product has more than one purpose, it was considered which of these purposes would be so obvious to be covered by s.35 CRA. In relation to digital content, products would often only have a single purpose. Here, the problem was that even though the purpose was obvious, it was easy that the intended purpose encompassed an 'unusual degree'. In this situation, it is unavoidable to place some responsibility on the consumer because, due to the large number of extrinsic factors which could impact whether the product is fit for the particular purpose, it will be impossible for traders to include all this information in the description of the product.

The Consumer Rights Act 2015 provides specific remedies for contracts for the supply of digital content. The general structure of the various rights were looked at, before those remedies exclusive under digital content were examined. In case of a breach, consumers have the right to repair or replacement. It was established that, where consumer demands repair, there is no fixed limit on the number of repairs that trader can undertake, before other remedies, such as the right to a price reduction,

become available. However, the acceptable number of repairs is met where further repair would result in 'significant inconvenience'. Consumers have also the option of claiming for damages in addition or instead of other remedies but, of course, cannot recover twice for the same loss. Furthermore, there is no right to reject or return digital content as its nature makes it impossible to do so in a 'meaningful sense'. It could also be said that providing specific remedies, rather than relying on the classification of terms into conditions, warranties and innominate terms makes accessing remedies easier to consumers as they are more likely to understand when a remedy becomes available or exercisable.

When looking at s.46 CRA, covering damage to hardware or other digital content, it could be seen that it provides a more appropriate scope with regard to the contracts it covers, since it is somewhat separated from the other sections and therefore does not have to satisfy the same requirements. Omitting the requirement of 'payment of price' allows contracts for counter performance, other than money, to be covered, and resembles the scope of the proposed Digital Content Directive more closely. While it provides consumers with a right to claim for damages where digital content has caused damage to hardware or other digital content, it was shown that, in reality, consumers might find difficulties in exercising it. The nature of digital content is such that it would be difficult to match cause and effect. In a typical scenario where a consumer discovers damage, it would usually be impossible to determine the cause, or where there are more than one possible causes to prove which one was at fault. In order to reduce this risk, a reversed burden of proof, combined with joint liability across the producers of digital content that reasonably could have caused the damage was suggested. However, it had to be doubted whether a court would even consider it appropriate to apply this test, which was developed for the protection of mesothelioma victims who, without it, would not have had any means of recovery. The scope of s.46 CRA was found to be further limited by the need to interpret 'consumer' narrowly only referring to the individual. Damage that is caused to components of other individuals seemed to be excluded and only recoverable in tort.

Another argument was made that, where consumers purchase digital content, a breach of a term of the contract under which the product was provided could result in 'loss of enjoyment'. Applying the already narrow rules on claims for loss of enjoyment in relation to digital content was somewhat more problematic, due to the unpredictable, and wide-ranging, effects malfunctions can have. The key question, therefore, was to determine when damage is too remote to be recovered. It all

depends on the intended functioning of the product where whether there was a 'serious possibility' of such damage occurring. If damage is covered, the question of 'mitigation' arises. This was found to be of particular importance where artistic contents were damaged or deleted and could not easily be replaced, and in these situations the award of an amount of money reflecting the loss of enjoyment which the consumer suffered seemed appropriate.

Consideration also was given to the possible liability of traders where digital content was damaged in transit. The rules under s.39 CRA are extreme and place all risks on either the trader or the consumer. However, it was shown that, in most cases, this would not be appropriate. A 'control'-based approach was suggested whereby traders would assume the foreseeable risks associated with the transfer of digital content, such as issues with the internet service provider, or the anti-virus software. Consumers, on the other hand, would be responsible for problems that area caused by an unusual hardware setup, including demilitarised zones or proxy servers, in their private network. Where such a component causes a problem, it needed to be examined whether the trader would still be under an obligation to re-supply the product. Without an obligation to make a reasonable effort to re-supply, consumers would often end up with a licence that they cannot use as they never actually received the product which, of course, is undesirable. Digital content can usually be re-supplied at negligible cost and would not burden trader to a significant degree.

Chapter 5:

Consumer Protections and Digital Content

Summary

This Chapter will look at different means of consumer protection and how they fare in relation to digital content. Initially, the regulations on distance selling will be looked at and the current approach will be explained. The focus, here, will be on the provision of pre-contractual information and the right of withdrawal from a contract within a cooling-off period. When the general functioning of those methods is set out, issues in relation to digital content will arise and be considered, and some solutions to improve consumer protection will be made.

The unfair terms regime has provided some protection for consumers against unfair terms since its implementation into national law by the Unfair Terms in Consumer Contracts Regulations 1994. We will look at how regime operates generally under the Consumer Rights Act 2015 before its application to terms that are typical in contracts for the supply of digital content is addressed. In particular, consideration will be given to terms which give traders the right to unilaterally change terms of the contract, and terms relating to the right to change the subject matter. In both cases, such terms might be seen as necessary in contracts for the supply of digital content, but an unfettered right to undertake such changes are likely to be considered unfair under the Act,[1] and the issue of whether, and how, such terms can be included so as to be fair, will be addressed.

Subsequently, the rules on unfair trading practices will be looked at. The scope of the Consumer Protection from Unfair Trading Regulations 2008 will be discussed in general, before the practices which are typically engaged in by traders in relation to

[1] See further, paras. 11 and 13 sch.1 CRA.

the supply of digital content are addressed. The discussion will extend to the measures for private redress for consumers which were introduced in 2014, and public enforcement will be considered.

Finally, the discussion will be brought together, with much of the protection addressed throughout the chapter, the being focussed on the situations where traders provide digital content with a Digital Rights Management component. There are general concerns regarding these components creating additional inequality between the parties which need to be looked at, before it will be considered whether trader should be allowed to gain access to the product on the consumer's device and, if they see fit, undertake changes without the need for permission.

Distance Selling

In the past, sales of goods at a distance raised the difficulty that the buyer could not physically see, or examine, the goods, or assess the business from which they were buying. Plainly there was scope for consumers to be disappointed that the goods did not measure up to their expectations, so what was needed for the consumer was good information before the purchase was made, and a right to change their mind once they had actually seen the goods. Providing rights to information, and the right to withdraw from the transaction, has been the core of the protection which has been afforded to consumers in relation to particular problems of distance sales. The provision of such rights has been central since distance selling regulation made its significant appearance in European instruments in 1997, with the introduction of the Distance Selling Directive (DSD).[2] It required traders to provide consumers with specific pre-contractual information[3] and granted consumers a time within which they could exercise the right to withdraw from distance contracts '*without penalty and without giving any reason*'.[4] The right of withdrawal gave consumers the ability to revoke a contract unilaterally, merely by giving notice to the trader. At the time, this was a great improvement to consumer rights because then, consumers could simply send back the products which did not meet their expectations, without the need for there to be any breach of contract. Furthermore, the requirement for traders to provide certain information about themselves and the contract prior to the

2 Directive 97/7/EC on the protection of consumers in respect of distance contracts 1997 (OJ L144/19).
3 DSD, art.4.
4 DSD, art.6.

conclusion of a distance, or off-premises, contract under art.4 DSD was intended to give consumers the ability to make more informed decisions and to avoid contracts with doubtful traders over products that did not meet the consumer's expectations.

These two essential rights have, in part, been revised to take account of current technological advances, such as the emergence of 'digital content'. Based on EU Directive 2011/83/EU on consumer rights,[5] the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (CRR) cover both of those approaches. The Directive is largely a 'maximum harmonisation' measure, to make trading across the European internal market easier for businesses and consumers, and Recital 19 states that '*[c]ontracts for the supply of digital content should fall within the scope of this Directive*'.[6] For both means of protection that are looked at here, the particular nature of digital content is taken into account, and what has been provided, or might have been better provided, will now be addressed.

Pre-contractual information

Requirements for the provision of pre-contractual information in relation to digital content existed before the Consumer Rights Directive, but the sources were patchy and often only applied to specific types of products or excluded others for no good reason.[7] For example, under Directive 2010/13/EU on the provision of audiovisual media services,[8] providers of audiovisual media services (broadcasters) have to comply with less stringent provisions regarding pre-contractual information,[9] whereas providers of digital content other than audiovisual media services need to comply with similar requirements under art.5 of Directive 2000/31/EC on electronic commerce[10] to which information on commercial communications and electronic contracts is added.[11] Providing audiovisual media in an 'on-demand' format falls within the scope of both Directives.[12] The general requirement for information under the CRD applies to consumer contracts regardless of the type, save in a limited number of cases where more appropriate provisions are already in place.[13] Article 6

5 Directive 2011/83/EU on consumer rights 2011 (OJ L 304/64).
6 CRD, Recital 19.
7 Natali Helberger and others, 'Digital Content Contracts for Consumers' (2013) 36 J Consum Policy 37, 48.
8 Directive 2010/13/EU on the provision of audiovisual media services (OJ L 95/1) (AVMSD).
9 Article 5 AVMSD only lists name, geographical address, contact details for 'rapid contact' by electronic means and, where applicable, the competent regulatory or supervisory bodies.
10 Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ L 178/1) (ECD).
11 See artt.6 and 10 ECD; see also Helberger and others (n 7) 48.
12 See art.1(g) AVMSD and Recital 18 ECD.
13 Article 3(3) CRD provides a list of contracts to which the Directive does not apply.

CRD lists 19 items of information, although not all will be applicable to a particular contract, traders have to supply all of those which are important for the consumer, before he or she becomes bound by the contract. With regard to consumer contracts for the supply of digital content, the Directive obliges traders to provide information about functionality, technological limitations and restrictions via Digital Rights Management (DRM) systems and software and hardware interoperability of which the trader is, or reasonably should be, aware.[14] Of course, with constant, and wide-scale, updating of software and hardware, there will be limitations on what the trader can reasonably be aware of, and thus of the usefulness of the information, from this perspective. All of this information is important for consumers to be able to understand how the product works, and to predict how it will perform on their devices. Increasing the information that is available to consumers is, in theory, an effective means of protecting them from making choices they are likely to regret later. However, a number of issues arise in relation to this.

First, as already noted in Chapter 1,[15] the need for consumer protection rules dealing with the provision of information have partly emerged from an informational imbalance between the parties. However, it is not simply the possession of information which is important, but rather the use which is, or can be, made of it by the average consumer. As the work of social psychologists, and behavioural economists has shown, simply presenting consumers with information does not necessarily deal with a knowledge imbalance.[16] Consumers stop processing information quickly once they feel overwhelmed by it.[17] Thus, even though additional information is available that would help consumers make better choices, there is a limit of what they can generally absorb and process. In fact, the provision of information beyond that point can have a negative impact on consumers contributing to a decline in the amount of information which is given. Complex and technical language and the sheer amount of information that is, and is required to be, given, are the main reasons why consumer cannot, and do not attempt to, understand the information which is provided.[18] Increasing the amount of information, which is

[14] CRA, artt.6(r) and (s).

[15] See Chapter 1, p.17.

[16] Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 J. Law & Soc. 349, 359; see generally Richard H Thaler and Cass Sunstein, *Nudge - Improving Decisions about Health, Wealth and Happiness* (1st edn, Penguin Books 2009).

[17] Annette Nordhausen, 'Information Requirements in the E-Commerce Directive and the Proposed Directive on Unfair Commercial Practices' in Geraint Howells, André Janssen and Reiner Schulze (eds), *Information Rights and Obligations* (1st edn, Ashgate Publishing 2005) 93.

[18] Helberger and others (n 7) 49; see also Yannis Bakos, Florencia Marotta-Wurgler and David R Trossen, 'Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts' (2014) 43 Journal of Legal Studies.

required to be provided, can have a negative impact on the consumer's contractual decision making.

The way in which information is presented, is an important factor in how it is perceived. The Directive only addresses the presentation of information to a limited extent. It states that the required information shall be made available '*in a way appropriate to the means of distance communication used in plain and intelligible language*',[19] but does not take into account issues in relation to the bounded rationality of consumers which impacts greatly on if, and how, any such information is used. Of course, what can be made specific is limited by the great number of different types of communication which have to be dealt with, and falling back on such a vague formula is generally understandable, and 'appropriateness' should mean that it is placed so that it can be seen. Its display might also need to be such that the consumer would recognise it as of some importance, and something done to distinguish it from other terms, or at least those of lesser importance.[20] Consumers presented with less information at a time might be able to absorb the 'important' terms. Any such approach raises the spectre of something akin to the problem of small print, i.e. terms which are actually important being effectively 'hidden' amongst the less conspicuous terms. Where it is terms which are in question, something like the 'red hand rule' might then need to be brought into play so that, where it is incorporation by notice which is in question, an unusual or unreasonable term might not be incorporated without something having been done to make it stand out. This would then raise issues of its comparative prominence to that of the information required by legislation, and the 'appropriateness' of the presentation of that information. The situation might then result in more general requirements of quality, such as those under the statutory implied terms, or the requirement of fairness of terms in consumer contracts, becoming relevant. It is, of course, better for the consumer if they can simply contract for the right product in the first place, and issues about the information, which is most salient to that decision, remain.

Alongside appropriate presentation, it can be suggested that there might be greater benefit for consumers if less information was required to be provided, at least immediately. There are a reduced number of mandatory items which have to be provided where the chosen means of commutation '*allows limited space or time to*

[19] CRD, art.8(1).

[20] Of course, a trader would argue that all the terms are important, but a distinction can be made between primary terms, such as obligations to perform or pay, which will be important in any case and secondary terms, such as terms on alternative dispute resolution, which will only become relevant in a relatively small number of cases.

display the information'.[21] In these cases, traders only have to provide information under items (a), (b), (e), (h) and (o) of art.6(1) CRD.[22] The Recitals identify situations where this is typically the case: with regard to limitations of space, mobile telephone screens and, in relation to time, television sales spots. However, the Directive does not waiver the provision of the complete set of information. Where there are constrains with regard to space of or time, the consumer should then be directed to, for example, a toll free telephone number or a website, via a hyperlink or web address (URL), 'where the relevant information is directly available and easily accessible'.[23] The Recital does not mention the provision of a URL to access a website containing the information and, arguably, this might be because typing a lengthy web address it prone to typos and not 'easily accessible'. The use of a hyperlink is, of course, easier but it should be noted that its use might not be appropriate in all circumstances, for example, where a hyperlink is provided via a mobile phone, where the hyperlink might not work, depending on the consumer's device. However, the general idea of limiting the requisite information, which is put to the fore, might usefully be extended beyond situations where it is needed because of constraints of time or space in the method of communication. Empirical investigation might be the way ahead, to determine the optimal quantity of information, to avoid the point at which the consumer actually takes in less, because more has been provided.

In fact, websites themselves may sometimes provide a time-limited environment, which although not readily comparable to the swiftness with which an image disappears from a television screen, is nevertheless restricted as to the time the consumer can spend on digesting information before the process is interrupted. Where the information is contained on a static page this may not be the case, but if, during the ordering process, a hyperlink is displayed, there will only be limited time available for consumers to access and read the page, before he or she has to start over with the ordering process.

At the latest when the consumer signs in to start the ordering process, the user's internet browser creates a, so-called, 'session' on the server which is represented by a unique string of letters (the session key).[24] Any communication between server and

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21 CRD, art.8(4).
22 CRD, art.8(4).
23 CRD, Recital 36.
24 For basic information on 'browser sessions' and how they work, see Robin Nixon, *Learning PHP, MySQL, JavaScript, CSS & HTML5 : A Step-by-Step Guide to Creating Dynamic Websites* (3rd edn, O'Reilly Media 2014) 312–320.

browser will contain the session key so that all requests of an individual user can be attributed to the user. This is necessary to create an experience of 'continuous browsing'. The session holds information about the user and his or her activities,[25] for example a list of product in the shopping basket. As long as the user keeps actively using the website, every single browsing action sends the session key to the server which, in turn, registers that the user is still active. Since the session is stored on the server where it uses up resources, sessions have a limited 'life span' and expire unless they are kept 'alive'. Once a session has expired, it is deleted and the next request, even if it contains the session key, will result in the creation of a new session.[26] If this happens during the order process, maybe because the consumer spent too long reading the terms, and this might happen after just 10 minutes, the browser would reset and, even though the products might still be in the shopping basket, the consumer has to start over the ordering process.

