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Copyright Meets Consumer Data Portability Rights: Inevitable Friction between IP and the Remedies in the Digital Content Directive

The 2019 Digital Content Directive harmonizes the remedies of consumers in case of a lack of conformity of digital content or a digital service supplied to them by a professional party. Although the Directive is 'without prejudice' to intellectual property (IP), there are inherent overlaps with copyright in scenarios where consumers are entitled to terminate the contract. On the one hand, Art. 16(4) provides consumers with a restricted right at the time of termination to retrieve any nonpersonal content which was provided or created by them when using the digital content or service. It is argued that exercising that right can entail infringements of third-party copyright, depending on the circumstances, and that IP may often undermine the very regulatory concept and objectives of this 'portability right', particularly when cocreated content is involved. By contrast, traders should not be allowed to reject portability requests by waiving their own IP rights, as this would hamper the effectiveness of the consumer's remedy. On the other hand, directive-based termination does not necessarily affect the fate of terms licensing or transferring IP rights in consumer content to traders, service providers or their (sub)licensees, because this is primarily a matter for national law. However, it is argued that traders, service providers and remaining service users can only keep relying on those licenses if their uses are within the scope of Art. 16(3) of the Directive, notwithstanding any deviating agreement to the detriment of the consumer.

I. Introduction

Contracts for the supply of digital content and/or digital services by professional suppliers to consumers are now largely governed by harmonized legislation in the European Economic Area. Faced with the fragmented and often even absent national-law rules on these types of agreements,[1] the EU legislature adopted the Digital Content Directive[2] in 2019, while simultaneously updating the harmonized rules for consumer sales of tangible goods.[3]

The novel contract law regime for digital content and digital services was due to be transposed in July 2021 and to be applicable from 1 January 2022 onwards,[4] although not all Member States seem to have met those deadlines.[5] The rules only apply to agreements where a person acting for purposes relating to their trade, business, craft or profession (i.e. a 'trader') undertakes to supply digital content or a digital service to a consumer in return for money, for a digital representation of value like cryptocurrencies, or for personal data.[6] Hence, the harmonized rules do not govern agreements between professional

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1 EC, Explanatory Memorandum accompanying the Proposal for an EP & Council Directive on certain aspects concerning contracts for the supply of digital content, 9 December 2015, COM(2015)634 final (Explanatory Memorandum to the Digital Content Directive), 5.

2 EP & Council Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services (Digital Content Directive) [2019] OJ L136/1.

3 EP & Council Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (2019 Consumer Sales Directive) [2019] OJ L136/28.

4 Digital Content Directive, art 24.

5 To give but some examples, Germany has implemented the Directive on time (Bürgerliches Gesetzbuch, §§ 327-327u, introduced by Law (DE) of 25 June 2021 [2021] OJ I 2123); France has implemented the Directive in Sep 2021 (Code de la consommation, arts L224-25-1 to L224-25-32, introduced by Ordonnance (FR) No 2021-1247 of 29 September 2021 [2021] OJ 228); the Netherlands started the implementation process in February 2021 (Tweede Kamer der Staten-Generaal (NL), Voorstel voor Implementatiewet richtlijnen verkoop goederen en levering digitale inhoud [2020-21] Bill No 35734-2) but was unable to succesfully conclude it before January 2022; the Belgian legislature has started the implementation procedings as late as Dec 2021 (Chambre des représentants / Kamer van volksvertegenwoordigers (BE), Projet de loi modifiant les dispositions de l'ancien Code civil relatives aux ventes à des consommateurs, insérant un nouveau titre VI^{bis} dans le livre 3 de l'ancien Code civil et modifiant le Code de droit économique / wetsontwerp tot wijziging van de bepalingen van het oud Burgerlijk Wetboek met betrekking tot de verkopen aan consumenten, tot invoeging van een nieuwe titel VI*bis* in boek III van het oude Burgerlijk Wetboek en tot wijziging van het Wetboek van economisch recht [2021-22] Bill No 55K2355/1) and was equally unable to succesfully conclude it before January 2022.

6 Digital Content Directive, art 3(1) read in conjunction with art 2(5) to 2(8); for more information about the scope, see Simon Geiregat and Reinhard Steennot, 'Proposal for a Directive on Digital Content: Scope of Application and Liability for a Lack of Conformity' in Evelyne Terryn and Ignace Claeys (eds), *Digital Content & Distance Sales* (Intersentia 2017) 100-118; Dirk Staudenmayer, 'Auf dem Weg zum digitalen Privatrecht – Verträge über digitale Inhalte' [2019] NJW 2497, 2497-98; Dirk Staudenmayer, 'The Directives on Digital Contracts: First Steps Towards the Private Law of the Digital Economy' [2020] ERPL 219, 223-228; Dirk Staudenmayer, 'Digital Content Directive (2019/770), Article 3' in Reiner Schulze and Dirk Staudenmayer (eds), *EU Digital Law* (CH Beck 2020) paras 7-90; Jozefien Vanherpe, 'White Smoke, but Smoke Nonetheless: Some (Burning) Questions Regarding the Directives on Sale of Goods and Supply of Digital Content' [2020] ERPL 251, paras 2-7.

parties. Except in specific constellations where either a new, separate contract within the Directive's scope is concluded[7] or where it can be argued that the trader merely acts as a representing agent,[8] the new rules likewise do not govern the consumer's entitlements viz-à-viz the developer(s), manufacturer(s) or intellectual-property-right holder(s) of the content or service.[9] This is so even when a consumer is compelled to consent with those actors' unilaterally drafted 'terms of service' or 'end-user license agreements' (EULAs) in order to be able to actually enjoy the content or service, which is very often the case.[10]

The Directive exclusively deals with contracts concerning digital content and services. Digital content is defined as 'data which are produced and supplied in digital form', whereas a 'digital service' is a service that either 'allows the consumer to create, process, store or access data in digital form', or 'allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other users of that service'.[11] Although these definitions make the Directive's scope quite broad, it should not be overlooked that it only harmonizes the rules on conformity (defects), on the factual supply and intended modification of content or services, as well as consumers' ability to invoke remedies and the modalities of that.[12] Other aspects are outside the harmonized scope. Moreover, the Directive's scope explicitly excludes some specific contracts, including those on healthcare, gambling, and financial services.[13]

The implementation of the new rules is expected to have implications for intellectual property (IP) rights in various spheres. This holds true for copyright, neighboring rights and the *sui generis* right in databases in particular. Whereas these IP rights depend on a relatively low threshold for protection and as they are attributed to their rightsholders *ex lege* (*de plano*), without formalities, protected content is omnipresent in the online environment.[14] Moreover, due to international policy choices, every technical operation of digital copying is considered an act of reproduction pursuant to copyright law.[15]

The Digital Content Directive explicitly refers to IP on two occasions. First, it lays down that its regime is 'without prejudice' to EU and national law on copyright and neighboring rights.[16] The recitals confirm that it is without prejudice to the distribution right in tangible copies, in particular.[17] The legislative history is silent on the meaning of that passage.[18] In the copyright *acquis*, distribution refers to the right for authors to decide whether 'to authorise or prohibit any form of distribution to the public' of tangible copies[19] of their original works.[20] Hence, the passage from the recitals presumably only intends to confirm that this exclusive right with third-party effects remains unaffected by the obligations and rights which traders and consumers may have towards one another in relation to the act of supplying tangible data carriers that embody copyright-protected digital content.[21] Second, the Directive establishes that digital content and services are also hampered by a lack of conformity when their use, as agreed upon or as required by the objective conformity rules, is prevented or limited due to 'a restriction resulting from a violation of any right of a third party, in particular intellectual property rights'.[22] Taken together, these two approaches suggest that the enactors have considered IP rights as phenomena external to the Directive which will remain unaltered by the Directive, but which may entail practical implications that can give rise to consumer remedies against a trader, at most.[23]

The text's clear stance on its relationship with IP law, and the explicit provision that an object of a supply agreement may lack conformity not only due to practical aspects ('material defects') but also due to IP-related restrictions ('legal defects') are two welcomed clarifications in the Digital Content Directive. It is particularly noteworthy how the wording about restrictions resulting from third-party rights was improved throughout the

7 cf Linda Kuschel and Darius Rostam, 'Urheberrechtliche Aspekte der Richtlinie 2019/770' [2020] CR 393, para 2.

8 See Michael Grünberger, 'Verträge über digitale Güter' [2018] AcP 213, 289; Pavel Koukal, 'Digital Content Portability and its Relation to Conformity with the Contract' [2021] Masaryk University JLT 53, 62-63; Christiane Wendehorst, 'Hybride Produkte und hybrider Vertrieb' in Christiane Wendehorst and Brigitta Zöchling-Jud (eds), *Ein neues Vertragsrecht für den digitalen Binnenmarkt?* (MANZ 2016) 60-61.

9 See below at section II.3.

10 Kuschel and Rostam (n 7) para 2; Axel Metzger, 'Verträge über digitale Inhalte und digitale Dienstleistungen: Neuer BGB-Vertragstypus oder punktuelle Reform?' [2019] JZ 577, para 578; Liliia Oprysk and Karin Sein, 'Limitations in End-User Licensing Agreements: Is There a Lack of Conformity Under the New Digital Content Directive?' (2020) 51 IIC 594, 597 and 599; Martin Schmidt-Kessel, 'Stellungnahme zu den Richtlinienvorschlägen der Kommission zum Online-Handel und zu Digitalen Inhalten' (2016 German Federal Parliamant (Bundestag)) 19 <http://www.bundestag.de/resource/blob/422258/c3ecca9b7286f38bda7e060f7b420c06/schmidt_kessel-data.pdf> accessed 6 April 2022; Gerald Spindler, 'Digital Content Directive And Copyright-related Aspects' [2021] JIPITEC 111, paras 5-17; Wendehorst (n 8) 71-72.

11 Digital Content Directive, arts 2(1) and 2(2).

12 Digital Content Directive, art 1.

13 Digital Content Directive, art 3(5).

14 Johannes Druschel and Philipp Engert, 'Vertragsrecht und Urheberrecht im Konflikt? – Eine Bestandsaufnahme' [2018] ZUM 97, 98; Michael Grünberger, 'Verträge über digitale Inhalte – Überblick und Auswirkungen auf das Urheberrecht' [2018] ZUM 73, 74; Grünberger, 'Verträge über digitale Güter' (n 8) 228; Kuschel and Rostam (n 7) para 2; Andreas Sattler, 'Urheber- und datenschutzrechtliche Konflikte im neuen Vertragsrecht für digitale Produkte' [2020] NJW 3623, para 18; Spindler (n 10) para 2.

15 See Agreed statements concerning the WIPO Copyright Treaty (1996) (WCT) 2186 UN Treaty Series 203, at art 1(4); EP & Council Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society (InfoSoc Directive) [2001] OJ L167/10, art 2; CJEU, Case C-433/20 *Austro-Mechana* EU:C:2022:217, paras 16-17; Valérie Laure Benabou, *Droits d'auteur, droits voisins et droit communautaire* (Bruylant 1997) para 421; Bridget Czarnota and Robert J Hart, *Legal Protection of Computer Programs in Europe. A Guide to the EC Directive* (Butterworth 1991) 56; Sari Depreeuw, *The Variable Scope of the Exclusive Economic Rights in Copyright* (Kluwer 2014) paras 194-199 and 220; Séverine Dusollier, 'La contractualisation de l'utilisation des oeuvres et l'expérience belge des exceptions impératives' [2007] PI 443; Spindler (n 10) para 5.

16 Digital Content Directive, art 3(9) and recital 36, last sentence.

17 Digital Content Directive, recital 20, last sentence.

18 The wording is not explained in the Explanatory Memorandum to the Digital Content Directive (n 1), and has remained unaltered since it was proposed.

19 CJEU, Case C-456/06 *Peek & Cloppenburg* EU:C:2008:232, para 36; CJEU, Case C-5/11 *Donner* EU:C:2012:370, para 26; CJEU, Case C-98/13 *Blomqvist* EU:C:2014:55, para 28; CJEU, Case C-419/13 *Art & Allposters International* EU:C:2015:27, para 37; CJEU, Case C-516/13 *Dimensione Direct Sales v Labianca* EU:C:2015:315, para 25; CJEU, Case C-572/17 *Syed* EU:C:2018:1033, para 22; CJEU, Case C-263/18 *Tom Kabinet* EU:C:2019:1111, paras 39-40, 43 and 51-52; see Simon Geiregat, *Supplying and Reselling Digital Content: Digital Exhaustion in EU Copyright and Neighbouring Rights Law* (Edward Elgar 2022).

20 See InfoSoc Directive, art 4(1).

21 cf Sattler (n 14) para 19, on the use of the neutral term of 'supply' as a means to avoid copyright-sensitive terminology.

22 Digital Content Directive, art 10, in turn referring to arts 7 and 8.

23 cf Spindler (n 10) para 21.

negotiation process.[24] Nonetheless, let there be no doubt that these provisions do not exhaustively cover all potential crossovers between IP law and the new consumer contract instrument.[25] The novel regime has already entered into force, so issues are now expected to arise. Against that background, it is surprising that a variety of other potential frictions appear to a large extent to have been neglected.

Several scholars have already focused on some points of friction between the Digital Content Directive and IP. In particular, they have stressed the unavoidable complications stemming from the widespread use of EULAs concluded between consumers and parties that are not the trader,[26] and have regretted that the Directive completely ignores the existence of IP-related issues between the trader and third-party right holders in cases where the trader merely acts as an intermediary.[27] By lack of clearly established benchmarks for novel products like digital content and digital services,[28] a fair number of commentators have highlighted how copyright law and copyright-based licensing practices might effectively shape consumer expectations, and thus influence, concretize, or even lower the standard of conformity that content and services need to meet pursuant to the Directive.[29] Moreover, some eminent scholars have also rightfully suggested that copyright limitations and exceptions should be considered a source for a minimum set of protected consumer expectations.[30]

Adding to those findings, this paper further refutes the cited statement by lawmakers that the Digital Content Directive is 'without prejudice' to copyright and neighboring rights. It focuses on two other cases where frictions between the Directive and IP rights are foreseeable, more specifically in cases where consumers terminate their agreement as a remedy for lack of conformity. It first addresses the IP aspects of the consumer's post-termination 'portability right' (II) and consequently turns to the scenario where the agreement is terminated where the consumer had explicitly licensed or transferred IP rights in their digital content to a professional co-contracting party (III). A final section wraps up with some remarks (IV). For conciseness, reference is henceforth principally made to copyright only. Yet, findings may also be applicable to neighboring rights and the *sui generis* right in databases, *mutatis mutandis*.

II. Portability of consumer content

As a part of the Digital Content Directive's remedies scheme, consumers are sometimes entitled to request that the co-contracting trader 'makes available' to them 'any content other than personal data, which was provided or created by the consumer when using the digital content or digital service supplied by the trader'. In particular, the consumer is entitled to receive that content 'free of charge, without hindrance from the trader, within a reasonable time and in a commonly used and machine-readable format'.[31] From 22 May 2022 onwards, the Omnibus Directive will ensure that, upon withdrawal, consumers enjoy very similar entitlements for content provided to a trader during the 14-day withdraw period that applies to distance and off-premise contracts concluded between a trader and a consumer.[32]

The underlying rationale of these entitlements is to safeguard the effectiveness of the rights to termination and withdrawal, respectively, by avoiding lock-in effects, and thus to 'empower' consumers by incentivizing them to exercise their rights[33] and, ultimately, to enhance competition.[34] After explaining how this right is conceptually construed in the Digital Content Directive and when it is applicable (1), this section assesses which data is within its scope (2), how consumers can exercise it (3) and in what circumstances professional parties are entitled to refuse to give effect to that right (4), before scrutinizing the potential conflicts with IP rights held by third parties (5) and by consumers' co-contracting parties (6).

1. Concept and applicability

The consumer's remedy to claim back consumer-provided and consumer-created non-personal data has been

24 See EC, Proposal for an EP & Council Directive on certain aspects concerning contracts for the supply of digital content, 9 December 2015, COM(2015)634 final (Digital Content Directive Proposal), art 8; cf Geiregat and Steennot, 'Proposal for a Directive on Digital Content: Scope of Application and Liability for a Lack of Conformity' (n 6) 142-149; Frank Rosenkranz, 'Digital Content Directive (2019/770), Article 10' in Reiner Schulze and Dirk Staudenmayer (eds), *EU Digital Law* (CH Beck 2020) paras 12-15; Liliia Oprysk, 'Digital consumer contract law without prejudice to copyright: EU Digital Content Directive, Reasonable Consumer Expectations and Competition' [2021] GRUR International 943, 950.

25 Sattler (n 14) 3624.

26 Spindler (n 10) paras 18-17.

27 Axel Metzger and others, 'Data-Related Aspects of the Digital Content Directive' [2018] JIPITEC 90, paras 46-49; Oprysk and Sein (n 10) 599; Oprysk (n 24) 949-953; Spindler (n 10) para 68.

28 Druschel and Engert (n 14) 102; Oprysk and Sein (n 10) 597-598; Vanherpe (n 6) para 14.

29 European Law Institute, 'Statement on the European Commission's Proposed Directive on the Supply of Digital Content to Consumers' (2016) 24-25 <europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Statement_on_DCD.pdf> accessed 6 April 2022; Michael Grünberger, 'Die Entwicklung des Urheberrechts im Jahr 2019' [2020] ZUM 175, 190; Kuschel and Rostam (n 7) paras 11 and 19-21; Oprysk (n 24) 949-953; Schmidt-Kessel (n 10) 16-17; Karin Sein and Gerald Spindler, 'The new Directive on Contracts for the Supply of Digital Content and Digital Services – Conformity Criteria, Remedies and Modifications – Part 2' [2019] ERCL 372-373; Spindler (n 10) paras 42-44; see also Grünberger, 'Verträge über digitale Güter' (n 8) 247-250.

30 Oprysk and Sein (n 10) 599-621; Oprysk (n 24) 956.

31 Digital Content Directive, art 16(4).

32 EP & Council Directive 2011/83/EU on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (Consumer Rights Directive) [2011] OJ L304/64, art 9(1), read jointly with art 13(6) and art 13(7), as created by EP & Council Directive (EU) 2019/2161 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (Omnibus Directive) [2019] OJ L328/7, art 4(10).

33 Digital Content Directive, recital 70.

34 Ruth Janal, 'Data Portability – A Tale of Two Concepts' [2017] JIPITEC 59, para 5; Orla Lynskey, 'Art. 20. Right to data portability' in Christopher Kuner, Lee A Bygrave and Christopher Docksey (eds), *The EU General Data Protection Regulation (GDPR): A Commentary* (OUP 2020) 499; Metzger and others (n 27) para 50; Metzger (n 10) 583; Axel Metzger, 'Access to and Porting of Data under Contract Law: Consumer Protection Rules and Market-Based Principles' in German Federal Ministry of Justice and Consumer Protection and Max Planck Institute for Innovation and Competition (eds), *Data Access, Consumer Interests and Public Welfare* (Nomos 2021) 293; Thomas Tombal, 'Imposing Data Sharing Among Private Actors. A Tale of Evolving Balances' (University of Namur 2021) para 154; cf art 29 Data Protection WP, 'Guidelines on the right to data portability' (2016 revised 2017 WP), 4-5 <https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-right-data-portability-under-regulation-2016679_en> accessed 6 April 2022.

identified as a specific right to data portability.[35] In the context of engineering and international standardization, 'portability' *grosso modo* refers to the ease with which a system, a component, an application, data or another object can be transferred from one hardware, software or platform environment to another, or to the capability of being read, applied, processed and/or interpreted by multiple systems when moved.[36] In the legal context, the term gained fame by the explicit establishment of a right to data portability in the General Data Protection Regulation (GDPR). Rather than reading the term in its technical sense, the portability right in the GDPR is defined as a natural person's twofold[37] right 'to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format, [as well as] to transmit those data to another controller without hindrance from the controller'.[38]

The wording of the data portability provision in the GDPR is similar to that in the Digital Content Directive and the more recently adopted Omnibus Directive. Unlike the homonymous expression in the Portability Regulation,[39] the concept in these three instruments essentially designates a sort of digital-world equivalent of the right of recovery (*rei vindicatio*) which has existed in tangible movable property (chattels) for millennia.[40] By lack of recognized ownership rights, in the proper sense, recovery claims in digital data have indeed proven far from evident in many European jurisdictions.[41] Nonetheless, it is uncontested that user-generated data can be very valuable, sometimes in monetary terms as a means of exchange,[42] but in any case for the very user who created the data. Against that backdrop, the GDPR and consumer-law data portability rights aim to remedy the recovery gap and try to avoid users getting locked in with one data storage provider[43] without creating data ownership rights[44] or even getting entangled into the vexed debate of exclusive rights in data at all.[45] Similar considerations explain why the European Commission intends to enhance effective enforcement of existing data portability rights and even to create new portability rights through its recently proposed regulations for a Digital Markets Act and for a Data Act.[46]

Despite their similar rationales, the precise scope of the portability right in the Digital Content Directive differs substantially from that in the GDPR.[47] In fact, the conditions for consumers to invoke the novel portability right are quite strict. First, like the corresponding right inserted in the Consumer Rights Directive by the Omnibus Directive, the portability right in the Digital Content Directive can only be invoked by consumers viz-à-viz a professional trader with whom they concluded a contract for the supply of digital content or a digital service in exchange for a payment in money or in personal data. This is true, even if the content or service is supplied by a third-party developer (hereinafter referred to as 'service provider' for conciseness) and the trader only acts as an intermediary, or if such third-party service provider holds the IP rights in the content. If, by contrast, the consumer buys tangible products with embedded software ('goods with digital elements') and that contract is terminated, a similar right to portability of user-generated content is strikingly absent.[48] Should the regulation for a Data Act

35 Metzger and others (n 27) para 50.

36 IEEE, *IEEE 100. The Authoritative Dictionary of IEEE Standard Terms* (Standards Information Network - IEEE Press 2000), see at 'portability'; International Organization for Standardization, 'Information technology. Vocabulary' (2015), see at 'portability' <https://www.iso.org/standard/63598.html> accessed 6 April 2022; cf Nestor Duch-Brown, Bertin Martens and Frank Mueller-Langer, 'The economics of ownership, access and trade in digital data' (2017) JRC Digital Economy Working Paper 43 <ec.europa.eu/jrc>; Niamh Gleeson and Ian Walden, 'Cloud Computing, Standards, and the Law' in Christopher Millard (ed), *Cloud Computing Law* (2nd edn, OUP 2021) 504; W Kuan Hon, Christopher Millard and Jatinder Singh, 'Control, Security, and Risk in the Cloud' in Christopher Millard (ed), *Cloud Computing Law* (2nd edn, OUP 2021) 42-43.

37 art 29 Data Protection WP, 4-5.

38 EP & Council Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (GDPR) [2016] OJ L119/1, art 20(1).

39 EP & Council Regulation (EU) 2017/1128 on cross-border portability of online content services in the internal market [2017] OJ L168/1, see notably art 3(1).

40 cf Hon, Millard and Singh (n 36) 43; TFE Tjong Tjin Tai, 'Data ownership and consumer protection' [2018] EuCML 136, 138-139; Tombal (n 34) para 153; Ivo van Wijk, 'Consumentenbescherming bij de levering van digitale inhoud in het licht van het concept voor een nieuwe Europese richtlijn' [2016] IR 140, 148.

41 See, eg, in Germany, rendered on the basis of the Bürgerliches Gesetzbuch, § 667, German Federal Supreme Court (Bundesgerichtshof), Case VIII ZR 5/95, [1996] NJW 2159 – *Toyota*; German Federal Supreme Court (Bundesgerichtshof), Case VIII ZR 283-96, [1998] NJW-RR 390; in the UK, House of Lords (UK), *OBG Ltd v Allan* [2007] UKHL 21; Court of Appeal (Civil Div), *Your Response Ltd v Datateam Business Media Ltd* [2014] EWCA Civ 281; cf Simon Geiregat, *Digitale verspreiding* (Intersentia 2020) 5-98; Geiregat, *Supplying and Reselling Digital Content: Digital Exhaustion in EU Copyright and Neighbouring Rights Law* (n 19) ch 5 s 1.1 and the references cited there; Johan David Michels and Christopher Millard, 'Digital Assets in Clouds' in Christopher Millard (ed), *Cloud Computing Law* (2nd edn, OUP 2021) 179-186, 193-195 and 202; Tjong Tjin Tai (n 40) 138-139.

42 cf Gianclaudio Malgieri, ''User-provided personal content' in the EU: digital currency between data protection and intellectual property' [2018] International Review of Law, Computers & Technology 118, 119.