Although, it must be recognised that there is a great difference between time limitations on a website and those on a television screen: it is not like merely hoping that a particular television advertisement will be shown again, whereas the ordering process on a website can easily be repeated without the need to spend the same time on reading the 'Terms and Conditions'. Nevertheless, a recognition of this limitation on some website might provide courts with a means of interpretation to progress the consumer agenda in terms of limiting the most immediate information which is required to be provided to the consumer.

However, as has been indicated, the whole issue might be best dealt with by data being obtained by experimentation to establish the optimum amount of information which can be immediately presented to the consumer, before its quantity becomes such that the consumer is less able to assess it. Such gathering of data would not be simple, as it would have to allow for traders to present sufficient of the product information which they want to impart, which would not necessarily be included in that which consumer law would regard as important.

Right of Withdrawal

If the information requirements fail to prevent consumers from making distance purchases which they discover are not what they wanted, or with which they are

[25] This is the case, even when the user is anonymous.

[26] The technology behind this is more complex and additional technologies, such as cookies, or synchronous data transfer are used in addition to fulfil some of those functions, but the issue in relation to sessions remains the same.

simply unhappy, or have thought better of, from the perspective of their personal finances, then they can be assisted by a right to withdraw from these contracts. The Consumer Rights Directive provides an extended and more coherent right to unilaterally withdraw from distance, or off-premises, contracts across Member States for 14 days from the relevant starting date.[27] It has long been recognised, particularly with regard to goods, that, in order to increase trust in the online markets, consumers need a tool which gives them time for reflection upon their online purchase decisions. In relation to goods, there is a right of withdrawal which allows consumers to gain some experience of, and make some evaluation of, the product within 14 days of purchase.[28] Of course, what the consumer can do by way of examination of the product is limited by the condition which it has to be returned, of the right of withdrawal is exercised.[29] Furthermore, consumers have, at least, 14 days to decide whether the purchase was appropriate, not only in terms of value-for-money, but under consideration of the overall financial situation. Consumers may become 'click-happy'[30] and, within the protected space of their home, carelessly or irrationally undertake obligations producing uncontemplated consequences and regret. The Directive manages to provide some relief from these situations through the right of withdrawal, at least in contracts for the sale of goods.

The right of withdrawal does exist in relation to contracts for the supply of digital content, with the starting date for the cancellation period being '*the day of the conclusion of the contract*'.[31] However, as has been seen, there is a problem with a right of withdrawal in relation to a contract for the acquisition of digital content, i.e. it cannot be returned. Therefore, even though the Directive generally grants this right to consumers, it does not arise provided that consumers have given their '*prior express consent and […] acknowledgement that [they lose] their right of withdrawal*'.[32] Only in cases where traders have not obtained such consent, or where they omitted to provide consumers with the required information on the right of withdrawal (under art.6(1)(h) CRD) can consumers withdraw from the contract within the specified period (with that being extended up to 12 months when the latter

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27 CRD, art.9(1).

28 Joasia A Luzak, 'To Withdraw Or Not To Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contract Taking Into Account Its Behavioural Effects on Consumers' (2014) 37 J Consum Policy 91, 94–96.

29 CRD, art.14(2).

30 Robert A Hillman and Jeffrey J Rachlinski, 'Standard-Form Contracting in the Electronic Age' (2002) 77 N.Y.U. L. Rev. 429, 479.

31 CRD, art.9(2).

32 CRD, art.16(m).

information was omitted).[33] It is apparent that the Commission's focus was predominantly on contracts for the sale of goods and services and, despite its express inclusion, the CRD makes only a limited attempt to accommodate the particularities of digital content.

Due to the exemption where consumers have given their consent under art.16(m) CRD, and it is unlikely that many will perceive any benefit in not giving such consent, and delaying their receipt of the digital content, there is likely to be only a small number of consumers of digital content who have the right to withdraw. Even those few might quickly encounter difficulties when trying to exercise their right, as digital content simply *cannot* be 'returned'.[34] It is supplied as a digital, intangible copy of the source product, rather than the actual product. The attempt to 'return' would merely create another copy, whilst the entity at the consumer's end would remain unchanged. Short of some restriction by means of Digital Rights Management,[35] the consumer would still be physically able to use the product, even after they received their money back. Any licence to use it would have terminated, but the potential for unlawful use would remain, and such use is hardly a minor problem in relation to digital content.[36]

It is likely that the UK recognised this problem in making some adjustment to the rules regarding the right of withdrawal when implementing this aspect of the CRD. The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013[37] delay the trader's obligation to supply digital content until after the cancellation period has expired, unless consent and acknowledgement are obtained in advance, in which case there will be no cancellation period. Delayed performance prevents the question of the impossibility of returning digital content from arising, but it also means that the period within which the consumer can change their mind cannot afford consumers with all the opportunities for further evaluation which the right of withdrawal provides in relation to goods. Where the consumer has not provided the relevant consent and acknowledgement, so that performance is

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33 CRD, art.10(1).

34 'Consumer Rights Act 2015 - Explanatory Notes' (Department for Business, Innovation and Skills 2015) para 205.

35 Where the right Digital Right Management (DRM) system is in place, it could be said that the consumer returns the licence to use the product. The DRM system would upon each execution of the product check with the provider's licence database whether the consumer's licence is valid and, where the licence has been returned, the check would fail and further use of the product would be impossible.

36 On licensing, see Charlotte Waelde and others, *Contemporary Intellectual Property: Law and Policy* (3rd edn, Oxford University Press 2013) 908.

37 Regulation 37(1) Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134).

delayed, the consumer has only time for further reflection on the information provided, and on their financial situation. Of course, it seems unlikely that the consumer will not be only too happy to provide the necessary consent and acknowledgement, to ensure that their anticipated enjoyment of the digital content is not delayed.

However, even when such consent is not forthcoming, so that the consumer does have 14 days to reconsider, it is plain to see that any re-assessment of the product would be affected when performance only takes place when the cancellation period has expired. Consumers are deprived of any opportunity to test the digital content for themselves and remain exposed to one of the major problems of distance selling. In this, there is no difference between UK law and the Directive. Nevertheless, producers of, at least, some types of digital content, particularly software, may provide some help for the consumer in this, not because they are seeking to assist consumers as such, but as a necessity of remaining competitive in the market. Consumers are more inclined to make a purchase if they have faith in the product, and producers often give potential buyers the chance to examine the product before they make a purchase decision. Trial versions of digital content often can be accessed on, or downloaded from, producers' or traders' websites. In those cases, consumers have an opportunity to familiarise themselves with, at least, some functionalities and compatibilities of the digital content, or where such trial version is fully available but for a limited period of time, with all of it. To ensure consumer cannot use a full version beyond the trial period, producers have used various types of Digital Rights Management, all of which sought to prevent the product to be used after the trial period has expired (unless the consumer has purchased and provided a licence key).

Of course, the process whereby traders provide trial versions of the product is merely voluntary, so consumers might not receive such an opportunity to protect their interests. Legislation could provide for the availability of a trial version of types of digital content, and if Brexit occurs there would be no issue of it clashing with maximum requirements of an EU Directive. It would, however, be a requirement which could mean not insignificant expenditure by producers which had not previously operated such a business model, and could be seen to increase the price of a product without sufficient benefit to the consumers. This type of issue would require investigation, at a probably not insignificant cost in itself. At the most, it would seem that a 'wait and see' approach would be likely to be adopted, as it might

be a problem which market competition might sufficiently diminish, as there might be a preference for producers who provide trial versions.

Unfair Contract Terms

Legislation dealing with unfair contract terms has been a significant aspect of effective consumer protection for many decades. Until 2015, it was piece-meal and located in two distinct instruments. The Unfair Contract Terms Act 1977 (UCTA) deals only with exemption clauses, albeit in a broad sense.[38] It applied to exemption clauses in contracts quite generally, subject to some exceptions[39] and, whilst simply prohibiting some exemption clauses (or notices), such as those excluding or restricting liability for negligently causing death or personal injury, most were subject to the 'requirement of reasonableness',[40] and ineffective unless satisfying it. The operation of UCTA was not, however, confined to the consumer context. Later, the Unfair Terms in Consumer Contracts Regulations of 1994,[41] and subsequently 1999 (UTCCR),[42] implementing the EC Directive on unfair contract terms (UTD),[43] with some exceptions, subjected all non-negotiated terms in consumer contracts to the 'fairness' test.[44] It did so, however, only in the consumer context, and with a different approach to the delimitation of consumer contracts, than that taken under UCTA's reference to 'deals as consumer'.

For consumers, it was difficult to understand the operation of the two instruments, with their different scopes and tests. Non-negotiated exemption clauses could be subject to both instruments, and potentially two different tests, other terms might have to satisfy one. As a result, the Law Commissions designed the unfair terms part of the CRA to simplify matter, by consolidating the treatment of unfair terms (or notices), in the consumer context, in one piece of legislation, with one set of definitions, and a single test of fairness. Under the CRA, some terms (and clauses) remain automatically non-binding on the consumer, without the need for the

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38 UCTA, ss. 13 and 3(2)(b); Elizabeth Macdonald, 'Exemption Clauses: Exclusionary or Definitional? It Depends!' (2012) 29 JCL 47, 66; see also Elizabeth Macdonald, 'Exclusion Clauses: The Ambit of s 13(1) of the Unfair Contract Terms Act 1977' (1992) 12 LS 277.

39 Exceptions are listed under sch.1 UCTA and include contracts of insurance, contracts relating to creation or transfer of interest in land, intellectual property or securities, contracts relating to the formation or dissolution of a company.

40 'Consumer Rights Act 2015 - Explanatory Notes' (n 34) 289.

41 Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159).

42 Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083).

43 Council Directive 93/13/EEC on unfair terms in consumer contracts 1993 (OJ L95/29).

44 UTCCR, reg.5(1); 'Consumer Rights Act 2015 - Explanatory Notes' (n 34) 290.

application of any fairness (or reasonableness) test. Basically, provision for consumer contracts (and consumer notices) has been removed from UCTA, and these are now dealt with by the CRA.[45]

As would be expected of legislation implementing an European Directive, the CRA basically follows the approach of the Unfair Terms Directive to 'consumers', just enlarging it slightly, and UCTA's phrase 'deals as consumer', and its odd approach to determining where the greater protection afforded to consumers should apply,[46] disappears. However, the CRA also follows some aspects of UCTA, in that it generally does not reduce the level of protection which it provided in relation to exemption clauses, where that exceeds the protection of the Directive. For example, it maintains the automatic ineffectiveness of some clauses, without them being subject to the fairness test, just as they were ineffective without failing the requirement of reasonableness. Further, just as UCTA's application to contracts where one party 'dealt as consumer' was not confined to non-individually negotiated terms, so the CRA's protection is not restricted to non-individually negotiated terms, even if they are not exemption clauses, but applying to all of them, maintaining their automatic ineffectiveness, but Part 2 of the CRA sets out a single test for fairness, with a single test of fairness also being applied to consumer notices, again, to ensure that the protection which was present in UCTA is not reduced. Basically, it follows the approach taken under the EC Directive closely, and incorporates some of the additional protections of UCTA, whilst confining the 'requirement of reasonableness' to history, in the consumer context.

One further point which should be noted here, however, is in relation to enforcement. Following the UTD, the CRA, and before it the UTCCR, operate at two levels of enforcement. UCTA only provided a means for exemption clauses to be struck down in actions between the parties to a particular contract (or in actions where a non-contractual notice was being used between particular parties). The UTD provides for actions at a general, and preventive, level, and in the UK, powers were given to the Office of Fair and other regulators to seek injunctions, or accept undertakings, to prevent the future use of unfair terms by a business in its standard contracts. Under the CRA, the lead role in that has now been allocated to the Competition and Markets Authority, but beside that change there have also been

[45] 'Consumer Rights Act 2015 - Explanatory Notes' (n 34) 294.

[46] Elizabeth Macdonald and Ruth Atkins (eds), *Koffman and Macdonald's Law of Contract* (8th edn, Oxford University Press 2014) para 10.46-10.56.

additional powers added, such as Enhanced Consumer Measures[47] which can be attached to enforcement orders, which had previously merely mirrored those to seek injunctions or accept undertaking provided under the UTCCR. It is not though, a uniform improvement of the situation of consumers in relation to enforcement. UCTA may have only operated at the individual level, and only in relation to exemption clauses, but it did place the burden of proof, in relation to the reasonableness of an exemption clause, on the party seeking to rely on the clause. There is no such shift in the burden of proof under the CRA, even in relation to actions involving individual consumers, merely a 'grey list' of terms which 'may be unfair', which has no such formal impact in relation to the fairness test.

Terms and consumer notices

The Consumer Rights Act applies a test of 'fairness' to terms in all consumer contracts as defined under the Act, excluding certain special contracts such as employment contracts since they are regulated elsewhere.[48] As has been indicated, the CRA expands on the minimum level of protection required by the UTD and, besides 'non-individually negotiated terms',[49] it also covers contractual terms which have been individually negotiated. Furthermore, the protection of consumer under UCTA was not limited to standard or non-individually negotiated terms, but it is of limited significance generally, and most electronic consumer contracting is standardised without the possibility to negotiate. An assessment on fairness of terms can, of course, only take place, if what is to be assessed has become a 'term' of the contract and the rules on incorporation of terms, by signature, notice or consistent course of dealing, are used to determine whether this happened.[50] Subject to limited exceptions, clauses that satisfy the rules of incorporation, and thus are part of the contract, fall generally within the scope of Part 2 CRA.

There are, however, documents with statements displayed to consumers which are not incorporated into the contract but still relied upon by traders. This can be the case, for instance, when there is no consumer contract in the first place or when consumers are presented with information after the contract is made. Contracts for the supply of digital content, and particularly online services, often make reference

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47 These Enhanced Protection Measures will be brought by a public authority (an enforcer) against the trader with the aim of addressing the unfair behaviour of that trader. These measures will be looked at p.202.

48 CRA, s.61(4); 'Consumer Rights Act 2015 - Explanatory Notes' (n 34) 295.

49 See UTD, art.3.1.

50 Macdonald and Atkins (n 46) 9.9-9.59.

to additional 'documents' which define the relationship between the parties but are usually non-contractual. End user licences, for example, are displayed during the first launch of the product and are designed to impose obligations on the consumer or grant rights to the producer, to all of which the consumer has to agree before the digital content can be used. In case of 'browse-wrap'[51] or notices on a producer's website, suppliers often inform consumer as to the ways in which their products can, or more likely cannot, be used. These documents cannot readily be classified as contractual,[52] but they might still form part of what can be assessed for 'unfairness' under the CRA. The scope of Part 2 extends to 'consumer notices' which are defined under the Act as '*[any] notice to the extent that it (a) relates to rights or obligations as between a trader and a consumer, or purports to exclude or restrict a trader's liability to a consumer*'.[53] Particularly for the protection of consumers engaging in online transactions, this may be an important adaptation. End user licences, in particular, typically relate to 'rights and obligations' between the parties, and their clauses might now be assessed for fairness as 'consumer notices'.

Black List and Grey List

There are certain terms which are sometimes referred to as being 'black listed' by the CRA. The terminology is obvious. Such terms are automatically made not binding on the consumer, without any question of needing to apply the fairness test to them.[54] In relation to the CRA, 'black listed' terms include any attempt to exclude or restrict liability for obligations imposed on traders by other parts of the CRA. This is an expansion of the protection which used to be provided by ss.6 and 7 of UCTA, extending it to more obligations and beyond goods contracts. It is dealt with by ss.31, 47, and 57 CRA. In addition, s.65 CRA deals with attempts to exclude or restrict negligence liability, black listing, as did UCTA, such attempts in relation to death or personal injury.

There is also often said to be a 'grey list' in the UTD and the CRA (and before that the UTCCR). The terminology is more obscure here, as is the role of the 'grey list' which is now contained in sch.2, and introduced by s.63, of the CRA. Schedule 2 is an indicative and non-exhaustive list of terms which 'may be unfair'.[55] Further, a term that is included in the 'grey list' can be assessed for fairness, even if they would

[51] More information on 'browse-wrap' can be found in Chapter 2, p.43.
[52] 'Consumer Rights Act 2015 - Explanatory Notes' (n 34) 296.
[53] CRA, s.62(4).
[54] 'Black listing' is also used to cover terms which are required to be ineffective under certain Directives, for example art.25 of the Consumer Rights Directive.

otherwise fall within the scope of the 'core exemption'[56] in s.64 CRA.[57] The 'grey list' is helping in subjecting terms, which otherwise would have escaped scrutiny, to the fairness test as well as, more obviously, providing a generally useful indication of types of terms to scrutinise, and illustrations of the factors which may be relevant in considering their unfairness. The CMA, and before it the OFT, has adopted it as providing the organising structure for its examples of terms which one, or the other body, has thought to be unfair and, as will be seen, it covers a wide range of terms, such as exemption clauses (e.g. paras. 1 and 2), clauses allowing a business to change its obligations (e.g. paras. 11–13) or clauses allowing a business to change the consumer's obligation in relation to payment, or only to set them after the contract is made (e.g. paras. 14 and 15).

'Core exemption'

A small number of terms are exempt from an assessment for fairness. What is commonly termed the 'core exemption', is now stated in s.64 CRA:[58]

> (1) A term of a consumer contract may not be assessed for fairness under section 62 to the extent that—
> (a) it specifies the main subject matter of the contract, or
> (b) the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it.
> (2) Subsection (1) excludes a term from an assessment under section 62 only if it is transparent and prominent.
> (3) A term is transparent for the purposes of this Part if it is expressed in plain and intelligible language and (in the case of a written term) is legible.
> (4) A term is prominent for the purposes of this section if it is brought to the consumer's attention in such a way that an average consumer would be aware of the term.
> […]

Generally, the idea is to maintain contractual freedom[59] where the partiers' obligations under the contract '*relate to the core of the contract*'.[60] It was not included in the original draft of the UTD, but was inserted after the criticism made by Brandner and Ulmer that:

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55 'Consumer Rights Act 2015 - Explanatory Notes' (n 34) 302; 'Unfair Contract Terms Guidance - Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' para 5.1.2.

56 In relation to the 'core exemption', see below.

57 'Consumer Rights Act 2015 - Explanatory Notes' (n 34) 303.

58 It comes from art.4(2) UTD and was previously brought into English law in the Unfair Terms in Consumer Contracts Regulations 1994, and then the 1999 Regulations.

59 Macdonald and Atkins (n 46) 11.1.

60 'Unfair Contract Terms Guidance - Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' (n 55) 3.2.

> 'In a free market economy parties to a contract are free to shape the principal obligations as they see fit. The relationship between the price and the goods or services provided is determined not according to some legal formula but by the mechanisms of the market. Any control by the courts or administrative authorities of the reasonableness or equivalence of this relationship is anathema to the fundamental tenets of a free market economy.'[61]

However, they also recognised the need for a requirement of 'transparency' because of terms which

> 'may conceal the principal obligations or the price and thus would make it difficult for the consumer to obtain an overview of the market and to make what would (relatively speaking) be the best choice in a given situation.'

Thus, the origin of the 'core exemption', and the limitation that the relevant terms must also be 'transparent', and the basic idea underlying them, are clear, but its coverage has been controversial, with a divergence of views in the UK courts becoming very plain in *Office of Fair Trading v Abbey National plc*, with the Court of Appeal,[62] and the Supreme Court[63] taking very different approaches.

The Court of Appeal emphasised the distinction made by the House of Lords in *General Director of Fair Trading v First National Bank*[64] between terms falling within the 'core' and incidental or subsidiary terms. It developed this approach to confine 'core terms' to those embodying the 'essential bargain', to ensure '*protection in respect of the kind of issues that a consumer will not have in focus when entering the bargain*'.[65] The relationship of such an approach to the original conception of Brandner and Ulmer is clear, and in *First National Bank* the House of Lords had been mindful of the impact of the scope of the core exemption on the efficacy of the legislation, in taking a restrictive approach.[66]

However, a very different, and much broader, approach was taken by the Supreme Court in *Abbey National*, which confined the *First National Bank* case to its facts. The facts of the case, viewing the term there as not exempt since it was a default term. The Supreme Court took the approach that, subject to the protection of the consumer by the limitation of transparency, the scope of the core exemption was simply a matter of construction of the contract. Lord Mance stated:

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61 Hans Erich Brandner and Peter Ulmer, 'The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposals Submitted by the EC Commission' (1991) 28 CMLR 647, 656.

62 *Office of Fair Trading v Abbey National plc* (2009) 1 All ER (Comm) 1097 (CA).

63 *Office of Fair Trading v Abbey National plc* (2010) 1 AC 696 (SC).

64 (2002) 1 AC 481.

65 *Office of Fair Trading v Abbey National plc* (n 62) [86]

66 *Director General of Fair Trading v First National Bank plc* (n 64) Lord Bingham [15], Lord Steyn [34].

> [T]he identification of the price or remuneration for the purposes of […] Regulation 6(2) is a matter of objective interpretation for the court. The court should no doubt read and interpret the contract in the usual manner [… There] is no basis for requiring it to do so […] by confining the focus to matters on which it might conjecture that [the consumer] would be likely to focus. The consumer's protection under the […] Regulations is the requirement of transparency […] That being present, the consumer is assumed to be capable of reading the relevant terms and identifying whatever is objectively the price and remuneration under the contract into which he or she enters.[67]

This was much criticised[68] for taking insufficient account of the aim of the Directive as a consumer protection measure, and as having a detrimental impact upon its scope.

However, in *Kásler v OPT Jelzálogbank Zrt*,[69] the Court of Justice of the European Union was asked to consider the notion of the 'core exemption' under art.4(2) UTD, and provided long-needed guidance. The court noted:

> [T]the court has consistently held that the system of protection introduced by Directive 93/13 is based on the idea that the consumer is in a position of weakness vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge […].
> […]
> [The 'core exemption'] thus laying down an exception to the mechanism for reviewing the substance of unfair terms, such as that provided for in the system of consumer protection put in place by that Directive, that provision must be strictly interpreted.[70]

Thus, the need for a narrow approach to the core exemption was emphasised, and explained. In relation to the first of the exceptions in the core exemption the court made plain that it only covers terms which are 'essential obligations of the contract and, as such, characterise it'.[71] In terms of the scope which this gives to the first part of the core exemption, this is more in line with the decision made in *First National Bank* and the in Court of Appeal decision in *Abbey National plc*, than the Supreme Court, and makes it plain that the first part of the 'core exemption' must be treated as narrow exception to the general application of the fairness test.

However, the CJEU did not run the two elements of the core exemption together under the overriding idea of the 'essential bargain'. Rather it recognised that whilst a price term might well fall within the first element of the core exemption, the second element had a different and practical focus. The CJEU recognised the very pragmatic reason for its ouster of, what can be termed, the value-for-money-question, from

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67 *Office of Fair Trading v Abbey National plc* (n 63) [113].

68 Mindy Chen-Wishart, 'Transparency and Fairness in Bank Charges' (2010) 126 LQR 157; Paul S Davies, 'Bank Charges and the Supreme Court' (2010) 69 CLJ 2; Phillip Morgan, 'Bank Charges and the Unfair Terms in Consumer Contracts Regulations 1999; the End of the Road for Consumers?' [2010] LMCLQ 21; Simon Whittaker, 'Unfair Terms, Unfair Prices and Bank Charges' (2011) 74 MLR 106.

69 [2014] OJ C 194/5.

70 C-26/13 *Árpád Kásler* (n 69) [39 and 42].

71 C-26/13 *Árpád Kásler* (n 69) [49].

review under the fairness test on the basis that '*no legal scale or criterion exists that can provide a framework for, and guide, such a review*'.[72] Nevertheless, this still remains a narrow approach to the core exemption, more protective of consumers than that taken by the Supreme Court in Abbey National.

We should nevertheless emphasis the restriction on the impact of the exemption, than what would otherwise be covered by it is, nonetheless, subject to the fairness test, where the term is not transparent or, as it now states, possibly more exactingly, in the CRA, where they are not 'transparent and prominent'.[73] Transparency requires a term to be 'expressed in plain and intelligible language' and to be legible,[74] and for a term to be 'prominent' it must have been brought to the consumer's attention in such a way that the 'average consumer', who is reasonably well-informed, observant and circumspect, would be aware of the term.[75]

Fairness

The fairness test, that is applied to contractual terms and consumer notices, is basically that of the Directive, and that which was previously in the UTCCR.[76] The meaning of 'fairness' must be interpreted in accordance with the purpose of the Act which in turn follows that of the Directive. The CJEU has explained that the provisions of the Directive are '*based on the idea that the consumer is in a position of weakness*',[77] and this takes account of the consumer's limited bargaining power and knowledge as well as the inability to process the latter adequately. The idea of 'fairness', as employed under the Directive, is a means for the national courts to '*compensate [...] for the imbalance which existed between the consumer and the seller or supplier*'.[78] As with the Directive, the CRA tries to achieve this by declaring certain terms 'unfair' and making them non-binding on consumers.[79] Under the Act, '*[a] term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.*'[80] Key to any assessment under the test are the requirement of 'good faith' and 'significant imbalance', which has to be to the consumer's detriment. Since

72 C-26/13 *Árpád Kásler* (n 69) [55].
73 CRA, s.64(2).
74 CRA, s.64(3).
75 CRA, ss.64(4) and (5).
76 cf. Art.3 UTD and reg.5 UTCCR.
77 C-26/13 *Árpád Kásler* (n 69) [39]; C-415/11 *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* (2013) 3 CMLR 5 [H7].
78 C-415/11 *Aziz* (n 77) [H8].
79 CRA, s.62(1).
80 CRA, s.62(4).

both, the 1999 Regulation and the CRA implement the 'fairness' test from the EU Directive, until Brexit occurs, the existing case law that was developed under the 1999 Regulations, remains usable in relation to the CRA.

However, even though these elements require examination, the guidance provided by the CMA on the fairness test under the CRA makes it clear that '*the overall requirement is a unitary one – the question is whether a term is unfair*'.[81] Thus, while it is crucial to understand each of the elements, it will not be possible to draw a clear line between them, and overlap is to be expected.[82]

Significant imbalance

The CRA requires 'significant imbalance in the parties' rights and obligations[83] and the same applied under the UTCCR. The OFT's guidance document only goes so far as to re-state this requirement but does not offer elucidation regarding possible factors for an assessment.[84] However, the concept of 'significant imbalance' is a complex one. Obviously, some form of balancing exercise is required to come to a conclusion and, *prima facie*, one would economically weigh the parties' overall rights and obligations, but one must refrain from applying an overly mechanical approach. The CMA indicates that 'price' is not necessarily a decisive factor and, for example, even though a product is offered at a low (or lower) price, this can only have a limited effect, or none at all, on terms allowing traders to keep prepayments.[85] In contrast, 'significant imbalance' will be present if the contractual obligations of the trader compared to those of the consumer indicate an asymmetry unduly disadvantaging the consumer. Such asymmetry is often found in terms that places the same burden on trader and consumer, such as a financial sanction for cancelling, burdening the consumer who is much more likely to cancel.[86] In addition, the same financial sanction, if imposed on the trader, is less harsh on the trader who, typically, adds a fraction of these costs into every sale, whereas a consumer has no means of absorbing sanctions.

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81 'Unfair Contract Terms Guidance - Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' (n 55) 2.10.

82 'Unfair Contract Terms Guidance - Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' (n 55) 2.10.

83 CRA, s.62(4).

84 'Unfair Contract Terms Guidance - Guidance for the Unfair Terms in Consumer Contracts Regulations 1999' 9.

85 'Unfair Contract Terms Guidance - Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' (n 55) 2.15.

86 'Unfair Contract Terms Guidance - Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' (n 55) 2.13.

The economic weighing of obligation to the same effect can also be done by looking at imbalances between consumer groups. This situation arose in *Office of Fair Trading v Abbey National plc*[87] where the bank operated a 'free if in credit' business model. Under this model, consumers in overdraft subsidise the general transaction costs of solvent consumers placing a particular group of consumer in a disadvantaged position. The term in *Abbey National* was not subjected to the fairness test, for reasons which need not be considered here, yet it seems plausible that an analysis of the term would have revealed 'significant imbalance'.[88]

The major difficulty with an approach focussing too much on 'economic weighing' is that it would require values to be assigned to anything that is subjected to the test, which is simply impossible. Where no such valuation can be made, the test cannot give a conclusive answer, and another approach has to be used in those cases. From *Smith v Eric S. Bush*,[89] it can be seen that, if there is too much focus on the economic aspect, outcomes which had been reached under the reasonable test of UCTA, do not seem reachable under the fairness test. In *Smith*, property valuers would include a term in their contracts removing liability for accuracy of the report. The House of Lords found the disclaimer ineffective, and professionals had to accept negligence liability, as it would be 'unfair and unreasonable' for a prospective purchaser to potentially suffer a considerable detriment (financially and otherwise) for relying on the 'valuation report'.[90] Of course, this would result in a higher price, due to the fact that the valuer would have had to insure against his or her negligence, but a small increase in price for all consumers getting a valuation was preferable to the allocation of risk to the consumer.

Applying the fairness test, offering cheap reports with a disclaimer which, in absence of it, would have been more expensive, does not seem to cause 'significant imbalance' between the parties, particularly since the majority of consumers are likely to benefit from the report. However, considering the hardship that individuals, who received a negligent survey, would suffer, a similar outcome would be possible, in relation to the fairness test, when comparing the term in question to the default rules under national law and considering the possible effects of this deviation on the consumer.[91] Recently, this was affirmed by the CJEU as a way of looking at

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87 (n 63).
88 Elizabeth Macdonald, 'Achieving Fairer Terms for the Consumer' (in preparation).
89 (1990) 1 AC 831.
90 *Smith v Eric S. Bush* (n 89) 853.
91 Chris Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (1st edn, Ashgate Publishing 2007) 47–49.

'significant imbalance' under the fairness test of the Directive[92] and, thus, any assessment should also consider the '*default rules […] and remedies as benchmarks of fairness.*'[93]

This is possible where there are default rules covering the particular situation, and where such rules '*for breach of contract [or] breach of a tortious duty to take reasonable care […] are based on a balancing of the interests of the parties*'.[94] Any contractual term disturbing the balance of interests can be assessed relatively against the default rule. In other words, a contractual term, like the one in *Smith v Eric S. Bush*, which attempts to limit or exclude liability for negligence in exchange for a lower price would deviate from the rule under tort where a negligent party is generally liable for the damage caused. If a default rule is a just balancing of the interests of the parties, then departing from it will show an imbalance, but whether the imbalance is 'significant', will be a matter of how far it departs from that.

In looking at default rules, what is considered then is the economic detriment of the consumer as another way of looking at 'significant imbalance' under the fairness test. However, its use is limited to areas of law where the national law has developed rules which undertake the required 'balancing of the parties' interests' which is mostly the case where terms deal with allocation of risk or exemption of negligence.

With other terms it will not be possible to rely on 'economic weighing' or a comparison to a balancing default rules, and it has been suggested that 'reasonable expectations' might provide a comparator.[95] Obviously, the concept is intended to take into account what consumers might have 'reasonably expected' under such a contract, but this idea is very broad and needs further refinement. Plainly, any subjective expectations of the actual consumer must be set aside. The most obvious way of generally looking for 'reasonable expectations' is by describing those experiences which the parties have gained from '*trade usage, custom [and] past dealings*'.[96] They are ultimately a 'shared understanding' grounded in 'community values' which are based on a particular contracting community.[97] While this idea has some appeal, apart from the issue of businesses being able to create unduly low objective consumer expectations by their practices, there is the difficulty of simply identifying community values and a contracting community when consumers, rather

92 C-415/11 *Aziz* (n 77) [H16].
93 Willett (n 91) 47.
94 Willett (n 91) 120.
95 Willett (n 91) 138.
96 Willett (n 91) 140.
97 Willett (n 91) 140.

than commercial parties, are in question. Consumers will not generally perform the same transactions repeatedly in order for community standards to develop.