43 cf Inge Graef, Martin Husovec and Nadezhda Purtova, 'Data Portability and Data Control: Lessons for an Emerging Concept in EU Law' [2018] GLJ 1359, 1365; Inge Graef, Martin Husovec and Jasper van den Boom, 'Spill-Overs in Data Governance: Uncovering the Uneasy Relationship Between the GDPR's Right to Data Portability and EU Sector-Specific Data Access Regimes' [2020] EuCML 3, 4.

44 The data portability right *is* not a (form of) ownership by lack of power to exclude others; it merely mimics one attribute traditionally linked with ownership; see Graef, Husovec and Purtova (n 43) 1368 and 1393; Graef, Husovec and van den Boom (n 43) 9; cf Tjong Tjin Tai (n 40) 138-139.

45 For a detailed overview of the debate on 'data ownership' or exclusive rights in data, reference is made to Geiregat, *Supplying and Reselling Digital Content: Digital Exhaustion in EU Copyright and Neighbouring Rights Law* (n 19) ch 5 s 1.1.2.

46 EC, Proposal for an EP & Council Regulation on contestable and fair markets in the digital sector (Digital Markets Act), 15 December 2020, COM(2020)842 final, art 6(1)(h) and recitals 54-55; EC, Proposal for an EP & Council Regulation on harmonised rules on fair access to and use of data (Data Act), 23 Feb 2022, COM(2022)68 final, arts 4(1), 5(1) and 23(1)(c).

47 Graef, Husovec and van den Boom (n 43) 1393-94; Metzger, 'Access to and Porting of Data under Contract Law: Consumer Protection Rules and Market-Based Principles' (n 34) 295; Tombal (n 34) para 159.

48 See 2019 Consumer Sales Directive, notably at art 16 (*e contrario*), read jointly with the scope as determined by art 3(3) and recital 13, as well as by Digital Content Directive, arts 2(3) and 3(4); cf Simon Geiregat and Reinhard Steennot, 'Consumentenkoop & digitale inhoud: toepassingsgebied & afbakening' in Ignace Claeys and Evelyne Terryn (eds), *Nieuw recht inzake koop & digitale inhoud en diensten* (Intersentia 2020) paras 82, 89 and 120; Metzger and others (n 27) para 52; Metzger, 'Access to and Porting of Data under Contract Law: Consumer Protection Rules and Market-Based Principles' (n 34) 316; Jasper Vereecken and Jarich Werbrouck, 'Goods with Embedded Software: Consumer Protection 2.0 in Times of Digital Content?' (2019) 30 Indiana Int'l & Comp Law Review 53, 81; Jasper Vereecken and Jarich Werbrouck, 'Goods with Embedded Software: Consumer Protection 2.0 in Times of Digital Content?' in Dan Wei, James P Nehf and Claudia Lima Marques (eds), *Innovation and the Transformation of Consumer Law* (Springer 2020) 94; Jarich Werbrouck, 'Goederen met

be enacted in the reading proposed by the Commission in February 2022, then 'users'[49] of some of those products[50] – whether consumers or not – will nonetheless be entitled to access, receive and transfer the sensor- or machine-generated non-personal data which these products have produced.[51] That would make the position of consumers who own products with embedded software even more awkward: they would then be entitled to claim access to automatically generated data in these products, but not to data that they themselves created and/or provided while they were using those products.

Second and most importantly, a consumer is only entitled to invoke the right of portability in the Digital Content Directive in the event of termination of the contract pursuant to that Directive,[52] and notably in just three alternative scenarios: when the act of supply did not take place and will reasonably not take place;[53] when the contract is terminated as a remedy for a lack of conformity;[54] and in cases where the consumer was entitled to terminate a contract due to unilateral modifications.[55] In the first scenario, however, the portability right is purely theoretical because without supplied content or service, the consumer cannot have provided or created content while using that content or service. This leaves two situations where a consumer is entitled to portability.

The first is termination for non-conformity, and the systematics of the remedies should not be overlooked here. Mimicking the rules for consumer sales of tangible goods,[56] the Digital Content Directive lays down a strict hierarchy between the remedies that a consumer may invoke when content or a service is supplied with a lack of conformity. First and foremost, the consumer is entitled to have the content or service brought into conformity within a reasonable time, free of charge and without any significant inconvenience. Only if that is impossible or would produce disproportionate costs, if the trader fails or refuses to effectively do so, or if the defect is too serious will the consumer be entitled to terminate the agreement, though on the additional condition that the lack of conformity is 'not minor'.[57] Hence, termination is the last resort for the consumer.

On the other hand, the portability right can be activated when a consumer terminates a contract in response to the negative effects that they experience because of modifications made to digital content or a digital service beyond what is necessary to keep the content or service in conformity. This, in turn, implies that the content or service is agreed to be supplied or made accessible over a period, and that three cumulative *de minimis* conditions apply: the modification has a negative impact on the consumer's enjoyment of the content or service; the impact is more than 'only minor'; and the consumer terminates within a term of thirty days.[58]

Outside of these two sets of strictly delineated instances, consumers will only be entitled to apply the harmonized portability right when they exercise their right of withdrawal within the timeframe prescribed by the Consumer Rights Directive. Whereas this timeframe will usually be limited to 14 days, those instances are less likely to produce the same IP-related issues that may come about when a contract is terminated pursuant to the Digital Content Directive. Therefore, the effects of the portability right upon withdrawal are not further studied in detail below.

In all possible scenarios where the contractual relationship between the trader and the consumer ends, other than in the instances of termination and withdrawal above, the consumer will not be entitled to a harmonized right of portability. This is true, for instance, when the contract is terminated due to force majeure or declared null and void, e.g. for a lack of consent or lack of legal capacity pursuant to national contract law.[59] In those cases, data portability does not currently come into play, unless and insofar as a Member State's internal law provides for a similar right.[60] The latter is a policy option that certainly merits consideration, as it seems hard to justify why a consumer should, for instance, not be entitled to claim back their data when their cloud storage contract with a professional supplier ends due to circumstances beyond both parties' control, or when the contract is found invalid because the consumer was a minor and therefore could not have legally consented.[61]

In the same vein, the Digital Content Directive, and the Consumer Rights Directive, as amended by the Omnibus Directive, do not provide the consumer with a right to retrieve the data that they provided or created, in cases where they merely want to terminate the agreement *ex nunc*, for whatever discretionary reason. However, the proposed regulation for a Data Act could soon partially fill that gap, because the European Commission proposes to introduce yet another portability right in relation to certain digital services. Indeed, it is proposed that all 'customers' of digital services which 'enable on-demand administration and broad remote access to a scalable and elastic pool of shareable computing resources of a centralized or highly distributed nature' (called 'data processing services'[62]) be henceforth entitled to port 'its (*sic*, probably to be read as: 'their') data, applications and other digital assets to another provider of data processing services', while maintaining 'functional equivalence of the service'.[63]

Clearly inspired by the rationales underlying Art. 20 of the GDPR, this newly proposed portability right is mainly meant to target obstacles for professional and nonprofessional customers to effectively switch between cloud

"embedded software". Consumentenbescherming 2.0 in tijden van digitale inhoud?' in Reinhard Steennot and Gert Straetmans (eds), *Digitalisering van het recht en consumentenbescherming* (Intersentia 2019) para 33.

49 EC, Proposal for a Data Act Regulation, COM(2022)68, art 2(5).

50 See the definition of 'products', ibid, art 2(2), read jointly with recitals 14 and 15.

51 ibid, arts 4(1) and 5(1) (and art 3(1)), read jointly with recitals 17 and 28.

52 Metzger and others (n 27) para 52.

53 Digital Content Directive, art 13(3).

54 Digital Content Directive, art 16.

55 Digital Content Directive, art 19(3).

56 EP & Council Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (1999 Consumer Sales Directive) [1999] OJ L171/12, art 3; 2019 Consumer Sales Directive, art 13.

57 Digital Content Directive, art 14.

58 Digital Content Directive, art 19(2).

59 cf Digital Content Directive, recitals 12 and 14.

60 Metzger, 'Access to and Porting of Data under Contract Law: Consumer Protection Rules and Market-Based Principles' (n 34) 292.

61 Similarly, see Sein and Spindler (n 29) 379-380.

62 EC, Proposal for a Data Act Regulation, COM(2022)68, art 2(12).

63 ibid, art 23(1)(c) and (d), read jointly with recitals 71 and 72.

computing solutions.[64] If enacted in its proposed reading, the Data Act regulation would entitle consumers, like any other customers, to take the content that they had provided or created with them when switching to another provider. Nonetheless, the proposed right would only apply to cases where a data processing service provider is at hand, and not to all traders who supply digital content or a digital service. What is more, the consumer will be entitled to transfer their data to another party, but not necessarily to retrieve that data on a device of their choice. It should not be overlooked that there is not a complete overlap between the objectives, scopes, and effects of the portability right in the proposed Data Act and the portability right in the Digital Content Directive.

2. Object of portability

As explained, the hierarchy of remedies strongly restricts the instances where a consumer can invoke the Digital Content Directive's portability right. Add the narrow description of the data eligible for portability, and the scope of that right is clearly quite restricted.[65] Given the similar wording, the same holds true for the right of portability upon withdrawal pursuant to the amended Consumer Rights Directive. Indeed, these rights only concern digital 'content other than personal data', which moreover needs to have been 'provided or created by the consumer when using the digital content or digital service'.

a) Nonpersonal data

Due to the limitation to nonpersonal data, the novel portability right does not apply to *all* digital data that is sometimes referred to as 'user-generated data' in the vernacular. The reasoning behind the delimitation is that consumers' claims to port personal data is already covered by Art. 20 of the GDPR,[66] which applies to personal data provided in the context of consent or a contractual relationship, regardless of whether the agreement has been terminated.[67] As illustrations of portable data, the predecessor of the European Data Protection Board lists a history of e-mails sent and received through a certain service, playlists of music streaming services, contact lists in web applications, titles of ordered books and so on.[68] Nonetheless, it must not be overlooked that these examples constitute personal data for the scope of the GDPR only insofar as they are or contain information relating to an identified or identifiable natural person.[69] In short, the GDPR provision and the new right for nonpersonal data were conceived to constitute a mutually exclusive and collectively exhaustive set of rights.[70]

This reasoning about two collectively exhaustive rights is flawed, though. Firstly, various scholars have rightfully questioned whether it is possible to implement the theoretical distinction between personal and nonpersonal datasets in practice.[71] Indeed, how and why should one distinguish between the case where a consumer uploads a text processor document with an anonymous author from that of a document with the consumer's name in the metadata, or from documents that contain the names of other individuals? Similarly, it seems hard to uphold a strict differentiation between cloud-stored photos that feature recognizable humans and photos that do not. Besides, the exact boundaries of what constitutes 'personal' data are subject to evolution (expansion)[72] and remain extremely blurry to date. Secondly, the GDPR portability right only applies to personal data that concerns the applicant (the data subject, who might be a consumer) who invokes that right,[73] which is logical from a data protection perspective. Yet, it is perfectly conceivable that a consumer provides or creates personal data that relates to a third-party data subject. Examples are manifold: consumers may send a message to a friend, mention an acquaintance in a written post on social media, upload pictures or videos that contain someone else's image or name, and so on.

Insofar as these instances concern data that allows the simultaneous identification of both that third party and the applicant, the GDPR portability right will apply. If the applicant subsequently uses the received data for private purposes only, no personal data concerns arise. Should they want to transfer that data about multiple data subjects to a third-party processor, then the latter will require a lawful ground for processing, however.[74] In practice, recourse will often be had to the necessity to process for the purposes of legitimate interests, a legal base for processing that implies a balancing exercise[75] and thus a case-by-case analysis. By way of illustration, it should be accepted that a data subject transfers their e-mails from one e-mail provider to another without consent of each of the e-mails' senders and recipients, but not necessarily that pictures of an individual published on one social media platform are publicly made available via another platform without that individual's consent.