In order to find a suitable approach to the 'reasonable consumer's expectations', the way in which those expectations are formed must be looked at. Willett reminds us that the expectations of the reasonable consumer are not based on the terms of the contract, i.e. such standard is not formed by considering which expectations the reasonable consumer might hold when looking at the terms, but:

> '[…] these expectations are likely to be formed by the basic description of the goods or services at the point of sale or in advertising; and by the perception of the consumer as to what normally happens in transactions of this type (these perceptions being formed by personal experiences of buying these goods or services from this trader or other traders and/or by observation of what normally happens to others when they purchase such goods or services).'[98]

The practical dimension of this approach has a clear advantage for consumers but it raises the question as to why 'reasonable expectations' should be taken as a benchmark for obligations under a contract, rather than the terms of the contract themselves. Baker explains that '*the justification which most readily suggests itself […] is that they may mean more to the parties [(particularly consumers)] than the finer points of classical contractual theory.*'[99] Since many consumers will not be familiar with the terms of the contract, for reasons which are amply discussed above,[100] this standard takes into account the expectations which the trader raises before, and at the time of, contracting. Thus, there may, for example, be an expectation of successful performance of, what the consumer might reasonably expect to be, the main obligation.[101] Furthermore, expectations might extend to ancillary aspects of the contract which the trader chose to accentuate.[102] Unsurprisingly, the factors show a congruence with those that need to be considered in deciding if goods, or digital content, are of satisfactory quality. In both cases, assessment is made based on the description, consumer notices, and other external factors will be relevant here, as in relation to satisfactory quality, such as trader's public statements made in advertising or labelling.[103] This is unsurprising because in one situation a general standard against which to weigh the goods, or digital content

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98 Willett (n 91) 141–142.
99 JH Baker, 'From Sanctity of Contract to Reasonable Expectation' (1979) 32 CLP 17, 23.
100 See Chapter 1, p.13.
101 Willett (n 91) 143.
102 Michael I Meyerson, 'The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts' (1993) 43 University of Miami Law Review 1263, 1301.
103 CRA, s.34(6).

is being used, and in the other, it is a general standard against which to weigh the terms is being sought.

If the expectations of the reasonable consumer are to be used to assess whether a contractual term is significantly imbalanced, it is important to emphasise their objective nature. The test does not consider whether the consumer having been in a particular situation would reasonably hold certain expectations; rather, the question is whether the reasonable consumer being subjected to the same situation would. If this is affirmed the conclusion can be drawn that, because of the disparity between the terms and the reasonable consumer's expectations, the term causes significant imbalance between the parties.

Good faith

It is now time to consider the second element of the fairness test under s.62(4) CRA. 'Good faith' is a complex and versatile legal doctrine and has been widely used in many continental European jurisdictions, although without a uniform approach. In the UK, it was a relatively unused concept until it was included in the legislation implementing the UTD into UK law (initially the UTCCR 1994). However, even in relation to the UTD, its meaning has been unclear from the start, with it even being suggested that it had no role independent of significant imbalance, with it being said, for example,

> 'there is no way that a contractual term which causes a "significant imbalance in parties' rights and duties arising under the contract to the detriment of the consumer" can conform with the requirement of "good faith". Indeed, the opposite is true: a term is always regarded as contrary to the requirement of "good faith" when it causes such an imbalance.'[104]

However, recently the CJEU has shed light on the correct understanding of this concept. The court stated that, under good faith, '*the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations*'.[105] Underlying this is the idea that '*the consumer is in a position of weakness vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge*'.[106] It has also identified the aim of the Directive as being '*to replace the formal balance which [the contract]*

[104] Mario Tenreiro, 'The Community Directive on Unfair Contract Terms and National Legal Systems' (1995) 3 E.R.P.L. 273, 279.
[105] C-415/11 *Aziz* (n 77) [H17].
[106] C-26/13 *Árpád Kásler* (n 69) [39].

establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them'.[107]

In the light of these statements, two points must be considered. First, traders can add a whole range of different terms to a contract without consumers noticing (information imbalance).[108] Supposing hypothetical negotiations with an 'individual consumer', one would examine the term under circumstances where the consumer is aware of the term and, therefore, can consider its effects. A term to which the reasonable person would not have agreed, while aware of it, should not be regarded as being offered in good faith and ought to fail this part of the test. Furthermore, mere agreement during the hypothetical negotiations by the reasonable person should not suffice to satisfy the good faith requirement since the existence of an imbalance in bargaining power is also a common phenomenon in consumer contracts. One common effect is that consumers might agree to terms which they know of, only because the contract is non-negotiable, as is generally the case in relation to consumers, and it is a situation in which the consumer either agrees to all terms or does not make the contract at all, i.e. the consumer is an a 'take-it-or-leave' situation. It must, therefore, be considered whether such agreement was only reached because of the weak bargaining position, i.e. the inability to actually negotiate terms, in which the consumer was or the unawareness of, or inability to understand, the impact of the terms.[109] Only if the reasonable trader could assume that the reasonable consumer would agree without these inequalities being present, should the trader be regarded as acting in good faith.

Application to Online Contracts and Online Services

Having considered the basic elements of the fairness test, it is time to look at contracts for the supply of digital content and contracts for online services. All of these contracts are fairly similar in content and structure, and certain terms require a closer look regarding their fairness. What must be asked is whether the regime is sufficiently equipped to deal with issues which might arise under those contracts and whether there are drawbacks. Terms that have continuously aroused suspicion in the

[107] C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2005] ECR I-10437 [36].

[108] To prove the point that consumers do not read standard terms (or EULAs), PC Pitstop added a term to their EULA which entitled the first user to notice the term to claim $1,000. It took 4 months and around 3,000 downloads before the term was noticed (Larry Migid, 'It Pays To Read License Agreements' (*PC Pitstop*) <http://www.pcpitstop.com/spycheck/eula.asp> accessed 23 September 2017).

[109] Macdonald, 'Achieving Fairer Terms for the Consumer' (n 88) 14.

past relate to unilateral variations of the contract or to the subject matter. Other terms concern technological limitations, for example, via Digital Rights Management (DRM), that need to be installed alongside the product, or operate via an online service, and are designed to control (or monitor) how the product can be used, such as restrictions to make copies. The increased use of DRM combined with the consumer's willingness to share much of his or her personal data on social media platforms, has enabled producers and service providers to collect a considerable amount of personalised data, and contract and 'end user licences' for such products often contain terms granting the right to use such data and assigning rights to fully exploit user-generated content, be it text, image or sound.[110] Loos and Luzak have used a similar classification and examined typical terms in consumer contracts of online service providers.[111] Their results, too, illustrate problems with the said groups in relation to consumer contracts for the supply of digital content and online services. These terms, and whether they can be fair, will be assessed below.

Under the current law, the status of 'online services' is unclear. The unfair terms regime of the CRA applies to consumer contracts between a trader and a consumer. The extent to which 'online services' satisfy this has been discussed before.[112] Generally, it should be noted that some situations might lack the typical characteristics of a contract and would not be covered.

Another general problem which needs to be overcome before assessment of specific terms can be made, regards the question whether there can be a contract between the parties. While some providers supply their own products online, they often also rely on other online sales platforms to distribute the products. A good example of a product distributed by the provider and other traders is 'Windows 10' which is available via Microsoft's website and a wide range of traders, including amazon.co.uk.[113] Where the product is purchased via a trader, who is not the provider, the contract regarding the product will be between the trader and the consumer for the supply of the product, which, in itself, is unlikely to contain any terms allowing alteration of the contract. The issue here is in relation to the

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[110] Natali Helberger and others, *Digital Consumers and the Law* (1st edn, Kluwer Law International 2013) para 1.4.6.

[111] Marco Loos and Joasia A Luzak, 'Wanted: A Bigger Stick. On Unfair Terms in Consumer Contract with Online Service Providers' (2016) 39 J Consum Policy 63.

[112] See Chapter 4, p.95.

[113] n.b. Microsoft also distributes, so-called, OEM versions of Windows which are designed to be bought by computer manufacturers, installed on their products and then sold on to consumers. Here, the agreement between Microsoft and the trader stipulates that liability for defects vis-á-vis the consumer rests with the trader. This will be reflected in the end user licence and, unless the system including Windows, is sold by a third party trader, the situation is more straightforward.

provider's end user licence which the consumer has to accept to use the digital content. It is those licences which typically contain clauses granting the producer, for instance, the right to alter terms or subject matter unilaterally. Of course, licences can form part of a contract,[114] but where the product was supplied by a trader, the licence might not, for legal purposes, constitute a contract, due to lack of consideration.[115] However, this does not mean that these clauses cannot be assessed for fairness. Part 2 of the CRA also applies to non-contractual, as well as contractual, consumer notices,[116] and, when looking at the guidance document, the CMA intends for licences to be covered by that definition, thus allowing assessment of their clauses.[117]

Unilateral alteration of terms

It can be observed that suppliers of digital content often include terms in their contracts or, where there is no contract between the parties, the end user licence, allowing for unilateral variation of the contents. The CMA generally views a right for one party to alter terms as 'strongly suspicious' and '*may well, in any case, be blacklisted for the purposes of Part 1 of the Act*' as it interferes with the balance of the parties' obligations.[118] The CRA lists such terms under para.11 sch.2 CRA as 'potentially unfair', mandating its assessment for fairness under s.62 CRA.[119] In the consumer context, it is generally difficult to find a situation where it would be necessary to change a contract without the consumer's consent. A potential scenario might be where a provider intends to introduce some feature to his or her product at a later time that would, for instance, use data more extensively than originally intended. However, one might be inclined to ask why this should happen without the express consent of the consumer.

Assessment of the fairness of a term must be made by focussing on the key aspects of s.62 CRA, i.e. 'significant imbalance' and 'good faith', and the CMA guidance document offers some additional points for consideration. It states that fairness of such terms depends on:

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[114] 'Unfair Contract Terms Guidance - Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' (n 55) 4.20.

[115] 'Unfair Contract Terms Guidance - Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' (n 55) 4.21.

[116] 'Consumer Rights Act 2015 - Explanatory Notes' (n 34) 295.

[117] See 'Unfair Contract Terms Guidance - Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' (n 55) 1.22, 2.9, 4.21.

[118] 'Unfair Contract Terms Guidance - Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' (n 55) 5.21.1.

[119] CRA, s.64(6).

(a) its breadth – the extent of the changes that it allows, and particularly changes that are exclusively in the interest of the trader;
(b) its transparency – how far it can result in changes that are unexpected to and unforeseeable by the consumer; and
(c) the vulnerability of the consumer – in particular, whether consumers can realistically escape the impact of the changes by cancelling the contract.[120]

The breadth of a right to vary the contractual obligations can have a strong impact on the existence of 'significant imbalance' between the parties' rights and obligations. For that reason, the CMA explains that, where such cause is 'narrow in effect', it is more likely to be found fair. Here, 'narrow in effect' must be understood to mean that '*it cannot be used at the discretion of the trader to change the balance of advantage under the contract to the consumer's detriment*'.[121] In addition, regardless of the intended use or effect of a clause, the courts will consider the full potential of a clause even if it is not 'meant to be used in that way'.[122]

For a right to vary the contract to be fair, the term granting such right must also be 'transparent'. It is linked to the requirement imposed by s.68 CRA, that requires terms to be 'in plain and intelligible language and legible'. In this context, 'transparency' is aimed at making the possible (not only the intended) effects of such term foreseeable for the consumer.[123] Where a term does not provide sufficient information in a 'plain and intelligible' format, this is likely to preclude any such term from being fair. Furthermore, the CJEU has clarified that the fairness of a term allowing unilateral variation of a contract heavily depends on '*the reason for and method of the variation*' and '*whether consumers have the right to terminate the contract*' after such changes.[124] This information must also be given before or at the time when it is concluded, as '*the lack of information on the point before the contract is concluded cannot […] be compensated for by the mere fact that consumers will […] be informed in good time of a variation*'.[125] It would have the effect of depriving consumers of the possibility to consider the dimensions of the contract.[126]

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120 'Unfair Contract Terms Guidance - Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' (n 55) 5.21.2.
121 'Unfair Contract Terms Guidance - Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' (n 55) 5.21.5.
122 'Unfair Contract Terms Guidance - Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' (n 55) 5.21.3.
123 Case-92/11 C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* (2013) 3 CMLR 10 [55]; 'Unfair Contract Terms Guidance - Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' (n 55) 5.21.6.
124 C-92/11 *RWE* (n 123) [49].
125 C-92/11 *RWE* (n 123) [51].
126 Candida Leone, 'Transparency Revisited–on the Role of Information in the Recent Case-Law of the CJEU' (2014) 10 ERCL 312, 321.

The guidance lists 'vulnerability' as another aspect in order to establish whether a term might cause a 'significant imbalance'. It describes the consumer's ability to 'realistically escape' the consequences of a unilateral change to the contract, for example, by being given the right to terminate the contract. There are, however, a few point that ought to be noted. First, granting the right to terminate the contract does not, in itself, make any variation clause fair, but where a variation term is necessary, it can improve fairness.[127] Second, a right to terminate must allow the consumer to 'realistically' escape the contract. This must be understood as giving the consumer the chance to terminate without drawbacks. This may not be the case where cancellation is impossible as the obligations have been fully performed, or where termination carries with it a financial sanction for exercising the right.[128]

The OFT in their guidance document on unfair terms under the 1999 Regulations,[129] annexed examples that were found unfair and, unless merely deleted, provided the amended version. Only on one occasion, a variation term remained in the contract, albeit in an amended form, allowing the provider to make unilateral changes 'for security, legal or regulatory reasons'. It was also supplemented by a notice which would have to be given one month in advance, as well as a right to end the contract by giving one month's notice. This example shows how all three aspects, that were indicated by the CMA, are used to achieve a balance between the parties' rights and obligations, with only one thing to note: the CMA guidance might be somewhat narrower following the CJEU's judgement in *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*[130] whereby the general reference to variation 'due to changes of the applicable law' will not suffice,[131] and a more specific 'valid reason' might be required. However, empirical data shows that those general terms are common and deliberately, kept vague.[132] Under the CRA, those generic clauses are likely to become ineffective unless the provider, or trader, offers a 'valid reason' for its existence, such as 'security reasons or legal changes', and manages, at the time of contracting, to maintain a balance between the parties by making the clause transparent and removing the consumer's vulnerability to its effects.

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127 'Unfair Contract Terms Guidance - Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' (n 55) 5.21.8.

128 'Unfair Contract Terms Guidance - Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' (n 55) 5.21.8(a).

129 'Unfair Contract Terms Guidance - Guidance for the Unfair Terms in Consumer Contracts Regulations 1999' (n 84) Annex 1, group 10.

130 C-472/10 Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt.

131 C-472/10 *Invitel* (n 130) [29]; 'Unfair Contract Terms Guidance - Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' (n 55) 5.21.5.

132 Loos and Luzak (n 111) 69–70.

Unilateral alteration of subject matter

What needs to be dealt with now is, the fairness of clauses allowing a provider to make alterations to the subject matter which is particularly common in licences covering software. While such terms are rarely seen where the contract regards sales of goods, for certain contracts for the supply of digital content, they could be crucial to providers. They allow providers to fix bugs or update software, at a later stage, without the need to request permission for what may be nothing more than small patches, and making the application of a patch dependent on the consumer's approval is not appropriate for two reasons. First, there are situation where security loop holes need to be fixed, and consumers should not be able to refuse such updates which are clearly necessary. Second, as technologies advance, providers will need to make changes to their products to guarantee continuing compatibility with newer hardware and other software. In order to provide a product that works reasonably well on the wide range of different devices, it would be unreasonable to expect providers to also maintain a multitude of customer-specific versions. Arguably, the best way for providers to maintain a functional and safe product to consumer, is by having a right which allows for unilateral changes.

Altering a piece of software on the consumer's computer, or on the provider's service platform, will, in many cases, go unnoticed. Updates are applied to the device without prompting the consumer to authorise the execution of the updated file. If such right can be used without restriction, consumers could end up with a product which is significantly different from what they initially purchased. Even if a system necessitates authorisation, the consumer might effectively be required to comply, as otherwise he or she would be presented with an error, the next time the software is run, due to an old, or unsupported, version. Of course, providers may have a good reason for this approach, as has been explained but, similar to unilateral changes to contract terms, there is a risk of unfairness from a right to make changes to the subject matter. Providers are able to introduce changes which render the product significantly different from what it was when it was bought. Consumers have no means of checking what will happen to their system when an update is applied. All they are presented with is an executable file and, at best, a list of changes (a so-called change log) that this update is going to make. However, the actual contents of the update remain unknown. To protect consumers from the negative effects such an intrusion may have, fairness of terms allowing for, and acceptable scope of, changes to the subject matter must now be looked at.