By contrast, data that was provided or created by consumers and which only allows identification of data subjects who are not that consumer themselves, falls between the cracks of the harmonized legislation. Indeed, neither the Digital Content Directive, nor the GDPR provides for a portability right in such cases. Nonetheless, it should

64 EC, Explanatory Memorandum accompanying the Proposal for an EP & Council Regulation on harmonised rules on fair access to and use of data (Data Act), 23 February 2022, COM(2022)68 final, at p 9.
65 Metzger, 'Access to and Porting of Data under Contract Law: Consumer Protection Rules and Market-Based Principles' (n 34) 290; Sein and Spindler (n 29) 382; Staudenmayer, 'Auf dem Weg zum digitalen Privatrecht – Verträge über digitale Inhalte' (n 6) 2500; Vanherpe (n 6) para 27; Kai von Lewinski, '[DS-GVO] Art 20. Recht auf Datenübertragbarkeit' in Stefan Brink and Heinrich Amadeus Wolff (eds), *Beck'sche Online-Kommentare Datenschutzrecht* (37th edn, CH Beck 1 August 2021) para 116 <http://beck-online.beck.de>.
66 See Digital Content Directive, art 16(2) and recital 69.
67 See GDPR, art 20(1)(a) and (b) and recital 68.
68 art 29 Data Protection WP, 5, 6, 8, 10 and 11.
69 See GDPR, art 4(1).
70 Graef, Husovec and van den Boom (n 43) 8; Tombal (n 34) para 155; Christian Twigg-Flesner, 'Digital Content Directive (2019/770), Article 16' in Reiner Schulze and Dirk Staudenmayer (eds), *EU Digital Law* (CH Beck 2020) para 50; von Lewinski (n 65) para 116.
71 Inge Graef, Raphaël Gellert and Martin Husovec, 'Towards a holistic regulatory approach for the European data economy: why the illusive notion of non-personal data is counterproductive to data innovation' [2019] EL Rev 605, 607-611, 617-618 and 621; Graef, Husovec and van den Boom (n 43) 8; Tombal (n 34) paras 18-19 and 155.
72 Graef, Gellert and Husovec (n 71) 608-610 and 621; Metzger, 'Access to and Porting of Data under Contract Law: Consumer Protection Rules and Market-Based Principles' (n 34) 290.
73 See GDPR, art 20(1), first phrase.
74 art 29 Data Protection WP, 7; Boris P Paal, '[DS-GVO] Art 20. Recht auf Datenübertragbarkeit' in Boris P Paal and Daniel A Pauly (eds), *Datenschutz-Grundverordnung Bundesdatenschutzgesetz* (3rd edn, CH Beck 2021) para 26 <http://beck-online.beck.de> accessed 31 December 2021.
75 GDPR, art 6(1)(f); cf art 29 Data Protection WP, 11.

not be overlooked that the content in these instances may often be protected as works of authorship if it 'reflects the personality of its author' as an expression of their 'free and creative choices'.[76] If so, the consumer or consumers who created or provided the content, hold(s) the copyright in that content. Save for the scenario where these rights were validly and irrevocably transferred to the trader or a third party with effects surviving the termination of the contract for the supply of digital content or a digital service,[77] copyright law might therefore reinforce the consumer's position in relation to this content.[78]

What portability-like entitlements could consumers derive from their capacity as copyright holders of the original contents (works of authorship) that they provided or created when using a trader's digital service? By lack of a fully harmonized framework for copyright contract law in the EU, the answer to that question is dependent on national law. In this regard, it is unlikely that the copyright legislation of any of the EU's Member States contains specific provisions that explicitly enable authors to retrieve a digital copy of the copyright-protected works that they have created in the framework of a consumer contract that was terminated. However, some legislation provides authors with remedies that could lead to the same effect.

Indeed, consumers could theoretically try arguing that their professional co-contracting party performs acts of counterfeit when it withholds and further reproduces their protected content. Next, they could argue that the IP-infringing copies ought to be delivered up by the counterfeiter.[79] This rather theoretical line of reasoning is unlikely to be successful in practice, though. Likewise, it might prove difficult to persuade a court to order a co-contracting party to transfer digital copyright-protected content back to the consumer on the basis of general contract-law principles, like the principle of good faith in continental jurisdictions.

Apart from those reasonings based on very general principles, some specific legislative provisions come to mind when searching for a right for consumer-authors to retrieve their content. German and Austrian copyright law grants authors a right to receive access to the original or a copy of their work, for instance.[80] In the UK, a similar ground for action seems absent.[81] By contrast, Belgian and French law lay down a prohibition to destroy the original version of audio-visual works.[82] In addition, French copyright law determines that the author retains ownership in the original copy of their work when it is supplied to a publisher[83] and Belgian law provides for a right for authors to terminate their publishing agreement and buy up all hardcopies when a publisher intends to destroy its stock.[84] It is not inconceivable that these provisions may successfully be relied upon by consumers in relation to a trader to claim a digital copy of a work that they had provided or created while using a digital service, regardless of whether that work contains references to recognizable third parties, and even regardless of whether the agreement is terminated pursuant to the remedies in the Digital Content Directive or withdrawn pursuant to the amended Consumer Rights Directive. However, it remains to be seen whether courts will in reality allow consumers to invoke these and similar national-law provisions by analogy to claim back digital data.

b) Data provided or created by the consumer

Apart from constituting nonpersonal data, content must be 'provided or created by the consumer when using the digital content or digital service supplied by the trader' in order to fall in the scope of the portability right in the Digital Content Directive and the amended Consumer Rights Directive. The provision and the creation of data are classified as two alternative criteria, suggesting a broad interpretation. Indeed, the portability right should not only apply to, for example, texts created while using a social media platform, cloud storage service or another digital service, but equally to pre-existing texts, photos and audio-visual content that was uploaded to such a service. Without prejudice to the findings on co-authored content and third-party uploads below,[85] the wording of the right also suggests that it indiscriminately applies to content provided or created by the consumer alone and to content jointly provided or created by the consumer and third parties.

What the GDPR is concerned, there are uncertainties about the implications of the fact that the portability right concerns only personal data 'which [the applicant] has provided to a controller'.[86] Whereas the scope of that right clearly includes data that was consciously, actively, provided by consumers (e.g. via online forms, and clearly excludes deduced data, like user profiles drafted up by controllers), there is less consensus about a large grey area, which includes 'passively provided' data, like log files and one's internet history.[87] In the framework of the Digital Content Directive and the Consumer Rights Directive, that point of contention will most likely be less relevant, due to the nonpersonal nature of the data.

76 CJEU, Case C-5/08 *Infopaq* EU:C:2009:465, para 37; CJEU, Case C-145/10 *Painer* EU:C:2011:798, paras 87-89; CJEU, Case C-604/10 *Football Dataco* EU:C:2012:115, para 38; CJEU, Case C-161/17 *Renckhoff* EU:C:2018:634, para 14; CJEU, Case C-310/17 *Levola Hengelo* EU:C:2018:899, para 36; CJEU, Case C-683/17 *Cofemel* EU:C:2019:721, paras 29-30; CJEU, Case C-833/18 *Brompton Bicycle* EU:C:2020:461, para 23.

77 See below at section III.

78 Michels and Millard (n 41) 186-188; Chris Reed, 'Information Ownership in the Cloud' in Christopher Millard (ed), *Cloud Computing Law* (2nd edn, OUP 2021) 158-161.

79 Michels and Millard (n 41) 196-198.

80 Urheberrechtsgesetz (DE), § 25; Urheberrechtsgesetz (AT), § 22.

81 Michels and Millard (n 41) 195-196.

82 Wetboek economisch recht / Code de droit économique (BE), art XI.181, last paragraph; Code de la propriété intellectuelle (FR), art L121-5, 2nd paragraph.

83 Code de la propriété intellectuelle (FR), art L132-9, last paragraph.

84 Wetboek economisch recht / Code de droit économique (BE), art. XI.199.

85 See below at section II.5.

86 Graef, Husovec and Purtova (n 43) 1370; Graef, Husovec and van den Boom (n 43) 7; Gerald Spindler and Lukas Dalby, '[DS-GVO] Art 20. Recht auf Datenübertragbarkeit' in Gerald Spindler and Fabian Schuster (eds), *Recht der elektronischen Medien* (4th edn, CH Beck 2019) para 7 <http://beck-online.beck.de> accessed 31 December 2021; von Lewinski (n 65) paras 37-40.

87 art 29 Data Protection WP, 9-11; Janal (n 34) paras 7-9; Gleeson and Walden, 'Facillitating Competition in the Cloud' (n 36) 498; Jörg Hoffmann and Begoña Gonzalez Otero, 'Demystifying the role of data interoperability in the access and sharing debate' [2020] JIPITEC 252, para 66; Dimitra Kamarinou, Christopher Millard and Felicity Turton, 'Protection of Personal Data in Clouds and Rights of Individuals' in Christopher Millard (ed), *Cloud Computing Law* (2nd edn, OUP 2021) 284; Reto Mantz and Johannes Marosi, 'Vorgaben der Datenschutz-Grundverordnung' in Louisa Specht and Reto Mantz (eds), *Handbuch Europäisches und deutsches Datenschutzrecht* (1st edn, CH Beck 2019) para 137 <beck-online.beck.de>; Tombal (n 34) paras 144-145; von Lewinski (n 65) paras 41-48.

Indeed, only if the consumer is the actual source of certain content, the portability right will apply.[88]

Undoubtedly, the portability right cannot be applied to the acquired digital content or digital service itself – that is to the actual object of the terminated contract between the trader and the consumer. This follows indirectly from the wording of the portability provision, but no less so from the very concept of contract termination or withdrawal, as well as from the explicit obligation for the consumer to refrain from continuing to use the content or service and from making it available to third parties as from the time of termination.[89] However, the limitation to content 'provided or created by the consumer' also excludes that consumers invoke the portability right to retrieve digital content that they acquired through the digital service or via the service provider's platform (such as tokens, virtual objects in videogames, etc.). Although the policy objectives of avoiding lock-in effects and enhancing competition would equally be served by such a right, the portability right does not allow consumers to transfer acquired digital content (or 'digital assets') to a third party. Indeed, the merits of a (potential) right for acquirers to transfer digital content or cloud-based digital access rights, based on an analogy with an owner's right to pass off ownership (*ius abutendi*), are subject to another – though closely related – debate,[90] which the Digital Content Directive has left untouched.[91] With respect to this debate, the aforementioned 2022 proposal for a new portability right for digital assets in data processing services[92] has the potential of becoming a regulatory milestone.

3. Modalities of exercise

The trader's obligation to make the data available pursuant to the Digital Content Directive and the amended Consumer Rights Directive does not automatically follow from the termination or withdrawal of the contract. It is conditional on the explicit request of the consumer.[93] That request is not subject to formalities, though. The lack of time limits in the Directives' texts has led some to argue that the consumer can invoke their right to portability within a 'reasonable' period, to be assessed on a case-by-case basis save further guidance in national law.[94] Furthermore, in the absence of indications to the contrary it seems safe to conclude that the consumer can choose where the received data is to be stored (e.g. on a device of their choice or in the cloud).[95]

Once requested, the trader is required to make the data available 'free of charge, without hindrance' and 'within a reasonable time'.[96] In this respect, it must not be overlooked that the trader, the consumer's direct co-contracting party, is not necessarily the party that actually holds the requested data. The trader could be an intermediary in the chain of transactions,[97]for example a brick-and-mortar store or an online platform where the consumer pays money or personal data in exchange for access to a third party's digital service. As the legislature has deliberately chosen only to regulate the immediate contractual relationship between consumers and their professional co-contracting parties,[98] the Digital Content Directive just encumbers the trader with the obligation to comply with portability requests.