Paragraph 13 sch.2 CRA identifies '*[a] term which has the object or effect of enabling the trader to alter unilaterally without a valid reason any characteristics of the goods, digital content or services to be provided*' as potentially unfair. Any term granting the right to change the subject matter must be looked at with due care and naturally arouses suspicion. In extreme cases, it might undermine the mandatory statutory legal protection of the terms implied by ss.34 – 36 CRA regarding satisfactory quality, fitness for purpose and description.[133] Even though a product might have been compliant with the implied terms when it was supplied, this might change along with the product itself.

To remove this risk, the CMA proposes that '*clear and restricted [changes] allowing […] minor technical adjustments which can be of no real significance to the consumer*'[134] are more likely to be considered fair and, with regard to digital content, a sample reason that is given, mentions 'addressing a security threat'. It has to be considered how well such an approach can function where digital content is the subject matter to a contract.

First, we must recall the factors of the 'fairness' test. A term must cause 'significant imbalance' to the detriment of the consumer and be contrary to the requirement of 'good faith'. A term only allowing for the removal of a security threat, however, is unlikely to cause an imbalance and consumers might even expect such a threat to be addressed. It becomes more relevant when the producer has to, temporarily or permanently, remove certain functionalities of the product, in order to make it safe. The absence of functions which the product had when it was bought, the vulnerable position of the consumer becomes more apparent. A term like this might, of course, be necessary, but it will be difficult to phrase it in a 'clear and restricted' way, because what is necessary under the particular circumstances depends on the security threat that has to be dealt with. In lieu of a less precise description of the approach taken, it might be possible to give a precise 'valid reason', such as prevention of security threats. Other reasons, like improvement of the product's functionality or availability might be fair and, while they offer a level of flexibility to the provider, they oust actions to the same effect which are not in line with those reasons. However, the scope for flexibility is arguably fairly limited as providing a 'valid reason' is intended to help consumers '*foresee the circumstances in*

[133] 'Unfair Contract Terms Guidance - Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' (n 55) 5.22.3.

[134] 'Unfair Contract Terms Guidance - Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' (n 55) 5.22.4.

which changes may occur [and to offer] real protection […] against encountering unexpected and unacceptable changes',[135] and it might still be difficult for providers to provide reasons which are clear enough to consumer and flexible enough to cover possible actions which might be necessary to fix or improve a product. This limitation seems only appropriate when the product is not software, as it is the most suitable method of offering some flexibility to producers whilst maintaining a high level of protection to consumers. However, where the product is software, the likelihood of a term being fair can be further enhanced when traders provide a 'notice of variation' and allow consumers to cancel within a short period of receiving such notice, if dissatisfied with the variation.

It has also been suggested that consumers could be given the right to cancel the contract[136] and, at first sight, the right to cancel a contract for the supply of digital content seem incompatible, for reasons which have been discussed before.[137] The statutory position on this right is clear: consumers do not have the right to withdraw from a contract within the cooling-off period nor can they reject to product under the CRA.[138] Neither can be done meaningfully and would disadvantage traders unduly as the consumer would retain a copy of the product. On a voluntary basis, however, the situation would be different. A provider who offers the right to cancel as a remedy can be assumed to be aware of the implications. In fact, where providers use Digital Rights Management (DRM), there might be nothing to worry about. The consumer could actually 'return' the licence and, even if the product would remain on the consumer's device, DRM would ensure that it cannot be used. Of course, providers who do not rely on DRM technology are unlikely to offer such right as they would face the same problem of having provided a product whose deletion is uncertain even though the contract has been terminated. What can be said, though, is that the right to cancel may affect how fair a term to undertake changes is viewed. However, granting the right to cancel must not be overrated and should only have a small effect. First and foremost, the initial contract should be performed and the mere right for the consumer to drop out at the point at which he or she is no longer satisfied

[135] 'Unfair Contract Terms Guidance - Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' (n 55) 5.22.6-5.22.7.
[136] 'Unfair Contract Terms Guidance - Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' (n 55) 5.22.8.
[137] See Chapter 4, p.132.
[138] 'Consumer Rights Act 2015 - Explanatory Notes' (n 34) 205.

with the product, should not give the producer permission not to honour the initial contract.[139]

Unfair Trading Practices

Consideration should now move on from contract terms, as such, to unfair trading practices, which can distort consumer decision making, for example through misleading advertisements. In 2005, the European Union enacted Directive 2005/29/EC on unfair commercial practices. In the UK, the Directive is implemented by the Consumer Protection from Unfair Trading Regulations[140] (CPUTR) which confer powers upon 'enforcement authorities' to counter-act such practices using criminal and civil enforcement measures, which were enhanced by the Consumer Rights Act 2015. Some remedies for the individual consumer in relation to misleading or aggressive practices (two of the categories of unfair commercial practices) were added by the Consumer Protection Amendment Regulations 2014.[141] First, however, it will be considered what these rules are and, in more detail, what impact they may have on consumer transactions online.

Scope

The Directive's provisions are at 'maximum harmonisation' level, unsurprisingly, requiring more precision in its implementing legislation than a minimum Directive, and the Regulations stick closely to its wording. The goal of the Regulations the prohibition of 'unfair commercial practices',[142] and certain elements need to be examined to understand the general approach.

'Commercial practices', under the Regulations,

> 'means any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product'.[143]

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[139] cf. 'Unfair Contract Terms Guidance - Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' (n 55) 5.22.9.
[140] Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277).
[141] Consumer Protection (Amendment) Regulations 2014 (SI 2014/870).
[142] CPUTR, reg.3(1).
[143] CPUTR, reg.2.

They apply to activities associated with, but not necessarily directly related to, consumer transactions. Scrutiny, therefore, also extends to acts '*occurring before, during or after a commercial transaction (if any) in relation to a product*',[144] most of which would escape the protection under the rules of contract law. 'Unfairness' under the Regulations has a distinct meaning, depending upon the situation falling with one of the specific categories identified in regs.3(3) and 3(4) CPUTR. These are practices which contravene the requirement of professional diligence,[145] are misleading actions or omissions, aggressive practices,[146] or are one of the specific practices listed under Sch.1 of the Regulations.[147] Before we consider situations of online activity, some brief consideration will be given to some aspects of the various categories of unfair practices, apart from the list in sch.1 CPUTR which has no requirements other than presence on that list.

As has been indicated, the first, and broadest, category of prohibited unfair practice is expressed in reg.3(3) CPUTR:

> (3) A commercial practice is unfair if—
> (a) it contravenes the requirements of professional diligence; and
> (b) it materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product.

This general provision is designed to act as 'safety net' that allows the courts to penalise 'commercial practices' which are not caught by the other provision.[148] In relation to what constitutes 'professional diligence' the European Commission points towards '*the adoption [of] "honest market practice", "good faith" and "good market practice" [which] emphasise normative values that apply in the specific field of business activity.*'[149] For the other part of the test, the practice must materially distort, or be likely to materially distort, the economic behaviour of the average consumer. Regulation 2(1) CPUTR states that this means '*in relation to an average consumer, appreciably to impair the average consumer's ability to make an informed decision thereby causing him to take a transactional decision that he would not have taken otherwise*'. This aligns the test under reg.3(3) CPUTR with the definitions of those other categories of unfair commercial practices set out in reg.3(4) CPUTR.[150] As has been indicated, those other categories are misleading actions, misleading

[144] CPUTR, reg.2.
[145] CPUTR, reg.3(3).
[146] CPUTR, regs.3(4)(a) – (c).
[147] CPUTR, reg.3(4)(d).
[148] European Commission, 'Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices' (2016) 55.
[149] European Commission (n 148) 56.
[150] European Commission (n 148) 40.

omissions, and aggressive practices, and the requirements for those are set out further in regs.5, 6 and 7 CPUTR respectively.[151]

The 'average consumer' plays an important role in relation to determining whether there is an unfair practice. This idealised individual '*is reasonably well informed and reasonably observant and circumspect*',[152] and this is to provide a benchmark intended to balance consumers' need for protection and traders' need to promote their products against competitors.[153] There is, however, specific provision for referring to the average member of a particular group when targeted groups of consumers or groups of vulnerable consumers are in question.[154]

From the above brief discussion, it can be seen that the Regulations are capable of covering a very wide array of situations. Here, two areas can be identified where they might be used to improve the position of consumers in relation to online transactions. These areas concern unfair contract terms, and their continued use, and pre-contractual activities which affect the consumer's decisions in relation to making a contract.

Personalised information

Before a consumer enters into a contract, there is a plethora of sources that provide information to consumers designed to affect the consumer's decision-making; the most obvious one being advertisements. On the internet, the number of situations in which consumers are presented with advertisements is large and, of course, their purpose is to influence the consumer to make a purchase. However, the Regulations draw a line where the average consumer's decision-making is 'impaired' and he or she makes, or is likely to make, a transactions decision, he or she would not otherwise have made. In relation to adverts, this may be the case where it is not obvious to the consumer that the information he or she is presented with is tailored to the individual user. Above it has been argued that terms allowing the collection of data, which is then combined and used to influence the consumer, may be 'unfair' in a consumer contract. Here, we are concerned with the use of such personalised information and the influence it has on the consumer's decision-making.

Consumers show reasonable resistance to such influence if they are aware of it. Mik asserts that in these cases '*the average person displays some form of*

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152 C-210/96 *Gut Springenheide GmbH, Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung and Another* [1998] ECR I-4657 [31].

153 See Recital 18 UCPD; European Commission (n 148) 42.

154 CPUTR, regs.2(4) and (5).

psychological resistance, recognising a "threat to behavioural freedom".[155] Thus, when presented with 'recommendations' based on previous purchases made on the same commercial website, consumers understand that the trader is attempting to sell further products which the consumer is more likely to buy. This resistance might be lowered, when such recommendations appear out of context, i.e. on social media or before the start of a video on, for example, 'youtube', as there is no direct link between the previous transactions, which led to the recommendation, and the website containing it. The European Commission expressed concerns with regard to these 'hidden and misleading advertisements' on social media[156] and the question arises whether this method of advertising can be an 'unfair commercial practice'.

Depending on how and where an advertisement is shown on social media and the information it contains, it could be argued that the trader omitted 'material information' and thereby committed an unfair commercial practice under reg.6(1)(a) CPUTR, as the information was necessary for the average consumer to make the connection between the advert and data provided by the trader and, thus, necessary for taking an 'informed transactional decision'.[157] Alternatively, the need for the same information might also come from art.6 of the e-Commerce Directive[158] which imposes information requirements in relation to information society services, and thus is specified as 'material information' under the Regulations.[159] Any such omission must also show the potential to lead the 'average consumer' to take a transactional decision which he or she would not have taken otherwise. Here, it is the nature of the advert that is intended to tempt the consumer to make impulse purchases and, while this might be an acceptable means of marketing products in context, if the context is omitted the decision-making of the 'average consumer' is impaired because of the lack of contextualisation, and this revelation of the information on which it is based.

Furthermore, it can be argued that such practice is contrary to the requirement of 'professional diligence' if not sufficiently transparent. Considering that this concept is, in part, based on the principle of 'good faith', an argument can be made that subjecting consumer to an influence which they can only resist if they are aware, and then not raising sufficient awareness, seems to fit the idea behind this concept.

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[155] Eliza Mik, 'The Erosion of Autonomy in Online Consumer Transactions' (2016) 8 Law, Innovation and Technology 1, 15–16; see also Peter S Menell, 'Brand Totalitarianism' (2014) 47 UC Davis Law Review 787, 790.

[156] European Commission (n 148) 142.

[157] CPUTR, reg.6(3)(a).

[158] Electronic Commerce Directive (n 10).

[159] CPUTR, reg.6(3)(b).

Whether this condition is satisfied must also depend on the particular advert and how it would be perceived and understood by the 'average consumer'. Sometimes, the actual trader's identity is sufficiently clear in an advert for consumers to make the connection, but in cases where there is a lack of transparency and clarity it seems plausible to rely on the Regulations to prevent further use.

A similar problem is to be found in relation to search engines. Of course, the results shown will be linked to the search term entered, but few consumers realise that the first few items which their search engine, such as Google, return are marked 'Ad' and that this means they will appear at the top of the list either because of personal information or because the relevant trader has paid to improve their ranking. Even though these adverts may be marked by small 'Ad' icons beside them, this may not be sufficient for the average consumer to realise this. It does also not convey to consumers that the ranking order, or the selection of some results over others, was chosen because of information other than the search term. This is all the more likely because it has not always been the case. Ranking of websites in search engines was often based on the number of requests of, and links to, a website so that popular sites would appear higher up in the list. This has changed, but many will not have realised that the results they see now are influenced by their past online activities. The issue is how distinguishable the 'average consumer' finds 'personalised', or paid-for results, from those ordinarily created, without such assistance, as their presentation is identical (apart from the small mark 'Ad').[160] Greater transparency in relation to the creation of the ranking of the results could be required to avoid the consumer's decision-making being compromised.

Social media

Beside personalised advertisements, traders employ social media more broadly to promote their products and some of the means by which they do so are open to question. An example, which the European Commission provides, is a scheme of commissioned user 'likes' and reviews. Here, a seemingly random individual posts a review on a product or clicks the 'like'-button of a post relating to such product.[161] Peers in the network might well assume that this action is a true indication of the individual's unbiased view, but in truth, it should not be viewed in that way, as the individual received a 'free' sample of the product or payment in return.

[160] See Mik (n 155) 17.
[161] European Commission (n 148) 143–144.

The same type of issue arises, but is even more problematic, when the individual in question is a person with a public profile (these people are often called 'social media influencers').[162] A trend in relation to digital games is that gamers record their gaming activity, comment on the game and subsequently make these recordings available on sharing platforms. Initially, such activity was the user's own motivation, but soon developers started to approach known 'gamers' and send them (free) copies of their games to be 'reviewed'. Without any indication of a connection between trader and user, consumers are unaware that comments, ratings and views might have been influenced by the receipt of such benefits.

Paragraph 11 of sch.1 CPUTR makes activities, where the trader has paid for a promotion without making this clear, unfair in all circumstances. YouTube, for example, have their own advertisement policies[163] which also require users who promote contents to inform the audience at the beginning of the video, thus offering the same level of protection and arguably more control of contents. In relation to effectiveness, it should be noted that, while the Regulations are imposed on traders, the platform providers' policies apply to their user base. Failure to inform about promotional contents would result in action being taken against the user, for whom continued use of the platform may be very important.