While consumers can only target 'their' trader, that trader might need to urge its own supplier (i.e. the service provider that actually holds the data) to ensure compliance and avoid liability. In this respect, it was enacted that national law determines the remedies that the trader may have against persons liable 'in previous links of the chain of transactions'.[99] Like the 1999 and 2019 Consumer Sales Directives,[100] the Digital Content Directive leaves Member States with ample discretion to operationalize this right of redress.[101] Although the Directive does not require national legislators to do so,[102] it is advisable that national law implements the right to redress as a mandatory rule which up-chain suppliers cannot override by contract,[103] mimicking the example of German legislators.[104] First, such a rule would ensure the effectiveness of the portability right by avoiding that service suppliers circumvent the rules in the Directive by purposely only offering their content and services via independent intermediaries. Second, only a mandatory redress rule can prevent traders from getting squeezed in a 'delicate sandwich position' where they are liable for a

88 Tombal (n 34) para 155.
89 Digital Content Directive, art 17(1); Consumer Rights Directive, art 13(8) as created by the Omnibus Directive.
90 cf CJEU, Case C-128/11 *UsedSoft* EU:C:2012:407; CJEU, Case C-263/18 *Tom Kabinet* EU:C:2019:1111; see Geiregat, *Supplying and Reselling Digital Content: Digital Exhaustion in EU Copyright and Neighbouring Rights Law* (n 19) chs 3, 4 and 5.
91 Spindler (n 10) paras 42-44; Sein and Spindler (n 29) 372-373; see also Sattler (n 14) paras 6-19.
92 EC, Proposal for a Data Act Regulation, COM(2022)68, art 23(1)(c); see above at section II.1.
93 Digital Content Directive, art 16(4), 1st paragraph and recital 70; Consumer Rights Directive, art 13(6) as created by the Omnibus Directive; Twigg-Flesner (n 70) para 51.
94 ibid.
95 In relation to the GDPR portability right, see art 29 Data Protection WP, 4.
96 Digital Content Directive, art 16(4), 2nd paragraph.
97 Geiregat and Steennot, 'Proposal for a Directive on Digital Content: Scope of Application and Liability for a Lack of Conformity' (n 6) 110-111; Metzger and others (n 27) para 46; Juliette Sénéchal, 'Digital Content Directive (2019/770), Article 2' in Reiner Schulze and Dirk Staudenmayer (eds), *EU Digital Law* (CH Beck 2020) para 22; Staudenmayer, 'Digital Content Directive (2019/770), Article 3' (n 6) paras 12-13; cf European Law Institute, 16-17; Oprysk (n 24) 955; Juliette Sénéchal, 'The Diversity of the Services provided by Online Platforms and the Specificity of the Counter-performance of these Services – A double Challenge for European and National Contract Law' [2016] EuCML 39, 40-41.
98 Digital Content Directive, recitals 12 and 13.
99 Digital Content Directive, art 20.
100 1999 Consumer Sales Directive, art 4; 2019 Consumer Sales Directive, art 18.
101 See Digital Content Directive, recital 78.
102 Bert Keirsbilck, 'Right of Redress' in Ignace Claeys and Evelyne Terryn (eds), *Digital Content & Distance Sales New Developments at EU Level* (Intersentia 2017) 273-274; Bert Keirsbilck, 'Verhaalsrechten' in Ignace Claeys and Evelyne Terryn (eds), *Nieuw recht inzake koop & digitale inhoud en diensten* (Intersentia 2020) para 27; Roelien van Neck and Raoul Grifoni Waterman, 'Nieuwe digitale uitdagingen. Het voorstel van de Europese Commissie voor een richtlijn met betrekking tot overeenkomsten voor de levering van digitale inhoud' [2017] Computerr 136, 143; similarly, in relation to the corresponding provisions in the 1999 and 2019 Consumer Sales Directives: Martin Illmer and Juan Carlos M Dastis, 'Redress in Europe and the Trap under the CESL' [2013] (2013) 9 ERCL 109, 115-116; Piia Kalamees, 'Goods With Digital Elements And The Seller's Updating Obligation' [2021] JIPITEC 131, paras 38-41; Damjan Možina, 'Digital Content Directive (2019/770), Article 20' in Reiner Schulze and Dirk Staudenmayer (eds), *EU Digital Law* (CH Beck 2020) paras 9 and 31; Sophie Stijns and Ilse Samoy, 'Le nouveau droit de la vente: la transposition en droit belge de la Directive européenne sur la vente des biens de consommation' [2003] TBBR-RGDC 2, para 113.
103 Kalamees (n 102) para 41.
104 Bürgerliches Gesetzbuch, §§ 327t and 327u, introduced by Law (DE) of 25 June 2021 [2021] OJ I 2123.

failure to comply with consumer protection law but cannot pass on that liability to the suppliers where the lack of conformity originated but which happen to have a better bargaining position.[105]

The data that is subject to portability must be made available 'in a commonly used and machine-readable format' pursuant to both the Digital Content Directive and the amended Consumer Rights Directive.[106] The exact meaning of that double requirement is open for discussion. The reference to a 'commonly used' format suggests that the data should not be supplied in a business-internal format or in a format that uses a technology that requires operations subject to IP rights held by the trader or affiliated undertakings.[107] Referring to the consumer's obligation to refrain from using the digital content or service upon termination of the contract,[108] one author rightfully adds that the data should, in any case, be accessible via 'separate technical means',[109] that is without the consumer needing to access or log in to a service or platform held by the trader.

For lack of specifications, further implications of the requirement of a 'commonly used' format are uncertain.[110] By analogy to the similar criterion in the GDPR,[111] it is reasonable to argue that a format must ensure at least a minimum of interoperability and that a file format will in any case comply with that condition if a standard format for the sector is used. Very often, internationally accepted standards will not be available, though.[112] In that event, open formats are preferred.[113] The digital context being largely characterized by the omnipresence of 'proprietary' formats (i.e. formats that do make use of technology subject to pending IP rights), it would nonetheless be a bridge too far to conclude that the use of whatever IP-protected file format runs against the requirement of making the content available in a commonly used format.[114]

Besides being commonly used, the format needs to be 'machine-readable'. That terminology first saw light in EU law in the 2013 version of the PSI Directive,[115] most recently recast in 2019.[116] In line with its technical meaning within computer sciences,[117] machine-readability is defined therein as a reference to a 'file format structured so that software applications can easily identify, recognize and extract specific data, including individual statements of fact, and their internal structure',[118] excluding 'documents encoded in a file format that limits automatic processing, because the data cannot, or cannot easily be extracted from that'.[119]

The GDPR portability right likewise teaches that the data subject should receive their data in a machine-readable format.[120] The initial proposal mentioned an 'electronic' format, whereas the European Parliament favored reference to an 'interoperable' format.[121] Throughout the negotiating and drafting process, machine-readability was only used in relation to standardized information policies – a subject that did not make it to the final text.[122] For reasons that are nowhere clarified in publicly available documents the competent Working Party of the Council nonetheless changed the reference to 'electronic' formats in the current reading,[123] which the Council adopted[124] without further explanation.[125] In the initial proposal for the Digital Content Directive, machine-readability was equally not foreseen.[126] Although reports do not show Member States requesting modification,[127] the Council inserted that term as a requirement during negotiations.[128] Most probably

105 See Illmer and Dastis (n 102) 113-114.
106 Digital Content Directive, art 16(4), 2nd paragraph; Consumer Rights Directive, art 13(7) as created by the Omnibus Directive.
107 Twigg-Flesner (n 70) para 59; cf art 29 Data Protection WP, 17.
108 Digital Content Directive, art 17(1).
109 Twigg-Flesner (n 70) para 57.
110 Ignace Claeys and Jonas Vancoillie, 'Remedies, Modification of Digital content and Right to Terminate Long-Term Digital Content Contracts' in Evelyne Terryn and Ignace Claeys (eds), *Digital Content & Distance Sales* (Intersentia 2017) 206; Janal (n 34) para 36.
111 art 29 Data Protection WP, 16-18; von Lewinski (n 65) paras 76-78.1.
112 Gleeson and Walden (n 36) 504; Kamarinou, Millard and Turton (n 87) 282; Matthias Leistner, 'The existing European IP rights system and the data economy – An overview with particular focus on data access and portability' in German Federal Ministry of Justice and Consumer Protection and Max Planck Institute for Innovation and Competition (eds), *Data Access, Consumer Interests and Public Welfare* (Nomos 2021) 213-222.
113 Tatiana-Eleni Synodinou, 'The Portability of Copyright-Protected Works in the EU' in Tatiana-Eleni Synodinou and others (eds), *EU Internet Law* (Springer 2017) 229; cf art 29 Data Protection WP, 18; see however Hoffmann and Gonzalez Otero (n 87) para 66.
114 cf Lukas Feiler, Nikolaus Forgó and Michaela Weigl, *The EU General Data Protection Regulation (GDPR): A Commentary* (GLP 2018) 130; von Lewinski (n 65) para 77.
115 See EP & Council Directive (EU) 2013/37 amending Directive 2003/98/EC on the re-use of public sector information [2013] OJ L175/1, recital 21 and art 1(2), amending EP & Council Directive 2003/98/EC on the re-use of public sector information [2003] OJ L345/90 (in particular art 2(6)).
116 EP & Council Directive (EU) 2019/1024 on open data and the re-use of public sector information (recast) (PSI Directive) [2019] OJ L172/56.
117 IEEE, see at machine readable.
118 PSI Directive, art 2(13).
119 PSI Directive, recital 35.
120 Metzger and others (n 27) para 52.
121 EP, Position adopted at first reading with a view to the adoption of Regulation (EU) No …???/2014 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), 12 March 2014, [2017] OJ C 378/400, at art 15(2a).
122 EP, Position, cited n 121, [2017] OJ C 378/400, at art 13(a)(3).
123 See Council Presidency, Note to the WG DAPIX on the Proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) – Data Portability (Revision of art 18), 6 June 2014, No 10614/14; following Council Presidency, Note to the WP DAPIX on the Proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) – Data Portability, 25 March 2014, No 8172/14.
124 Council, Position (EU) No 6/2016 at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 8 April 2016, [2016] OJ C 159/1, see at art 20(1).
125 See Council, Statement of the Council's reasoning regarding Position (EU) No 6/2016 at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 8 April 2016, [2016] OJ 159/83, at para 4.7.
126 Digital Content Directive Proposal, art 16(4)(b).
127 See Member States delegations, Notes to the WP on Civil Law Matters (Contract Law) of 11 April 2016 on the proposal for a Directive of the EP and the council on certain aspects governing contracts for the supply of digital content, Nos 7746/16 and 7746/16 ADD 1 to ADD 22.
128 Council Presidency, Note to the WP on Civil Law Matters (Contract Law) on the proposal for a Directive of the EP and the council on certain aspects governing contracts for the supply of digital content (First reading), 15 June 2016, No 10231/16; see at art 13a(3), last paragraph of the proposal.

this was meant to align the text of the novel portability right with that in the GDPR and thus, in turn, with that in the Public Sector Information Directive.

This text alteration was more than a cosmetic operation. In relation to the GDPR, the implications of the requirement of machine-readability are highly contested. In any event, a machine-readable format is a digital format, so data on paper inarguably will not meet the criterion.[129] But which further requirements does machine-readability imply? Referring to the definition in the PSI Directive, Ignace Claeys and Nathalie De Weerdt argue that the format should allow the requesting consumer to interact with the data. Hence, HTML, TXT and ODT formats comply. A PDF format does not, for it can be configured to prevent users from printing, editing, or copying text.[130] Backed by references to information technology, Tatiana-Eleni Synodinou takes a stricter approach when interpreting the GDPR portability right. She argues that 'machine-readability' does not equal 'digital accessibility' but should instead be read as the opposite of 'human-readable'. In that sense, data is only 'machine-readable' when it can be read and processed automatically by a computer,[131] meaning that not only PDF files are excluded, but also DOCX, GIF, JPG, PNG and probably also TXT and ODT formats.[132]

Synodinou's thesis is undoubtedly solid from a technical perspective and there are indeed strong arguments to apply it to the GDPR. In relation to the GDPR portability right, a data subject might notably wish to transfer data referring to them to another controller to establish or improve their personal digital profile with that controller. By contrast, it seems unlikely that the drafters of the Digital Content Directive and the amendments to the Consumer Rights Directive wanted consumers to receive their data in a structured form that allows it to be readily processible by data processing software, but which is hardly readable by consumers themselves upon termination of their contract. In order not to undermine the effectiveness of the novel portability right, a less technical and less strict interpretation is advisable.

In plain terms, the Digital Content and amended Consumer Rights Directives' references to 'machine-readable' formats is an unfortunate legislative choice.[133] In line with Christian Twigg-Flesner's reading, that requirement therefore ought to be interpreted broadly, in a sense that the data should be supplied in a format that is 'suitable' for the nature of the content.[134] Social media text messages should not be supplied in PDF format for instance, but rather in a format that can be fed to word processing software.[135] In cases of uploaded files, it seems fair to argue that consumers should retrieve their data in the same format as uploaded[136] (i.e. photos in JPEG, but likewise PDF files in PDF format etc.). Even if this interpretation runs against the letter of the Directive, it is in line with its objectives. Indeed, which consumer would like to get all their saved PDF files and photos back from their cloud storage provider in an open-source format that can only be used via data-processing software?

4. Exceptions

The Digital Content Directive and the amended Consumer Rights Directive explicitly exclude the trader's obligation to make available nonpersonal data provided or created by the consumer in three cases. The first exception concerns data that relates to the consumer's activity when they were using the digital content or service.[137] Examples would be observed personal data that are irreversibly anonymized and stored as business statistics, or the exact second where the consumer stopped watching a movie.[138] The second exception relates to data that was aggregated with other data by the trader, and its disaggregation is either impossible or disproportionate.[139] In relation to the latter instance, it must be recalled that the trader is not necessarily the undertaking that actually holds the data. Indeed, the consumer's co-contracting party can be a mere intermediary in the chain of transactions.[140] As it would make little sense to grant consumers a right to receive irreversibly aggregated data when they have acquired digital content or a service via an intermediary but not when their co-contracting party is the actual service provider, it is advisable not to uphold an overly text-bound interpretation to the requirement of aggregation 'by the trader'.

The last explicit exception relates to content that has 'no utility' outside the context of the supplied content or service.[141] Take the consumer's login credentials, for instance.[142] From a civil-proceedings perspective, the trader theoretically bears the burden of proof of the lack of utility. Consumers can limit themselves to proving that the requirements for the remedy of termination are fulfilled[143] and that they invoked both the right of termination[144] and to data portability. In everyday reality though, traders (and service providers) will be the first to judge the remaining 'utility outside the context' at the occasion of a consumer's request to retrieve data. Utility is a very open term. Discussions about the scope of this exception are therefore immanent. Considering the unequal bargaining positions and the relatively limited monetary amounts that are often involved, it should be warranted that the exception in the end does not boil down to an easy route to erode the portability right.[145] In cases of

129 Twigg-Flesner (n 70) para 62.
130 Ignace Claeys and Nathalie De Weerdt, 'De conformiteit van digitale inhoud en digitale diensten' in Ignace Claeys and Evelyne Terryn (eds), *Nieuw recht inzake koop & digitale inhoud en diensten* (Intersentia 2020) para 46; cf von Lewinski (n 65) para 75.1.
131 Synodinou, 'The Portability of Copyright-Protected Works in the EU' (n 113) 228-229.
132 cf art 29 Data Protection WP, 18.
133 For a dissenting opinion, see Tombal (n 34) para 157.
134 Twigg-Flesner (n 70) para 60.
135 Claeys and Vancoillie (n 110) 206.
136 Twigg-Flesner (n 70) para 59.
137 Digital Content Directive, art 16(4), read jointly with art 16(3)(b); Consumer Rights Directive, art 13(6), read jointly with art 13(5)(b), as both created by the Omnibus Directive.
138 Tombal (n 34) para 155.
139 Digital Content Directive, art 16(4), read jointly with art 16(3)(c); Consumer Rights Directive, art 13(6), read jointly with art 13(5)(c), as both created by the Omnibus Directive.
140 See above at section II.3.
141 Digital Content Directive, art 16(4), read jointly with art 16(3)(a); Consumer Rights Directive, art 13(6), read jointly with art 13(5)(a), as both created by the Omnibus Directive.
142 Tombal (n 34) para 155.
143 Digital Content Directive, arts 14(1), 14(4) and 14(6).
144 Digital Content Directive, art 15.
145 Metzger, 'Verträge über digitale Inhalte und digitale Dienstleistungen: Neuer BGB-Vertragstypus oder punktuelle Reform?' (n 10) 583; Metzger, 'Access to and Porting of Data under Contract Law: Consumer Protection Rules and Market-Based Principles' (n 34) 291; Spindler (n 10) para 64.

doubt, the consumer should receive the data rather than being denied access. As such, it is for instance difficult to imagine visual, audio-visual, textual or other content that was supplied to a certain social media platform and that can have no utility whatsoever outside that platform.[146]

The exception for content with 'no utility' might have been conceived with videogames in mind. Pursuant to that logic, there is no further use in a building, piece of furniture, weapon or other virtual object or asset 'created' in a game.[147] Is that really the case, though? It is perfectly foreseeable that consumers might want to terminate their current agreement for a lack of conformity or due to unilaterally enforced modifications with negative effects, with a view to concluding a new agreement with the same or another trader in the near or far future. Moreover, a consumer might attach value to their virtually created asset and may want to transfer it to a third party.[148] This can be seen from the fact that the European Commission intends to introduce such a right to transfer digital assets in cases where a customer unilaterally decides that they want to switch cloud service provider.[149] Hence, it is yet to be seen whether the given examples count as not having 'utility outside the context' in the sense of the Digital Content Directive and the amended Consumer Rights Directive.

Apart from these three exceptions, the recitals mention that the portability right is without prejudice to Member State law that prohibits the trader to disclose certain information.[150] The legal value of that statement is questionable, as the Directive's body text remains silent on such an exception. Leaving aside this reference, a notable absentee is a general exception for data protected by rights held by third parties. Indeed, unlike the portability right in the GDPR,[151] that in the Digital Content Directive and the amended Consumer Rights Directive is notably not explicitly limited by the requirement that it 'shall not adversely affect the rights and freedoms of others'.[152] It follows that, whereas the GDPR portability right is without prejudice to third-party IP rights,[153] the same is not necessarily true for consumers' portability right. The implications of that finding for the Digital Content Directive are analyzed in the next section.

5. Conflicts with third-party IP

The portability right in the Digital Content Directive gives rise to two base scenarios of potential conflicts with third parties' IP rights. First, many digital services allow their users to react to, and interreact with, each other. As a result, a lot of content might qualify as works of joint authorship. Illustrations are texts, images, music, and audio-visual material made jointly by various users that all participate in a certain digital service. If these works meet the threshold of originality, various end-users qualify as co-authors and therefore also as joint owners of the copyright in those works pursuant to national copyright law.[154] Considering that the portability right in the Digital Content Directive is not limited to data created *exclusively* by the consumer,[155] one may wonder about the fate of the copyright in those co-authored works.

Second, the portability right applies not only to content 'created' by the consumer (whether alone or jointly) but equally to content that was 'provided' by the consumer. Hence, that right can potentially also be invoked for content that was initially created by a third party. Indeed, it is not impossible – and may in fact even be quite widespread – that consumers upload (provide) content that is protected by copyright (or other IP rights) held by a third party, such as images, texts, audio and audio-visual content and the like.

The scenarios of co-authored data and of uploaded third-party content both boil down to the same situation: a third party[156] holds copyright in the content that the consumer is entitled to retrieve pursuant to the portability right in the Digital Content Directive. In assessing the implications of this it should first be tested whether these operations fall within the scope of any of the author's exclusive rights and whether copyright exceptions apply (a). Insofar as these rights are applicable and exceptions are not, the correlation between the Directive's portability right, copyright law (b) and electronic commerce law (c) should then be examined to draw conclusions on liability.

a) Copyright assessment

The operations that are necessary to 'make available' the content to the consumer themselves and entitle them to 'retrieve' it inevitably entail acts of reproduction within the (technical[157]) meaning of EU-harmonized copyright legislation.[158] By contrast, they usually do not involve the right of communication to the public. Indeed, pursuant to the current stance of Court of Justice (CJEU) case law, the latter right only applies to acts of communication that are directed to 'a public': an 'unlimited and fairly large' number of potential recipients. The making available of subject-matter – for instance via download – to only one person or a small group of people is therefore outside the scope.[159]

146 Kuschel and Rostam (n 7) para 32; Metzger and others (n 27) para 54.
147 Kuschel and Rostam (n 7) para 32; cf Claeys and Vancoillie (n 110) 206.
148 See Katja Weckström, 'Chasing One's Tail: Virtual Objects as Intangible Assets, Intangible Property or Intellectual Property?' [2012-13] Journal of Internet Law 3.
149 EC, Proposal for a Data Act Regulation, COM(2022)68, art 23(1)(c); see above at section II.1.
150 Digital Content Directive, art 71.
151 GDPR, art 20(4).
152 Janal (n 34) para 33.
153 See GDPR, recital 63; art 29 Data Protection WP, 12; Alexander Dix, '[DSGVO] Art 20. Recht auf Datenübertragbarkeit' in Spiros Simitis, Gerrit Hornung and Indra Spiecker genannt Döhmann (eds), *Datenschutzrecht* (1st edn, Nomos 2019) para 18 <http://beck-online.beck.de>; von Lewinski (n 65) para 105.
154 Kuschel and Rostam (n 7) para 33.
155 Digital Content Directive, art 16(4), read jointly with art 16(3)(d) (*e contrario*).
156 For an assessment of the situation where the trader or service supplier is the IP-right holder, see below at section II.6 and ch III.
157 See the references in n 15.
158 EP & Council Directive 96/9/EC on the legal protection of databases (Database Directive) [1996] OJ L77/20, arts 5(a) and 5(e); InfoSoc Directive, art 2; EP & Council Directive 2009/24/EC on the legal protection of computer programs (codified) (Software Directive) [2009] OJ L111/16, arts 4(1)(a) and 4(1)(b).
159 CJEU, Case C-263/18 *Tom Kabinet* EU:C:2019:1111, para 69; CJEU, Case C-597/19 *Mircom* EU:C:2021:492, paras 52-55; CJEU, Cases C-682/18 and C-683/18 *YouTube* and *Cyando* EU:C:2021:503, paras 72-75 and 100; cf CJEU, Cases C-682/18 and C-683/18 *YouTube* and *Cyando* EU:C:2020:586, Opinion of AG Saugmandsgaard Øe, para 60; Case C-597/19 *Mircom* EU:C:2020:1063, Opinion of AG Szpunar, para 40; for a detailed analysis, reference is made to Geiregat, *Supplying and Reselling Digital Content: Digital Exhaustion in EU Copyright and Neighbouring Rights Law* (n 19) ch 3 s 1.1.2.

The consumer's retrieval must be differentiated from potential operations which the consumer may subsequently undertake. After retrieving the 'ported' content, a consumer may want to provide it to another digital service or platform, depending on the type of content and service concerned. After all, this is essentially the rationale behind the portability right.[160] Here, a distinction should be made between the type of service. If consumers upload the retrieved content to a cloud storage provider or to another platform ensuring private access reserved to the consumer or their close circle, then only the reproduction right comes into play. If, by contrast, a consumer makes the content publicly available via a social media service on a sharing platform, a website, or the like, then there will also be an act of communication to the public.[161]

The rights of reproduction and communication to the public are both subject to exceptions. Admittingly, it cannot be excluded that the mentioned acts of communication will sometimes constitute lawful citations or parodic use.[162] Likewise, it is conceivable that some of these acts take place in the context of education, public security, religious activities and so on.[163] Nonetheless, it cannot be *generally* concluded that a consumer will always act for these purposes when publishing their received content on new digital platforms. Hence, publicly 'reposting' or 'reuploading' received copyright-protected content is indeed an act subject to authorization by the holder of the right of communication to the public therein, save for specific circumstances.

The situation is different for the reproductions made in the course of retrieving that content and uploading it again. If the consumer's content constitutes a computer program for the Software Directive, then firstly the operations necessary for retrieving that content may qualify as 'the making of a back-up copy' or as a reproduction 'necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose'.[164] This is true for temporary copies made in the course of transmission and for durable copies in the consumer's ambit alike, provided at least that the content is retrieved for personal use only. If the consumer subsequently uploads that content to a new platform with reserved access, then those same two exceptions may apply.[165] Secondly, if the content is not a computer program but constitutes 'a collection of independent … materials arranged in a systematic or methodical way and individually accessible by electronic or other means', then the consumer will similarly benefit from the exception for lawful users of a database, insofar as the acts of receiving and reuploading are necessary to make 'normal use' of that database.[166] Finally, if the content qualifies as a copyright-protected work that is neither a program nor a database,[167] it should be determined, for each individual act of reproduction and on a case-by-case basis, whether one or more harmonized exceptions apply.

Of all harmonized exceptions to the reproduction right, the one for private use will presumably be applicable to most instances where the portability right is exercised over content that incorporates a work of authorship that is neither a program nor a database. That exception can only apply in Member States that have chosen to implement it into their national copyright right, though. Moreover, it is only open to natural persons acting for private purposes and not for uses driven by either direct or indirect commercial aims.[168] Consumers in the Digital Content Directive fit that description by definition.[169] Nevertheless, it should not go unnoticed that national legislators can choose to extend the personal scope of the rules when they implement the Directive.[170] They could notably also apply the rules to contracts for 'dual' use in cases where content or a service is acquired for both professional and private purposes.[171] Insofar as national implementation law does indeed apply to dual use contracts, it must be born in mind that the private use exception in copyright only applies to uses that are exclusively personal. Hence, even if the portability right is and can be exercised over content that is or will be used for both personal and professional reasons (like social-media content created by famous influencers, for example) the copyright exception only applies for the part that is personal use.