'Free' products

Another method often used by traders is the promotion of, so-called, 'free' products and services. This is again identified by sch.1 CPUTR as an unfair commercial practice '*if the consumer has to pay anything other than the unavoidable cost of responding [and] delivery of the item*'.[164] There are many European cases available which clarify the types of 'additional cost' that consumers have to accept[165] or when a product is not truly free.[166] The issue here is in relation to services or products in exchange for information. It has already been argued that certain services, for example, on social media are advertised as 'free' but would satisfy the requirement of contractual consideration as they are provided in exchange for information. Regardless of whether, or not, there might in fact be a contract, they are not 'truly

[162] Amazon.com, Inc., 'Amazon Influencer Program' (*amazon associates*) <https://affiliate-program.amazon.com/influencers> accessed 25 August 2017.
[163] YouTube, 'Ad Policy' (*YouTube Help*) <https://support.google.com/youtube/topic/30084?hl=en-GB&ref_topic=2972865> accessed 3 July 2017.
[164] CPUTR, sch.1, para.20.
[165] See European Commission (n 148) 97.
[166] 2S-27, Lietuvos Respublikos konkurencijos taryba (Vilnius), 11 November 2010; European Commission (n 148) fn. 214.

free' and would be an unfair commercial practice under sch.1 CPUTR. Furthermore, advertising these services as 'free' may also distort the consumer's economic behaviour,[167] if it does not become sufficiently clear that there is in fact an element of reciprocity. In this regards, the German Authority for Consumer Protection (vzbv) is currently seeking an injunction against facebook and raises this argument as one of three concern (the other two being in relation to unfair contract terms).[168]

Remedies

The original 2008 Regulations only provided for public enforcement at the criminal or civil level.[169] They did not provide any means of private redress, such as damages, for consumers. After a consultation in 2012, the Law Commissions considered reforming the Regulations and that led to the introduction of the Consumer Protection (Amendment) Regulations 2014, making available, to individual consumers, rights to civil redress which are now to be found in the inserted Part 4A of the Regulations.[170] The Law Commissions made it clear that the scope of Part 4A is narrower than the existing parts and 'prohibited practices' under it only relate to 'misleading actions' (Reg.5) and 'aggressive actions' (Reg. 7), thus excluding 'misleading omissions', 'practices contrary to commercial diligence' and any prohibited action under Sch.1.[171]

This scope was carefully chosen to remedy particular weaknesses which the existing law did not addresses adequately. The reason for targeting aggressive practices was the effect of those activities 'often affecting particularly vulnerable consumers', i.e. they are particularly susceptible to a practice '*because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee*',[172] and the lack of a clear and simple common law cause of action for consumers against the trader.[173] It was highlighted by the Commissions that the law on misrepresentation and fraud was not designed with consumers in mind.[174] Particularly '*[t]he right to rescind (or unwind) the contract is*

[167] See Decision PI2671 – Libero Infostrada para. 6, 5th indent by the AGCM; European Commission (n 148) fn. 215.
[168] See Verbraucherzentrale Bundesverband ./. Facebook Az. 116 O 341/15.
[169] cf. s.74(2) Consumer Protection Act 2007 (Ireland).
[170] HG Beale, *Chitty on Contracts*, vol I (32nd edn, Sweet & Maxwell 2015) para 38-145.
[171] See 'Consumer Redress for Misleading and Aggressive Practices' (Law Commissions 2012) Law Com No. 332; Scot Law Com No. 226 para 4.48-4.56 for more detailed opinions.
[172] European Commission (n 148) 46.
[173] 'Consumer Redress for Misleading and Aggressive Practices' (n 171) 4.3.
[174] 'Consumer Redress for Misleading and Aggressive Practices' (n 171) S.16.

uncertain and easily lost.'[175] With regard to aggressive practices it was discovered that '*[n]one of the main causes of action […] covers the sort of aggressive problems consumers typically encounter.*'[176] It is those deficiencies which the Law Commissions addressed and where the new Part 4A offers new means of redress to consumers. Thus, if a commercial practice falls within the scope of prohibited practices under Part 4A, the consumer might have the right to unwind the contract or demand a discount, and claim damages for consequential losses he or she incurred.

Of course, in an online context, aggressive practices are unlikely to be the problem, but it is a context ripe for the use of misleading actions, as the consumer is largely dependent on the information provided by the trader and scamming is a very 'real' problem for the digital consumer. The Financial Conduct Authority provide a good example of the vulnerability of particular consumer groups on their website.[177] They caution against companies offering financial recovery for scam victims. The very fact that the consumer fell for the first scam identifies him or her as susceptible to subsequent scams offering recovery. Some consideration should bow be given to the remedies provided in Part 4A CPUTR: the right to unwind, obtain a discount and damages for consequential losses.

Right to unwind

Regulation 27E establishes that consumers can unwind a consumer contract for the supply of digital content within 90 days after the product is first supplied. This right is removed only if the consumer has 'fully consumed' the product which, with regard to digital content, means '*[it] was available to the consumer for a fixed period and that period has expired.*'[178] The exercising of such right might, however, cause difficulties in relation to the need to return the product. Issues with any right for the consumer which requires the consumer 'return' the product, have already been discussed and in most cases, save where the product is covered by DRM, the product simply cannot be returned 'in a meaningful sense'.[179] With regard to these Regulations, a product is not 'fully consumed' if the consumer 'is able to reject some element of the product' and this forecloses access to the right to unwind the contract

[175] 'Consumer Redress for Misleading and Aggressive Practices' (n 171) 4.8.
[176] 'Consumer Redress for Misleading and Aggressive Practices' (n 171) 4.17.
[177] Financial Conduct Authority, 'Avoid Scams and Unauthorised Firms' (4 April 2016) <https://www.fca.org.uk/consumers/avoid-scams-unauthorised-firms> accessed 10 October 2016 under Step 9.
[178] CPUTR, regs.27E(8) & (9)(b).
[179] See p.167.

in most cases of DRM-free digital content. This position is sensible and, while it diminishes the effectiveness of the Regulations, consumers still enjoy the alternative right to a discount which they can enforce. As has already been discussed, this position seems inevitable, but consumers can still make use of the right to a discount.

Right to a discount

The right to a discount becomes available after a 90-day period has expired or, as is the case here, if the product has been fully consumed.[180] The Regulations provide four bands of discounts which reflect the seriousness of the prohibited practice. They start at 25 percent for conduct which is 'more than minor' and increase in steps of 25 percent to 'significant', 'serious' and finally to 'very serious' at a 100 percent discount.[181] These steps are less favourable than what was initially suggested by the Law Commissions.[182] Their lowest band started at 0 percent for 'negligible detriment' and awarded a 25 percent discount for minor actions which, under the Regulations, fall outside the scope as the lowest band already requires a practice that is 'more than minor'. Obviously, this adjustment has more impact in relation to digital content, as a category, than transactions relating to other subject matter, because of the widespread, effective, unavailability of the right to unwind.

However, there is a difficulty in relation to the use of this remedy, as well, where the consumer 'pays' for the digital content with information in return. A discount looks *prima facie* impossible as no pecuniary 'price' was paid, but the Regulations take into account alternative means of payment, and regs.27F(4) and (5) explain:

> (4) To the extent that the consumer transferred anything else under the contract, the consumer is entitled to receive back the same amount of what the consumer transferred, unless paragraph (5) applies.
> (5) To the extent that the consumer transferred under the contract something for which the same amount of the same thing cannot be substituted—
> (a) the consumer is entitled to receive back in its original state whatever the consumer transferred, or
> (b) if it cannot be given back in its original state, the consumer is entitled to be paid its market price as at the time when the product was rejected.

It is obvious that information or data, just like digital content, cannot be transferred back to the consumer. However, as indicated above, when dealing with a supply of digital content in return for which the consumer has provided information, a claim for damages may effectively be the only possibility. It might be argued that the

[180] 'Consumer Redress for Misleading and Aggressive Practices' (n 171) 5.22.
[181] CPUTR, reg.27I(4).
[182] See 'Consumer Redress for Misleading and Aggressive Practices' (n 171) 8.125.

consumer should make a claim for damage for the market price of such information.[183] It is a solution which is theoretically feasible, but very difficult to determine the value of the information. Depending on the type of information, the market value might be disproportionately high or low compared to the value of the contract.

Suggestions might be made that the amount awarded should reflect the consumer's financial loss or be based on the level of alarm and distress suffered, would be more appropriate, but quantification remains a problem, and neither option provides an outcome remotely similar to what consumers would find if the product was not 'digital content' or they pay by pecuniary means. Clearly, just as what is really required in relation to termination, or unwinding, of a contract, from the trader's perspective, i.e. that the consumer should no longer be able to access the product, the same cut off from use is needed for the information supplied by the consumer. Of course, that would pose additional problems where the information has been passed on to other traders.

Right to damages

Unlike the right to unwind the contract or the right to a discount, damages are a Tier 2 remedy and have attached to them additional conditions. First, the consumer has to prove that he or she has incurred financial loss, or suffered 'alarm, distress or physical inconvenience or discomfort', which they would not have suffered had the prohibited practice in question not taken place. It can be used in addition to the Tier 1 remedies above but also, as might be the case in some situations, when both Tier 1 remedies are unavailable. In addition to what the consumer must first establish, the trader is allowed a 'due diligence' defence so that any claim will be unsuccessful if the trader can establish that the prohibited practice was caused by any of the events listed under reg.27J(5)(a) CPUTR and that he, the trader, took '*all* reasonable precautions'[184] to avoid the occurrence. This makes a claim for damages less certain, and thus unsuitable for claims of minor magnitude.

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[183] CPUTR, reg.27F(5)(b).

[184] 'Consumer Redress for Misleading and Aggressive Practices' (n 171) 2.38; see also Christian Twigg-Flesner and others, 'An Analysis of the Application and Scope of the Unfair Commercial Practices Directive: Report for the Department of Trade and Industry' (2005) para 2.10.

Enforcement

The 2014 amendments to the Consumer Protection from Unfair Trading Practices equipped consumers with means of private enforcement. Obviously, consumers may be successful when informing traders of their intent to exercise any of the rights under regs.27E-27J CPUTR, i.e. the right to unwind a contract, the right to claim for a discount and the right to claim damages, but they may well encounter resistance. In that situation, the consumer can bring a civil claim for the court to make an order giving effect to those rights.[185] Of course, consumers may still feel unable, or unwilling, to start these proceedings, just as they are in relation to contract law actions, particularly where the product value is low.

In keeping with such inability, or reluctance, the Regulations continue to be primarily focussed on prevention, and the enforcement of the prohibition of unfair commercial practices, via public authorities. Practices which are found 'unfair' are recognised as criminal offences,[186] where the relevant *mens rea* is present, and can be enforced by any 'enforcement authority'.[187]

Originally, such enforcement by public authorities did not assist consumers who had incurred a loss. However, in October 2015, Amendment Order 3 of the Consumer Rights Act made a number of changes to the public enforcement regime in relation to unfair commercial practices, so that the Competition and Market Authority (CMA), for example, which can make applications to the court for 'enforcement orders' and 'undertakings' against infringing traders,[188] can now also have one of the new 'Enhanced Consumer Measures' (ECM) added to such 'orders' and undertakings. (This also applies to such orders or undertakings obtained in relation to the use of unfair terms under the unfair terms regime in the CRA.) These offer an opportunity to flexibly improve outcomes for consumers.[189] They enable enforcers to require traders to take positive action in addition to, or instead of, requiring them to stop breaching legal requirements (or using unfair terms).[190] Three categories of 'enhanced consumer measures' are provided for, dealing with redress, compliance and choice. Those will be looked at briefly to consider possible effects this may have on consumers retrospectively and in future transactions.

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185 CPUTR, reg.27K(4).
186 CPUTR, regs.8 – 13.
187 CPUTR, reg.19.
188 See HG Beale, *Chitty on Contracts*, vol II (32nd edn, Sweet & Maxwell 2015) paras 38–159.
189 Department for Business, Innovation and Skills, 'Enhanced Consumer Measures - Guidance for Enforcers of Consumer Law' (2015) para 44.
190 Peter Cartwright, 'Redress Compliance and Choice: Enhanced Consumer Measures and the Retreat from Punishment in the Consumer Rights Act 2015' (2016) 75 C.L.J. 271, 280.

The primary goal for enforcers, in relation to Enhanced Consumer Measures, should be the provision of redress to consumers who have suffered a loss.[191] Measures under this category include 'compensation or other redress', the right to terminate a contract or, in cases where it is impossible to identify the individuals, a measure can be issued in the 'collective interest of consumers', for example, payments of the losses caused to a consumer charity.[192] While the applied measures have to be 'just, reasonable and proportionate', taking into account the circumstances of the trader, the conduct and the overall loss,[193] the flexibility offered would allow enforcers to work with traders and the courts. This could provide consumers with remedies which are 'tailored' to the product and conduct in question which, as has become apparent, might be necessary for certain contract for the supply of digital content under Part 4A of the Consumer Protection from Unfair Trading Regulations 2008. In a situation where a trader collected information in a non-transparent way and used it to influence consumers to make purchases, maybe a subscription, it would, for example, be possible to require the trader to refund consumers who are unhappy with their purchase. Furthermore, it might be appropriate to award damages to consumers in addition if such information has been used in a wider range.

The second group allows for measures '*intended to prevent or reduce the risk of the occurrence or repetition of the conduct*'.[194] Typical examples of this group are the appointment of a compliance officer, provision of better staff training and guidance, improved record-keeping and the collection of customer feedback.[195] There is no list of possible measures as these depend on each individual case so that for cases where contracts are concluded online and the unfair commercial practice results from lack of information, or clear information, an 'enforcement order' or 'undertaking' could require traders to improve the information in a way which makes it more likely to register with consumer and be taken into account. Where the problems are due to poor administration or training, staff training or the appointment of a compliance officer might be appropriate.[196]

Lastly, enhanced consumer measures can require traders to inform consumers about their past performance and breaches, either directly on their website or in store, or via a third party 'register' of traders who have engaged in prohibited

[191] Department for Business, Innovation and Skills (n 189) 48–49.
[192] EA, ss.219A(2)(a)–(c); Department for Business, Innovation and Skills (n 189) 61–64.
[193] EA, ss.219B(1)–(3).
[194] EA, s.219A(3).
[195] Department for Business, Innovation and Skills (n 189) 46.
[196] Department for Business, Innovation and Skills (n 189) 46.

conduct. This is intended to improve consumers' decision-making but doubt can be cast on how readily this will be used. The use of any of the Enhanced Consumer Measures must be 'just and reasonable',[197] as well as 'proportional',[198] and the problem of the unpredictability of the impact of adverse publicity may limit the use of this measure by the courts.[199] It would act as a deterrent to traders, as well as improve the information available to consumers with which to make a choice, but the negative effect for the individual trader could be viewed as potentially too grave and disproportionate in relation to the benefits provided for consumers.

Digital Rights Management

Before concluding this chapter, the use of Digital Rights Management systems should be considered, as a particular aspect of the challenges which the consumer faces in relation to the acquisition of digital content. The use of Digital Rights Management has become an attractive means of addressing intentional piracy of digital content.[200] DRM systems operate by managing (or controlling) and monitoring use of the licensee.[201] In effect, they control how, and to what extent, licensees can use the contents covered by DRM. It describes all technological measures which enforce consumer compliance with the copyrights of the rights holder by monitoring, controlling or limiting the ways in which consumers can interact with the digital content.[202] These systems come in a variety of shapes. One example typically found on computers is a piece of software, although hardware solutions are possible,[203] that is automatically executed when a protected product is started. The DRM authorises the execution by validating the licence with the producers' databases. Alternatively, producers can add a 'region code' on CD or DVD, and reading devices outside the region, holding a different code would not permit certain actions, such as even playing back the disk. For modern audio files,

197 EA, s.219B(1).
198 EA, s.219B(2).
199 See Cartwright (n 190) 293.
200 Chih-Ta Yen, Horng-Twu Liaw and Nai-Wei Lo, 'Digital Rights Management System with User Privacy, Usage Transparency, and Superdistribution Support' [2014] Int. J. Commun. Syst. 1714. However, it has to be noted that computer scientists do consider 'non-technical' solutions the 'real' answer to the problem (cf. Stuart Haber and others, 'If Piracy Is the Problem, Is DRM the Answer?' in Berhard Becker and others (eds), *Digital Rights Management: Technological, Economic, Legal and Political Aspects* (1st edn, Springer 2003) 224).
201 Niels Rump, 'Digital Rights Management: Technological Aspects' in Berhard Becker and others (eds), *Digital Rights Management: Technological, Economic, Legal and Political Aspects* (1st edn, Springer 2003) 4.
202 Rump (n 201) 3–4.
203 See *Sony Computer Entertainment Inc v Owen* [2002] EMLR 742 (Ch D).

licensing information is held in the file itself and most media players will not allow actions which the licence prohibits.

The functionality of Digital Rights Management systems as 'content manager' is not limited to an initial check of whether the user has a valid licence, modern systems are also responsible for the enforcement of the contract through technologically restricting what the licensee can do. In addition, they can apply changes to the digital content, in some cases even without requiring the consumer authorisation and, in keeping with changed terms, they can change the way that the digital content can be used. Certain issues arise which should be considered.

DRM systems allow the imposition of restrictions on the availability or accessibility of contents. This might be a technical implementation of contractual terms to which the consumer agreed,[204] but these systems are often more intrusive and raise issues of over-enforcement and lack of transparency. *Prima facie*, the purpose of DRM is the restoration of '*the traditional balance between [right-holders and users]*' and this raises the issue of the enforcement of copyright protection under consideration of exemptions, such as 'fair dealing'.[205] No longer is 'fair dealing' a concept which is largely (because of practical difficulties of enforcement by the copyright holder) at the discretion of the consumer. Rather providers can use DRM to allow only the actions which they deem fair, without having to worry about breaches by consumers (as long as their system works well). The ability to enforce control which even extends beyond copyright holder's rights, creates a technological imbalance to the disadvantage of consumers.[206] Its effect is mono-directional as providers do have the possibility to act contrary to the terms of the contract, amend them for either party and, if they concern the consumer, enforce them directly by updating the DRM rules. This places providers in an advantageous position, but whether such DRM uses are acceptable has been debated frequently. From a copyright point of view, the argument is often made that it over-protects right holders and restricts, for example, consumers' right to 'fair dealing' unduly.