Interpreting the private use exception, the CJEU has furthermore established, on the one hand, that reproductions can only be exempted if they are made from a 'lawful source'.[172] Indeed, the reproduction must be made from a legitimate copy and not from a source that traces back to an act that was not authorized by the copyright holder.[173] With respect to the output of the exempted act of reproduction, on the other hand, it follows from EU case law that consumers are not only entitled to save their private copies on devices in their own physical presence, but also on the servers of subsequent cloud service providers.[174] Within these boundaries, data-receiving consumers are therefore exempt from asking the copyright holder's additional consent to exercise their portability right.

By its very nature and text, the private use exception only applies to reproductions made by the beneficiary

160 cf Graef, Husovec and Purtova (n 43) 1393; Graef, Husovec and van den Boom (n 43) 9.
161 InfoSoc Directive, art 3(1); CJEU, Case C-161/17 *Renckhoff*, EU:C:2018:634, paras 30-34 and 47; see also EP & Council Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (DSM Directive) [2019] OJ L130/92, art 17(1).
162 InfoSoc Directive, art 5(3)(d) and 5(3)(k), respectively.
163 See InfoSoc Directive, art 5(3).
164 Software Directive, art 5(2) and 5(1), respectively.
165 See CJEU, Case C-433/20 *Austro-Mechana* EU:C:2022:217, paras 30-33; CJEU, Case C-433/20 *Austro-Mechana*, EU:C:2021:763, Opinion of AG Hogan, paras 25-43.
166 Database Directive, arts 1(2) and 6(1).
167 See InfoSoc Directive, art 1(2) and recital 50; CJEU, Case C-128/11 *UsedSoft* EU:C:2012:407, para 51; CJEU, Case C-355/12 *Nintendo* EU:C:2014:25, para 23; CJEU, Case C-263/18 *Tom Kabinet* EU:C:2019:1111, para 55.
168 InfoSoc Directive, art 5(2)(b).
169 Digital Content Directive, art 2(6).
170 Digital Content Directive, recital 17.
171 Marco B M Loos, 'Herziening regelingen kooprecht en digitale inhoud aanstaande' [2019] TvC 106, 106-107; on dual use, see *inter alia*, CJEU, Case C-464/01 *Gruber* EU:C:2005:32; CJEU, Case C-498/16 *Schrems* EU:C:2018:37; cf Geiregat and Steennot, 'Consumentenkoop & digitale inhoud: toepassingsgebied & afbakening' (n 48) para 10; Staudenmayer, 'Digital Content Directive (2019/770), Article 3' (n 6) paras 23-26; Evelyne Terryn, '"Consumers, by Definition, Include Us All" … But Not for Every Transaction' [2016] ERPL 271 (note) paras 8-9.
172 See CJEU, Case C-117/13 *Ulmer* EU:C:2014:2196, paras 54-55.
173 CJEU, Case C-435/12 *ACI Adam* EU:C:2014:254, paras 31, 37-40 and 58; CJEU, Case C-463/12 *Copydan Båndkopi* EU:C:2015:144, para 74; CJEU, Case C-572/13 *Hewlett-Packard Belgium* EU:C:2015:750, paras 57-58.
174 CJEU, Case C-433/20 *Austro-Mechana* EU:C:2022:217, paras 30 and 33.

consumers themselves. However, it exempts neither the trader, nor the data-holding service provider, nor any potential subsequent service provider,[175] even though many of the technical acts of reproductions that they perform might be within the scope of the exception for temporary technical use in the InfoSoc Directive.[176] The same is true for some of the temporary technical reproductions that consumers themselves may make.

The temporary technical use exception depends on a number of conditions that are subject to a restrictive interpretation by the CJEU.[177] First, exempted acts can only give rise to a copy with temporary existence. Second, they should be an integral and essential part of a technical or technological process, meaning that the acts must entirely take place within that process and that they should not go beyond what is necessary for its effective functioning. Third, acts should either be transient in the sense that their lifespan is automatically limited to what is required for the process, or incidental in the sense that they do not pursue an aim in their own.[178] Fourth, the reproduction needs to take place either within a network transmission between third parties by an intermediary, or in the context of a use that is lawful.[179] Fifth and last, the act should be without independent economic significance, meaning that its value should not exceed the advantage that stems from the use of the work itself.[180] These five conditions do not exclude that certain technical acts of reproduction are indeed exempted from the rightholder's consent. Depending on the circumstances, consumers and service providers will be able to rely on this exception when performing or enabling caching, browsing, screen displays, etc.,[181] of protected content.

A common denominator for the exceptions for private use and for temporary technical reproductions is the required presence of either a source or use that is 'lawful'. Similarly, the cited exceptions for computer programs and for databases are conditional upon 'lawful' acquisition or use. More generally, it has been argued that every copyright exception is dependent on the lawfulness of the used source.[182] In EU copyright law, a use is lawful when it is either authorized by the rightholder or did not need to be authorized because it is 'not restricted by law' (i.e. within the scope of an exception or not subject to copyright protection).[183] For the consumer's retrieved content, this implies, on the one hand, that temporary acts of technical reproduction are essentially only exempted insofar as the subsequent use was either consented to or, in turn, falls into the scope of another exception such as that for private use. On the other hand, it means that the private use exception is not applicable to protected digital content that the consumer had provided without the consent of the third-party copyright-holder. Illustrative examples of this are illicitly downloaded films and music tracks that were uploaded to a personal cloud storage account. Retrieving and reuploading such unconsented content amounts to (additional) acts of IP infringement.

Assessing the 'lawfulness' requirement is a little less straight-forward in relation to cocreated content. Admittingly, it can be argued that the cocreating fellow-platform-users authorized all reproductions and acts of communication necessary for the normal functioning of the platform, either implicitly or through the acceptance of explicit licensing clauses to this end in the service agreement concluded with the trader or the service provider. From a purely legal-theoretical perspective, it is difficult to see how other users could derive fully-fledged usage rights from that agreement, though. Nonetheless, if one does accept that users agreed to 'tolerate' acts that their fellow-users make on the platform, this implies that content-retrieving consumers do rely on a lawful source when they exercise their portability right and make private copies of the co-authored content. In other words, they are indeed within the scope of the mentioned exceptions. However, even if the argument of toleration is accepted, it would go too far to argue that the cocreators have also implicitly authorized each fellow-user to publicly disseminate their share of a co-authored work on another platform or via another service after exercising their portability right. From this IP-law analysis, it follows that a consumer will not always be able to fully accomplish the policy objectives of the portability right without additional consent.

b) Hierarchy of norms

Once established that there are indeed multiple possible scenarios where the exercise of the portability right enters in conflict with third-party copyright, the relation between IP rights and the Digital Content Directive needs to

175 cf CJEU, Case C-265/16, *VCAST* EU:C:2017:913, paras 37-39 and 52; Tatiana-Eleni Synodinou, 'Lawfulness for Users in European Copyright Law. Acquis and Perspectives' [2019] JIPITEC 20, para 49.

176 InfoSoc Directive, art 5(1).

177 CJEU, Case C-5/08 *Infopaq* EU:C:2009:465, paras 56-58; CJEU, Cases C-403/08 and C-429/08 *Football Association Premier League* EU:C:2011:631, para 162; CJEU, Case C-302/10 *Infopaq International* EU:C:2012:16, para 27; CJEU, Case C-360/13 *Public Relations Consultants Association* EU:C:2014:1195, para 23; CJEU, Case C-527/15 *Wullems* EU:C:2017:300, para 62; for more detail, reference is made to Geiregat , *Supplying and Reselling Digital Content: Digital Exhaustion in EU Copyright and Neighbouring Rights Law* (n 19) ch 3 s 1.2.2.1.

178 CJEU, Case C-5/08 *Infopaq* EU:C:2009:465, paras 54, 61, 62, 64 and 71; CJEU, Cases C-403/08 and C-429/08 *Football Association Premier League* EU:C:2011:631, para 161; CJEU, Case C-302/10 *Infopaq International* EU:C:2012:16, paras 30 and 37; CJEU, Case C-360/13 *Public Relations Consultants Association* EU:C:2014:1195, paras 28, 34, 40, 43 and 49-50.

179 InfoSoc Directive, recital 33; CJEU, Case C-5/08 *Infopaq* EU:C:2009:465, para 54; CJEU, Cases C-403/08 and C-429/08 *Football Association Premier League* EU:C:2011:631, paras 161 and 168; CJEU, Case C-302/10 *Infopaq International* EU:C:2012:16, para 42; CJEU, Case C-527/15 *Wullems* EU:C:2017:300, para 64-65.

180 CJEU, Cases C-403/08 and C-429/08 *Football Association Premier League* EU:C:2011:631, paras 174-175; CJEU, Case C-302/10 *Infopaq International* EU:C:2012:16, paras 48-50.

181 InfoSoc Directive, recital 33, 4th sentence; CJEU, Case C-5/08 *Infopaq* EU:C:2009:465, paras 63 and 69-70; CJEU, Cases C-403/08 and C-429/08 *Football Association Premier League* EU:C:2011:631, para 165; CJEU, Case C-302/10 *Infopaq International* EU:C:2012:16, paras 31-32; CJEU, Case C-360/13 *Public Relations Consultants Association* EU:C:2014:1195, paras 30-32.

182 See CJEU, Case C-435/12 *ACI Adam* EU:C:2014:254, paras 31-41; CJEU, Case C-463/12 *Copydan Båndkopi* EU:C:2015:144, para 74; CJEU, Case C-572/13 *Hewlett-Packard Belgium* EU:C:2015:750, paras 57-62; CJEU, Case C-174/15 *Vereniging Openbare Bibliotheken* EU:C:2016:856, paras 66-75; cf CJEU, Case C-527/15 *Wullems* EU:C:2017:300, para 70.

183 See InfoSoc Directive, recital 33; cf Council Secretariat, Note to the WP on Intellectual Property (Copyright), 30 September 1999, No 11435/99, p 17, at footnote 52; CJEU, Cases C-403/08 and C-429/08 *Football Association Premier League* EU:C:2011:631, para 168; CJEU, Case C-302/10 *Infopaq International* EU:C:2012:16, para 42; CJEU, Case C-527/15 *Wullems*,EU:C:2017:300, para 65; CJEU, Case C-516/17 *Spiegel Online* EU:C:2019:625, paras 86-89.

be ascertained. In other words, does the Directive yield for the copyright prerogatives of third parties or does it rather create new limitations to copyright? At first sight, the latter approach of prioritizing the Directive would arguably guarantee full effectiveness of the portability right and contribute to the Directive's objective to install a high level of consumer protection.[184] As juxtaposing the provision on portability in the GDPR with that in the Digital Content Directive teaches that the former contains an exception for third-party rights[185] including IP rights,[186] whereas the latter does not. One could furthermore be tempted to confirm the Directive's priority over IP rights by a text-based argumentation.

Looking a little more deeply it is hardly tenable to draw conclusions about the Digital Content Directive on the mere basis of an omission of a paragraph that happens to be embedded in the GDPR – a normative instrument based on different rationales.[187] Moreover, limiting a copyright holder's ability to exercise their right amounts to eroding an IP right and, thus, to a limitation of a property right within the meaning of Protocol 1 to the ECHR and the EU Charter of Fundamental Rights.[188] Pursuant to established case law, such a limitation should therefore be prescribed by law, but also proportional to a goal necessary in a democratic society,[189] and it is questionable whether those requirements will always be met in every case where the portability right applies. As a final crushing argument, it is simply unignorable that the Digital Content Directive explicitly spells out that its regime is without prejudice to copyright and neighboring rights law.[190] Notwithstanding the nuances below,[191] it follows that the Directive yields for IP rights when applicable, which means that exercising the portability right in the Directive might indeed entail IP-right infringements in certain circumstances.

c) Liability

Two copyright prerogatives are particularly relevant in the context of the portability right: communication to the public, and reproduction. First, in determining who is liable for the acts of communicating a third-party work or co-authored work to the public via a new platform or service, a case-by-case analysis is required that takes into account the CJEU's case law on communications to the public,[192] Art. 17 of the DSM Directive,[193] and the e-Commerce Directive.[194] Second, in relation to the reproduction right, it is uncontested that the consumer will in any case be liable when copies of third-party works from an illicit source are made in execution of the portability right. Whereas copyrights are exclusive rights that are enforceable *erga omnes*, regardless of knowledge or good faith, service providers who hold, transmit or receive the consumer's data might simultaneously also be liable for those reproductions. In this context, the liability exemption schemes in the e-Commerce Directive and the proposed Digital Service Act Regulation[195] are relevant. Only service providers who fulfil the criteria in those schemes will be exempted from liability.