However, the focus here is on the use that might be made of the unfair terms regime and the use of the regime in this context might be avoided by including DRM as part of the product, without addressing it in the contract. The 'unfair terms'

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[204] For example, Spotify Ltd, '8 User Guidelines' (*Spotify Terms and Conditions of Use*, 11 January 2016) <https://www.spotify.com/uk/legal/end-user-agreement/#s8> accessed 24 June 2017.

[205] cf. Nicola Lucchi, 'Countering the Unfair Play of DRM Technologies' (2007) 16 Tex.Intell.Prop.L.J. 91, 102; see also 'Exceptions to Copyright' (*GOV.UK*, 18 November 2014) <https://www.gov.uk/guidance/exceptions-to-copyright> accessed 11 August 2017.

[206] Lucchi (n 205) 101–102; Pamela Samuelson, 'Digital Rights Management {and, or, vs.} the Law' (2003) 46 Comm. ACM 41.

provisions of the CRA only apply to contractual terms.[207] Of course, any such difficulty would be avoided if what the DRM was capable of doing technologically had to be included in the terms of the contract. Since the implementation of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (CCR)[208] provision of information regarding '*the functionality, including applicable technical protection measures, of digital content*',[209] has become mandatory and is treated as included into the contract as a term.[210] Subject to any issues about the 'core exemption', and anything detracting from use beyond the requirements of copyright should be outside of such protection,[211] questions over the fairness of the DRM would therefore be challengeable as unfair terms. Unfortunately under the Regulations, omission of the DRM limitations from the requisite information, and therefore terms, merely results in the contract not binding the consumer, and it is still common to find contracts in which the operation of DRM is only explained insufficiently or not at all.[212] In those cases, the consumer is denied the opportunity to form an opinion about the entirety of the subject matter on offer, and ratification of the aspect, which the trader failed to inform about, is the only option for consumers wishing continuance of the contract. It might be argued that a remedy akin to the 'consumers' rights to redress' under Part 4A of the Consumer Protection from Unfair Trading Regulations 2008[213] could be provided so that the consumer be entitled to a proportional refund reflecting the difference between the

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[207] In the US, this argument is probably of greater concern than in the EU (see text), and it has been suggested that '*technological protection measures [such as DRM] can be considered a condition of the widespread use of contract-based distribution models of the Internet*' (see Jacques de Werra, 'Moving Beyond the Conflict Between Freedom of Contract and Copyright Policies: In Search of a New Global Policy for On-Line Information Licensing Transactions: A Comparative Analysis Between U.S. Law and European Law' (2002) 25 Colum. J.L. & Arts 239, 250). This position is, from a European consumer protection viewpoint, highly questionable as it deprives consumers of the possibility to establish what is offered and comparing it to products of competitors.

[208] Consumer Contracts (Information, Cancellation and Additional Charges) Regulations (n 37) implementing Consumer Rights Directive (n 5).

[209] CCR, sch.2(v).

[210] CCR, reg.10(5).

[211] The restriction of copyright would, in any event, not be unfair as a matter of being in keeping with legal requirements (see s.73 CRA). However, outside of those rules, any attempt to argue that further restrictions on use were part of the definition of the main subject matter, would be met with the argument that they were exclusion clauses, taking away from the rights which the law otherwise allows in relation to the consumer in relation to information protected by copyright.

[212] For example, Valve's Steam platform explains the legal requirements in their User Agreement but does not inform about technical restrictions. Interestingly, detailed information on the functioning of their DRM measures can be found on their business section of their website for publishers (Valve Business solutions, 'Publishing Services' <http://www.steampowered.com/steamworks/publishingservices.php> accessed 24 September 2017).

[213] Part 4A cannot be applied directly here as it is narrowly framed and requires a positive action, see reg.27B Consumer Protection from Unfair Trading Regulations 2008. The Regulations are discussed in more detail on p.192.

performance reasonably expected (which would include the limitations of copyright law, where appropriate reasonable expectations can have institutional or normative ingredients).[214]

However, such remedies would only have a limited effect on the use of DRMs which are unfair in the breadth of their impact. It might be more effective, and would certainly directly address the real issue, if the limitations created by the DRM could, themselves, be subject to the test of unfairness as if they had been included in the term which the CRR should have ensured was present. This would make the fairness of their scope (particularly its imbalance), the focus of attention, and could lead to injunctions as to its future use.

For those contracts which contain all the necessary information about the restrictions imposed by DRM, the assessment should take place in the manner, similar to the approach explained above,[215] i.e. the provider should offer a 'valid reason' which will be used to determine whether the clause causes 'significant imbalance' or is contrary to the requirement of 'good faith'.

This position is a sensible one with regard to restriction that are imposed at the time when the contract was made, but there are a number of cases where DRM policies were changed subsequent to the conclusion of a contract, and the position might be somewhat more complex here. Subsequent changes to the DRM system which impose unenvisaged limitations on consumers naturally arouse suspicion. The two following examples will illustrate the different impetus for those changes:

In 2009, consumers of e-books provided by Amazon.com discovered that certain titles were remotely removed from their devices. As a result of copyright infringements by a third party provider, Amazon was required to remove the titles from their catalogue and delete them from their customers' devices. It did so and refunded the purchase price. This was an invasion of their devices which consumers did not even know was possible, at the time.[216]

In the same year, users of the e-book platform Fictionwise received notice that around 300,000 titles would soon no longer be available due to permanent server shutdowns of their supplier Overdrive. Contents which consumers downloaded, and stored, on their device remained accessible, but were not accessible from, and could

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[214] See Catherine Mitchell, 'Leading a Life of Its Own? The Role of Reasonable Expectation in Contract Law' (2003) 23 OJLS 639.

[215] See p.184.

[216] Laura June, 'Amazon Remotely Deletes Orwell E-Books from Kindles, Unpersons Reportedly Unhappy (Update)' (*engadget.com*, 17 July 2009) <https://www.engadget.com/2009/07/17/amazon-remotely-deletes-orwell-e-books-from-kindles-unpersons-r/>.

not be transferred to, other devices.[217] While Fictionwise was unable to prevent losing access to the titles in question, as Overdrive's protection mechanism prevented further use, Fictionwise made every effort to arrange alternative access by contacting the publishers.[218]

In both cases, the providers updated their DRM policies and the system executed those directly without the need for authorisation from the consumer. These contracts did not address this issue, but the question would be whether the providers could include a term which would allow such actions. Going back to the unfair contract terms regime, the potential for unfairness is plainly obvious from the two cases, and a general term would not satisfy the fairness test, but providers might be able to offer a precise 'valid reason' which would narrow the scope of possible actions.

Looking at the two cases, the events, i.e. copyright infringements or the unavailability of contents from an external supplier, do not seem to be completely unforeseeable. For a book-publishing platform open to third party products, copyright infringements are not an unlikely event and can, therefore, be reflected accurately in a contractual term allowing alteration (or deletion) of the contents. Likewise, in the second case, contents becoming unavailable after the shutdown of a third party supplier, is an event which is fairly common (even in relation to sales of goods). These issues can be phrased narrowly and put in a contractual term which consumers would understand, and might therefore be considered fair.

However, other situations might be more difficult to foresee or to express narrowly in a contractual term and, to some extent, the question remains as to what companies can be expected to predict, and at what level of detail. This is intimately connected to what a term dealing with changes can be expected to say, in relation to how predictable it can make the reasons for changes for consumers, and how predictable it needs to make them in order for the term to be regarded as fair. There is obviously balance which needs to be achieved here.

There are other scenarios, where providers would make unilateral changes to contents which are not necessarily an issue. Varying availability is an example which needs to be dealt with here. Generally, this will simply be covered by the terms of the contract and, even though there will be a point where it could be argued that the available content has changed so significantly, for example, in quantity, that it no

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[217] Amber Sami Kubesch and Stephen Wicker, 'Digital Rights Management: The Cost to Consumers' (2015) 103 Proceedings of the IEEE 726.

[218] Chris Meadows, 'Overdrive Pulls out of Fictionwise Distribution' (*TeleRead.com*, 8 January 2009) <http://teleread.com/overdrive-pulls-out-of-fictionwise-distribution/>.

longer resembles what the consumer contracted for. It then might become a matter of whether the consumer is equipped with the right to terminate the contract within reasonable time. Only if consumers are denied this option, should unfairness become an issue. If it is not covered by the core exemption, a 'real' right to terminate would seem to be the best way to deal with a service which is to provide variable contents, the enjoyment of which by the consumer is inherently a matter of individual taste, such as films or books. Although not a matter of personal taste, the same would seem to be the 'fair' way for an online film platform, for example, which had offered unlimited access to the available contents at the time the contract was made, but wants to change it to a limited or fixed number of films per month. A term allowing such a change would seem to depend on its fairness on sufficient notification and ability for the consumer to terminate, before such changes are made.

Of course, once unforeseeable events are under consideration, then the issue of frustration arises. The court in *Davis Contractors Ltd v Fareham UDC*[219] explained

> 'frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.'[220]

Where this is the case, the contract might be frustrated and the parties discharged from their obligations, but an attempt to escape a bad bargain after its conclusion will not be fertile. The doctrine '*[is] not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains*'.[221] However, in a situation where the provider loses the licence for continuous provision of the contents, compliance with copyright law, and not avoidance of 'bad bargain', is the provider's common motivation.

The design of the contract is an important factor in this regard. Consumers can get access to e-books by either taking out a periodical subscription with a provider or get e-books in single, unrelated transactions. If a situation like in Fictionwise occurred under a subscription scheme, it must be asked whether the removal of one title would render the service 'radically different'. In such a situation, the overall purpose of the contract would still be achieved, i.e. the consumer has access to a variety of books.[222]

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[219] [1956] AC 696.

[220] *Davis Contractors Ltd v Fareham UDC* (n 219) 729.

[221] *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (No2)* [1982] AC 724, 752; see also *British Movietonews v London and District Cinemas* [1952] AC 166.

[222] Depending on the terms of the contract, and possibly the length of time during which the book was available, consumers could claim for damages or, if the contents are irreplaceable, claim for loss of enjoyment (see Chapter 4, p.140).

If the contract is about making the contents accessible then, arguably, the contract is performed at that stage and cannot be frustrated. However, with e-books, which only exist on an electronic device, there is at least some expectation of continuing availability on a new electronic device when the old one ceases to operate. This might be particularly so in relation to reference or text books, but is probably so in relation to all electronic book purchases. Such continued availability, or the specification of the length of time for which it will be available, may be dealt with by an express term, which will preclude frustration, and be subject to the fairness test (provided it is not regarded as falling within the core exemption).[223]

Conclusion

First, the regulations on distance selling, and particularly, the right to pre-contractual information and the right of withdrawal within a cooling-off period, were looked at. Under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, implementing the Consumer Rights Directive, providing pre-contractual information is intended to improve consumers' decision-making. This information covers crucial aspects on trader's identity and contact details as well as the characteristics, and limitations, such as technological protection measures, of the product. It was noted that, in spite of the availability of such information, consumers' decision-making will only be improved when this information is read and understood, which is rarely the case in online contracts for reasons which were discussed in Chapters 1 and 2.

It was argued that reducing the amount of information that is provided at any point in time, could help consumers to better digest important information. A reduced number of mandatory items has to be provided where a distance contract is concluded by means which are subject to spatial or temporal limitations, such as on mobile phones or television sales. An attempt was made to make an analogy between the temporal limitation faced by traders in relation to television sales and the technical limitations which internet shopping imposes on transactions. This analogy was not perfect and, particularly at this point in time, is unlikely to be accepted but, with further empirical research could well show that consumers would benefit from a

[223] For example Amazon Ltd, 'Kindle Store Terms of Use' s 1 <https://www.amazon.co.uk/gp/help/customer/display.html?nodeId=201014950> accessed 14 November 2016.

reduced amount of information that is provided upfront, and maybe this exception would be extended to also encompass internet transactions.

The right of withdrawal was generally seen as useful to consumers where the provision (or digestion) of information is problematic in relation to distance sales. Consumers are able, within 14 days, to unilaterally withdraw from a contract without giving any reason. With regard to online shopping, consumer, who become, 'click-happy' and made purchases they regret later, can simply return products without any repercussions. However, it was found that, where the product is digital content, such a right does not generally exist. While the position is generally sensible, as 'returning' a product will often be impossible, this offers a significantly lower level of protection in an area where consumers are less likely to understand how a product functions before they can try it out for themselves. It was, therefore, considered whether this situation could be improved by giving consumer the chance to examine test or trial versions. To an extent, this would improve the situation but, since there is no legal requirement to offer such versions, it is down to individual traders whether consumers can test the product, or parts of it, prior to a purchase. Besides this, where traders use Digital Rights Management components that check the validity of a product licence, it was argued that consumers could have a right to withdraw from such contracts and return the licence within a cooling-off period, as the protection component would ensure that the product is no longer available after the licence is returned.

Subsequently, attention was given to the unfair terms regime under the Consumer Rights Act 2015. It was shown that, in comparison to former implementation of the Unfair Terms Directive, the CRA offers a more extensive scope. Contractual terms of any kind, not only non-individually negotiated terms, can be assessed as well as non-contractual notices relating to the rights and obligations of consumer (consumer notices) are covered. The structure of the test reflects the most recent developments regarding the notion of the 'core exemption' and the importance of the 'grey list'. This improves the level of protection, and makes it less likely for a term to fall under the 'core exemption': terms that are listed in the grey list will be assessed, regardless of whether the term would otherwise be exempt from the assessment.

'Significant imbalance' and 'good faith' were individually looked at as the two elements of the fairness test. In relation to 'significant imbalance', various factors, such as economic weighing or default rules, could be identified that were influential, but uncertainty as to the exact nature of this element of the test remains. The

meaning of the 'good faith' requirement poses a further problem in relation to the fairness test. It was suggested that the trader would only be regarded as acting in good faith where the reasonable trader could assume there would be agreement to the term by the reasonable consumer acting without those inequalities of bargaining power and information which the UTD was introduced to combat.

The fairness test was then considered in relation to terms, which are commonly found in contracts for the supply of digital content, which grant traders the right to make changes to terms of the contract. Under contracts for the supply of digital content, such changes might be necessary for the continuous provision of the product, but it was shown that a broad term carried some potential for unfairness, but that a term would be more likely to be fair where it was narrow and transparent. However, there was the additional problem that it was impossible to narrowly address all the individual events which could occur. Therefore, it was suggested that providing a narrow 'valid reason' when terms needed to be changed might equally satisfy the condition, if it allows the consumer to consider the dimensions of the contract. Similar points were made in relation to terms allowing changes to be made to the subject matter.

With regard to unfair trading practices, the general scope of the rules under the Consumer Protection from Unfair Trading Regulations 2013 and its categories into which a trading practice could fall were looked at. Subsequently, three scenarios the consumers are likely to experience online were presented, and it was assessed whether these would be considered unfair trading practices under the Regulations.

Traders might collect information about the contract, be it purchase preferences, recent purchases or the browsing history, and might make use of it, for example, to present targeted ads to the consumer. It is not clear to the consumer, why they are presented with it, and this can result in a lowered resistance against these temptations to which he or she is, obviously, susceptible. It was suggested that such behaviour omits 'material information' or contrary to the requirement of 'professional diligence' and could, therefore, be considered an unfair trading practice.

Another activity which was examined was the paid promotions on a social media platform by individuals, without this being disclosed. This, as well as advertising products as 'free' where there are 'hidden costs', are listed under sch.1 of the Regulations and prohibited under any circumstances.

Consideration was then given to the remedies which the Regulations provide, and it particularly the private remedies, which were introduced by the Consumer

Protection (Amendment) Regulations 2014, were looked at. For 'misleading actions' and 'aggressive actions' as well as any prohibited practice under sch.1, Part 4A provides consumer the rights unwind the contract(reg.27E), to receive a discount (re.27F) and to claim for damages (reg.27J). However, in relation to digital content, consumer would experience difficulties in exercising their rights in some cases. Returning 'digital content' or claiming a discount (or the equivalence value in damages, where a product has been paid for with, for example, information), may not always be possible or lead to absurd results.

However, besides those private rights, prevention of unfair trading practices is also enforced by 'enforcement authorities', public bodies and institutions which are equipped with the powers to apply for 'enforcement orders' or undertakings. Here, the Consumer Rights Act 2015 introduced three types of Enhanced Consumer Measures' which can be added on to order or undertakings and are designed to provide benefits to consumers. The categories (redress, compliance and choice) seemed suitable and the actions, they would entail, appropriate. However, these measures will only be granted when they are 'just and reasonable, as well as proportionate, and, since some measures might cause unpredictable side-effects, such as adverse publicity, courts might be careful in allowing them to be attached.

Finally, Digital Rights Management systems (DRM) and their function position in consumer contract was looked at. These systems pose a risk to consumers as they can be used to unduly restrict the consumer's use of a product and, in addition, perform other tasks, such as the collection of data from the consumer's device without the consumer being sufficiently aware of this.

However, when it was tried to subject DRM to the protective regimes, it was found that mandatory information about them was the greatest problem. Failure to inform about their functionality, effectively prevented the unfair terms regime from making an assessment as to the fairness of a the term covering the DRM since it was simply absent. It was suggested that it would be more beneficial to treat the failure to provide information as if such information had been included, making the unfair terms regime applicable.

With regard to the fairness test, it seemed sensible to expect traders to sufficiently outline how their DRM operates and what situations these system might make changes to contents on the consumer's device. After considering two scenarios, events that such systems cover seemed foreseeable which makes their inclusion in form of a contractual term possible.

On the other hand, where an event was not foreseeable and, as a result of it, the contents would have to be removed from the consumer's device, the question of frustration was considered. Obviously, the doctrine is narrow and would not arise where the event was somehow caused by one of the parties. More importantly, the fact that most events could be represented by an express term in the contract, seemed to preclude frustration.

Chapter 6:

Conclusions

This thesis discussed the need for further development of the regulatory framework with regard to consumer contracts for the supply of digital content. It considered the basics of consumer protection and aspects of formation and formal requirements of online contracts, before a detailed analysis of 'digital content' in consumer contracts. Eventually, these themes were brought together to examine how well current regulations are equipped to deal with contractual issues in the electronic environment.

There are many attempts to accommodate the shift from paper-based to electronic contracting. In Chapter 2 is was shown that, often, the traditional contract law rules are, and can be, applied to online contracts but, even though they are suited to produce desirable outcomes, certain rules, such as those on incorporation, require more guidance, allowing the use of contracting processes that comply with clear rules and are transparent for consumers. Many regulations acknowledge the special nature of the electronic environment, generally, and grant specific rights to consumers, but when provisions were looked at in detail, more might be needed to take into account technical limitations which would prevent consumer from exercising those rights.

Uncertainty exists in relation to the formation of 'click-wrap' and 'browse-wrap' contracts. No clear answer could be given as to how the click of a button is to be interpreted, though it was argued for the more flexible method of incorporation by notice. In this regard, the applicable rules for incorporation are clear and generally capable of dealing with issues arising in the electronic environment, but the design of the contracting procedure, is much more complex and the thesis makes suggestions of how typically used methods, such as hyperlinks or 'read and understood' declarations, should be interpreted under those rules.

Aligning browse-wrap contracts with the existing framework was somewhat more difficult. Even though 'browse-wrap' has received some recognition by the EU, and of course the US, the status of 'browse-wrap' has not been considered by the courts of England and Wales. The thesis examined the nature of 'browse-wrap' and how it could be accommodated into national law. Due to the very nature of such 'contracts', it is suggested that there be an initial need to provide sufficient notice of the possibility of a contract, the steps leading to it as well as the existence of terms and their contents, before it can be considered an enforceable contract. Here, it seems likely that most traders would currently not satisfy these requirements.

It was also found that the formal requirements of 'writing' and 'signature' in online contracts do not pose a significant problem in relation to consumer contracts. Writing in the electronic environment fulfils the same functions as traditional writing and, because of the availability of 'simple signatures' commonly used methods of signing contracts, such as typing or scanned signatures, are effective under English law, unless more stringent requirements are stated by legislation.

Consumers who live in the European Union, as is currently the case for the UK, will receive protection from the Rome I Regulation and Brussels I Regulation which determine the applicable law and jurisdiction, which will generally be those of the relevant Member State. In Chapter 3, determination of that state, was looked at in more detail since the two Regulations use different methods, Rome I relies on 'habitual residence' whereas Brussels I uses 'domicile'. Both concepts can cause uncertainty in border-line cases (literally and metaphorically), but the impact of deciding on one Member State over another was found not to be of great significance for the protection of the consumer, considering that both would be under the influence of EU law. Determining the correct standard, where the parties have agreed to a different law to be applied, is more complex, due to conflicting rules, but since the regulations aim to protect consumers, the over-all tenor seemed to be that rules that are more beneficial to consumer would apply.

The discussion on 'digital content', in Chapter 4, has shown that there was a general need for developing rights and remedies which take into consideration the special nature of 'digital content' rather than apply the existing framework on 'goods' or 'services'. However, the basic definition of what constitutes 'digital content' under the Consumer Rights Act 2015 and the requirement of a 'price to be paid' for a contract to be covered by Chapter 3 of the Consumer Rights Act 2015, were found to be too narrow and exclude certain transactions from the scope allowing traders to

focus on business models that circumvent some of the protection of the Act. This limitation has, however, been recognised by the EU in a recent proposal for a Directive aims to remedy this. Regardless of any issues Brexit might cause, changing the rules is seen as desirable.

The implied terms regarding description, satisfactory quality and fitness for particular purpose are capable to ensuring a reasonable quality standard of digital content and since all the terms are based on implied terms in relation to goods under the Sale of Goods Act 1979, there was generally sufficient clarity and guidance as to their scope and application. These parts still needed exploration to consider, for example, the impact of bugs on the quality. The thesis made recommendations how these aspects ought to be understood and came to the conclusion that they are sufficient in scope to ensure consumers receive a product that of, at least, reasonable quality.

The remedies which the Consumer Rights Act 2015 provides for contracts for the supply of digital content do not rely on the traditional classification into conditions and warranties, but offer tiered remedies. The structure was looked at which provides consumers with clear remedies which in part differ from those in relation to goods and are tailored to match the characteristics of 'digital content'. Particular attention was given to the right to claim compensation for damage to hardware or other digital content. The provision applied when its conditions are satisfied, i.e. a contract under which digital content is supplied, regardless of whether it meets the criteria for the other sections of Part 2 which required a 'contract for the supply of digital content', which would only be the case where 'a price was paid' in return. The scope is closer to the model suggested under the proposed Digital Content Directive and thus covers a wider range of contract. However, there are issues in relation to causation and burden of proof which could prevent consumers generally from making successful claims. Therefore, Chapter 4 offers an, albeit fairly drastic, solution to reduce that risk by reallocating the burden in a way that was used in cases where claimants contracted mesothelioma. It should be said, however, that some doubt was cast over whether the courts would follow these cases considering the limited extent of damage consumer suffered in relation to digital content.

Consumer surplus was another doctrine which had to be examined as consumer would typically make purchases to get some enjoyment which might be disappointed in case of a breach. The principle could easily be taken from existing case law and applied to digital products. The same quantification problems arise as in relation to

other types of contracts which had to be dealt with, but more important are the limitations which the rules on remoteness and mitigation pose where the product is digital. It was found that compensation would only be available where there was a 'serious possibility' that the parties would contemplate damage to digital content. Ultimately, this rule seems to occupy a similar position in relation to digital content as it does in relation to goods.

The thesis also considered liability of traders for damage to digital content during transit. The existing rules were found too inflexible for the number of possible problems that could occur. Therefore, different models were tested and an approach based on 'control over digital content' was suggested. The subsequent problems of obligations to resupply then had to be looked at. Imposing an obligation to re-supply, even on multiple occasions, seemed reasonable considering that the costs associated with this are negligible. The recommended approach constitutes a benefit to the protection of consumers without burdening traders unreasonably.

With an imbalance of information being one of the rationales for consumer protection, the Consumer Protection Directive addresses this by mandating traders to provide information at a pre-contractual stage. Chapter 5 showed that this might allow consumers to make better decisions but concerns regarding the bounded rationality of consumers, which the Directive does not take into account, were expressed. In an attempt of improving information, we looked at a narrow exception under the Directive allowing traders to reduce the amount of mandatory information where there are temporal or special constraints. It was explained how the exception might apply where consumers order online, though it is uncertain whether such reasoning would be accepted. The benefits of reduced information have not been proven and might require empirical support.

The benefits of a right of withdrawal, generally, were discussed and confirmed. In relation to digital content, however, the position under the Consumer Rights Directive, is that such right does not arise under normal circumstances, as digital content cannot be 'meaningfully' returned. The thesis considered this, and it was shown that the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 offered a somewhat better approach allowing consumer to reflect on their purchase, even though returning the product is also not envisaged. More importantly, it was suggested that Digital Rights Management components, which producers usually employ to protect the provider, can effectively be used to create the equivalent situation to consumers returning digital content, by disabling

their access to it. That way, technology could offer a method to match the level of protection in relation to digital content with the level granted in relation to goods, but the law has not developed sufficiently to recognise this.

In relation to unfair terms regulation, the thesis, in Chapter 5, explored how the regime applies to contracts for digital content, and examined some terms typically found in such contracts. While it is possible for traders to reserve a right to vary a contract unilaterally, it was shown that such a right must be sufficiently tailored to the purposes that it serves, so that there is no risk of abuse of the right (the purposes themselves must, of course, be reasonable). The same was said to be true for a right to change the subject matter. Typical situations, where changes would be reasonable, seemed foreseeable and related to security updates, improvements or extensions to the product.

Only recently, has the use of Digital Rights Management (DRM) components to control digital content become common place, and legislation has not yet sufficiently caught up with this. These components can easily be used to invade the consumer's privacy, or effect changes on the consumer's device over which he or she has no control. It was shown that traders are by law required to disclose the use of DRM, how it operates and affect the consumer, but often this information was insufficient or absent. However, such absence only grants the consumer the potential to take the 'all-or-nothing' option of walking away from the contract, which would not have become binding under the Consumer Contract (Information, Cancellation and Additional Charges) Regulations, where such information was omitted. A more multifaceted approach such as discounts was suggested as desirable.

In relation to unfair trading practices, the thesis analysed the Consumer Protection from Unfair Trading Regulations and their general application on some of the practices found in relation to digital content. Problems were the collection of personal information, 'endorsements' of products on social media and advertising of 'free' products with hidden costs. Each of those have the potential of being an unfair and match at least one of the categories of unfair trading practices provided under Regulations. Traders gain access to personalised information more easily where they use DRM components and, again, it was shown that there is a need to regulate the use of such components more specifically to reduce the risk they pose for consumers. Likewise, seemingly independent reviews and 'free' products directly influence the consumer's decision-making and, thus, can mislead the consumer, only revealing the

truth at a point after a contract is made. These practices exploit the consumer's bounded rationality and are contrary to the aims of consumer protection.

The private remedies under the Consumer Protection from Unfair Trading Regulations were looked at in Chapter 5 to establish in how far they could help consumers to protect themselves. The rights granted were similar to some provided under the Consumer Rights Act 2015, but without the specific provision which is made therein in relation to digital content. As a result of this, the right to unwind and the right to a discount posed problems in relation to digital content itself, or where digital content is 'paid for' by providing personal information. At best, this caused uncertainty as to the applicability of these remedies, but more likely made them simply unsuited in relation to such transactions.

Public enforcement to protect consumers from unfair trading practices has been improved by the introduction of Enhanced Consumer Measures (ECM) which, by application from an enforcement authority, can be attached to 'enforcement orders' and 'undertakings'. Each of the three categories of such measures seem appropriate to enhance consumer protections. However, doubts about the scope of the availability of those measures were expressed, due to limited guidance on their application and use.

Glossary

- **Anti-virus software** — The term describes a piece of software whose purpose is to detect malicious contents in files, emails and other data chunks that are transferred to the device before they are executed or read.
- **App** — Traditionally a short-form for application. In modern technology, the term describes an application that is designed to run in a particular environment, such as mobile phones or web browsers. Recently, since Windows 8, which was designed for mobile devices, Microsoft also provides apps that can be downloaded to run on Windows.
- **Bandwidth** — ~ describes the amount of data (typically in kilobyte/second) which can be transferred through the network. Local wired networking devices will usually handle up to 1 gb/sec; wireless devices of the old generation (at 2.4GHz) can manage up to 600 mb/sec, though many devices will already cap at 150mb/sec. However, typical consumer household internet connections have a ~ between 16,000 kb/sec to 100,000 kb/sec. Even at the low rate of 16,000 kb/sec, a consumer would still have at least a reasonable browsing experience.
- **Blockchain** — see **Distributed Ledger Technology**.
- **Checksum** — A ~ is a small data block that is generated by an algorithm in relation to a larger block of data. ~s serve as control block to ensure that the large data block arrives unchanged. This is checked by generating a ~ after the transfer and comparing it to the original. It should be noted that most algorithms do not generate a unique sum, i.e. different data blocks might result in the same ~, but the likelihood of an identical ~ after a transfer error occurred is very small.

- **Cloud computing** — ~ describes software applications that are made available on the web and that are not installed on the user's device. Such software relies on the computing resources of the server on which it runs, freeing resources at the user's end. Examples of this would be Google's cloud applications, Docs, Sheets and Slides which operate in a similar manner to Microsoft's well-known Office applications: Word, Excel and PowerPoint.
- **Cloud storage** — ~ is a service, whereby the user can upload data, in the form of files, onto the remote server. They are stored there only accessible to the user who uploaded them (the owner), and other users authorised by the owner. Since ~ is a type of **cloud computing**, the contents stored in a cloud, are generally available from any device that has access to the internet.
- **Demilitarised zone** — In computing, a ~ is an area in a network that exposes certain contents to an external, untrusted network (the internet) while internal services and work stations remain fenced-off by a firewall. It can be viewed as an additional network through which data needs to pass.
- **Distributed Ledger** — ~ is a decentralised pool of shared data, spread across multiple devices. It became known as underlying technology of bitcoin.
- **Digital Rights Management** — ~ connotes technological software or hardware components, typically issued by producers of digital content. These components are designed to protect intellectual property and enforce the licence agreement of the product to which it relates.
- **Domain name** — A ~ is a web address, or URL. The top-level of a ~ can be identified by the last part of it and generally relates to a country (for example .uk, .de, .fr.). In a few cases, the ending is more generic (.org, .net).
- **Double spending** — ~ relates to a problem in a digital cash system where an attempt is made to spend the same digital tokens twice on different transactions. Such a problem arises because digital tokens or files cannot literally be transferred. Instead a copy is created on the recepient's system or account, unless the system is able to falisy one of the transactions.
- **Firewall** — A ~ is a hardware or software component that shields devices by blocking the in-bound, and possibly out-bound, data ports via which data is transferred. In order to allow a connection, either the ~ automatically opens a required port or the user can define a custom rule for a port, or ports, to be constantly, or temporarily, opened. Closed ports are often a cause for transfer

errors, not allowing an in-bound connection to be established and data to be transferred.

- **Hybrid seller** — see **Prosumers**.
- **IP address** — The Internet Protocol address is unique identifier assigned to the router which connects to the internet. All devices that access the internet via the router share the same ~. Within the private network, the router handles the transfer for packets to the correct device.
- **Like** — A ~ describes a feature typically found on social media by which users can signal approval of, interest in or support of, the related message to other users. Based on this function, social media networks often also provide the option to dislike contents.
- **Optical fibre** — ~ is a glass material which can transfer light without loss, i.e. all the light that is put into the wire at one end will also reach the other end. Light signals of different wave lengths are used to transfer data and because light signals do not interfere with each other, this allows for a very large bandwidth and transfer speed.
- **Prosumers** — A ~ is an individual who sells products, for example, on web platforms. Often, it is uncertain whether a ~ should be classified as consumer or professional for purposes, such as tax or consumer protection laws.
- **Random Access Memory** — The ~ is a transient data storage for frequently used operations. Data can quickly be read from, and written to, any location of the ~ (which has to be contrasted with sequential reading methods where the process has to start at a pre-determined, entry point). This is achieved by the use of sector pointers, internal addresses, that point to the location where a chunk of data is stored.

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