The 2000 e-Commerce Directive lays down a liability exemption for providers of hosting services. The European Commission's proposal for a Digital Services Act Regulation contains the same exemption. Apart from a new carve-out for distance-trading platform providers that consumers may reasonably expect to act as their immediate co-contracting party in transactions, the exemption in the proposed Regulation has the same scope and is drafted in almost identical wording as that in the e-Commerce Directive.[196] Hence, the old exemption might soon be accompanied[197] by a younger twin sister.

Pursuant to the exemption(s), hosting service providers are only exempted from liability if they do not have actual knowledge of illegal content;[198] if they are unaware of facts or circumstances from which illegal content is apparent; and if they act expeditiously to remove or block access to the relevant content after obtaining such knowledge or awareness.[199] The Digital Content Directive does not explicitly address the relationship between its rules and those in the e-Commerce Directive or the (proposed) Digital Services Act Regulation. However, it does lay down that the conflicting provisions of another EU act governing a specific subject matter take precedence if necessary,[200] which implies that the e-Commerce and Digital Services Act exemptions take precedence as a *lex specialis*.

The hosting exemptions apply (and will apply) to any information society service that consists of the storage of information provided by a recipient of the service.[201] Information society services are 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of

184 Digital Content Directive, recital 2, 2nd sentence, referring to TFEU, arts 114, 169(1) and 169(1)(a).
185 GDPR, art 20(4).
186 See above n 154.
187 See Graef, Husovec and van den Boom (n 43) 4-5.
188 Protocol [1] to the ECHR (Paris, 20 March 1952) (Prot 1 ECHR), art 1; Charter of Fundamental Rights of the European Union (CFR) [2012] OJ L326/391, art17(2).
189 Prot 1 ECHR, art 1, 2nd paragraph; cf ECtHR, Case 36769/08 *Donald et al. v France* CE:ECHR:2013:0110JUD003676908; ECtHR, Case 40397/12 *Neij* and *Sunde Kolmisoppi v Sweden* CE:ECHR:2013:0219DEC004039712; for further references, see below n 228.
190 Digital Content Directive, art 3(9) and recital 36.
191 See below at section II.6.a).
192 See, *inter alia*, CJEU, Case C-466/12 *Svensson* EU:C:2014:76; CJEU, Case C-117/15 *Reha Training* EU:C:2016:379; CJEU, Case C-160/15 *GS Media* EU:C:2016:644; CJEU, Case C-527/15 *Wullems* EU:C:2017:300; CJEU, Case C-265/16, *VCAST* EU:C:2017:913; CJEU, Case C-161/17 *Renckhoff* EU:C:2018:634; CJEU, Case C-263/18 *Tom Kabinet* EU:C:2019:1111; CJEU, Case C-753/18 *Stim* and *SAMI* EU:C:2020:268; CJEU, Case C-637/19 *BY v CX* EU:C:2020:863; CJEU, Case C-392/19 *VG Bild-Kunst* EU:C:2021:181; CJEU, Cases C-682/18 and C-683/18 *YouTube* and *Cyando* EU:C:2021:503.
193 cf Kuschel and Rostam (n 7) para 22.
194 EP & Council Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (e-Commerce Directive) [2000] OJ L178/1.
195 EC, Proposal for an EP & Council Regulation on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, 15 December 2020, COM(2020)825 final (Digital Services Regulation Proposal).
196 Digital Services Regulation Proposal, art 5; art 5(3) is new.
197 See Digital Services Regulation Proposal, art 1(5)(a), stating that the new Regulation will be without prejudice to the e-Commerce Directive.
198 The e-Commerce Directive refers to the undefinied notion of 'illegal information', whereas the Digital Services Regulation Proposal refers to 'illegal content', which is defined as 'any information, which, in itself or by its reference to an activity, including the sale of products or provision of services is not in compliance with Union law or the law of a Member State, irrespective of the precise subject matter or nature of that law' pursuant to art 2(g).
199 e-Commerce Directive, arts 14(1)(a) and 14(1)(b).
200 Digital Content Directive, art 3(4).
201 e-Commerce Directive, art 14(1).

services'.[202] Not every service supplier will meet all these constitutive elements. If 'normally provided for remuneration' is understood as to include agreements where digital content or services are exchanged for personal data,[203] the material scope of the Digital Content Directive and that of the liability exemptions largely overlap, though. That much is true, at least when a given service provider provides their service by electronic means and at a distance, and that these services consist of the storage of information (content) provided by the consumer. In this respect, the prevailing view is that hosting includes not only cloud storage but also, for instance intermediary services that allow users to create and share their own content.[204] Hence, the e-Commerce Directive and the proposed Digital Services Act Regulation are likely to apply to social media platforms, platforms for the creation of a personal website, e-mail services, video sharing platforms and other digital services supplied to consumers. However, determining whether a supplier is within the scope of the exemption will remain a matter of case-by-case analysis.[205]

The hosting exemption is intended to exempt its beneficiaries from liability for content stored at the request of the recipient of their information society service when they act while providing that very service. In this respect, it must not be overlooked that operations necessary to comply with a consumer's portability right strictly speaking do not take place in the actual provision of such a service. In fact, the act of 'making available' the consumer's data is not in itself a service 'usually provided against remuneration'. Instead, it is an act that takes place after the termination of an agreement, in execution of an obligation prescribed by law. At least, this is true in cases where the trader is at the same time the very service provider that holds the content and not a mere intermediary. Insofar as the trader is merely an intermediary and there is a third-party service provider who holds the content and gives effect to the consumer's portability request, a legal obligation can equally be said to be incumbent upon that third-party service provider. This is so regardless of whether that provider acted either directly in response to the consumer's request, or in execution of the trader's right of redress.[206] Hence, juxtaposing the Digital Content Directive and the e-Commerce Directive or the Data Services Act Proposal, and applying a strict text-bound reasoning would lead to the conclusion that the hosting exemption does not apply.

Despite these textual arguments, the liability exemptions would be interpreted overly restrictively if they were not to extend to acts that are *related* to the provision of the service itself. Besides, legislators could hardly have wanted to create an exemption that does apply when an economic actor freely provides a service in relation to certain content but does not when that actor is required by law to transmit that content back to its customer. Hence, it is reasonable to conclude that the hosting exemption also applies to the execution of the portability right in cases where digital service providers can benefit from that exemption when providing their services. When acting to comply with the portability right, it follows that service providers are exempted from liability for the transmitting of IP-infringing content[207] 'back' to a consumer, unless they either had knowledge, or should have been aware of the infringing nature of the content, or if they did not act expeditiously to remove or disable access to that content after obtaining knowledge or awareness of it. In the latter cases, the service provider should refrain from giving effect to the consumer's request to exercise their portability right.

6. Conflicts with trader's or service provider's IP

Apart from creating tensions with third parties' IP rights, the portability right in the Digital Content Directive is likely also to give rise to conflicts with IP rights held by either the trader (the consumer's co-contracting party) or the service provider which provided the digital service (in cases where the trader only acts as an intermediary).[208] These professional parties might have acquired IP rights from the consumer through an IP transfer or license. On the other hand, they might have fulfilled the criteria for protection themselves or have acquired IP rights from third parties. For the former scenario of IP rights obtained from the consumer, reference is made to the next section.[209] The current section only scrutinizes the latter instances, where the digital content provided or created by the consumer was saved in a structure or format that enjoys IP protection to the benefit of the trader. Indeed, the structured content could qualify as an original work of authorship or as a database for which sufficiently substantial investments were made in order for it to enjoy *sui generis* protection. Outside the strict realm of IP rights, the consumer's data could also have been packaged in a format that allows its recipients to access, obtain, deduct or extract information that is protected as a trade secret.[210]

Admittingly, there might only be a limited number of cases where consumer-provided or consumer-created content is protected by a professional party's IP right and where it is impossible to make that data available to the consumer in a format that eliminates all IP-protected elements.[211] Besides, the number of instances might even be limited further whereas a trader is not obliged to make content available if it had been 'aggregated with other data by the trader and cannot be disaggregated or only with disproportionate efforts'.[212] Nonetheless, it is not inconceivable that there are situations where consumer content was not 'aggregated' with other data but structured in a way that brings about IP protection. In these cases, the question arises to what extent traders and service providers can invoke the existence of their IP rights to justify

202 e-Commerce Directive, art 2(1)(a), referring to Directive 98/34/EC, which is to be interpreted as a reference to EP & Council Directive (EU) 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services [2015] OJ L241/1, art 1(1)(b) and its Annex I.
203 See Digital Content Directive, art 3(1).
204 Esther Arroyo Amayuelas, 'E-Commerce Directive (2000/31/EC), Article 14' in Reiner Schulze and Dirk Staudenmayer (eds), *EU Digital Law* (CH Beck 2020) para 4.
205 Similarly but in relation to the GDPR, see Graef, Husovec and Purtova (n 43) 1381.
206 Digital Content Directive, art 20.
207 cf Digital Services Regulation Proposal, recital 12, 2nd sentence.
208 See above at section II.3.
209 See below at section III.
210 cf Graef, Husovec and Purtova (n 43) 1376-1377.
211 cf ibid; von Lewinski (n 65) para 105.
212 Digital Content Directive, art 16(3)(c) read jointly with art 16(4).

their refusal to give effect to a consumer's request for data portability pursuant to Art. 16(4) of the Digital Content Directive (a). If they cannot invoke their rights at all one may consequently wonder whether they could at least use these rights to avoid consumers making further use of the 'ported' content by transferring it to a third-party service provider (b).

a) Making available to the consumer

Consumers who exercise their data portability right will often fall within the scope of an IP-right exception, for instance that for private use.[213] The precise nature of exceptions is subject to a sensitive debate[214] and to evolution.[215] Notwithstanding that debate, it is currently not univocally accepted that IP exceptions create autonomous 'user rights' to the benefit of their beneficiaries. Indeed, pursuant to the classic view, exceptions are 'privileges' or 'carve-outs'[216] which merely exempt beneficiaries in their scopes from requiring permission to perform certain acts, for certain purposes, in certain circumstances and under certain conditions. By contrast, IP exceptions do not in themselves entitle a beneficiary to demand that certain IP-protected content is physically made available to them by the rightholder, save specific circumstances.[217] In relation to the Digital Content Directive, that act of making available is precisely the preliminary issue dealt with here: does the consumer's portability right constitute a valid legal ground to demand certain protected content to be made available to them, or does that right yield for any applicable IP rights? Only subsequently, once the consumer is indeed entitled to get that content physically delivered, does the question arise of whether their operations on that content are exempted from rightholders' authorization on the basis of an exception.

In sum, the first question boils down to determining whether the IP rights of the traders and service providers who hold the consumer's data take priority over the consumer's portability right. The argument was made above that respect for third parties' IP rights does take priority over that right.[218] In relation to IP rights held by the actual traders who need to comply with the portability right, this reasoning is hard to uphold, though. First, the Digital Content Directive requires traders to refrain from continuing to use the consumer's content after termination of the contract,[219] meaning that any IP rights in that content will often become largely unenforceable anyway. Second, allowing traders to fence-off consumers' portability requests by reference to their own IP rights would undermine the effectiveness of the Directive. Indeed, traders could be inclined to mix consumer content with their own IP-protected content to circumvent the portability obligation, whereas that obligation was created precisely to incentivize consumers to exercise their remedies when their co-contracting party fails to comply with the mandatory conformity requirements. Similarly, in the framework of the GDPR, it is accepted that data controllers cannot refuse to give effect to a data subject's portability request on the grounds of their own IP (and trade secrets) interests.[220]

The conclusion is that traders should not be entitled to refuse to make content available to a consumer pursuant to the Digital Content Directive by mere reference to their own IP rights in that content. It can be argued that the same should apply to the portability right in the amended Consumer Rights Directive. In order to prevent circumvention and to ensure full effectiveness of the objective of consumer protection, an identical reasoning should be upheld in relation to all persons (natural persons or corporations) that are economically and/or legally connected to the trader.[221] The IP rights of the actual service provider who holds the consumer's content should likewise not be used as a means of defense to avoid portability, particularly in instances where the trader merely acts as an intermediary. If the service provider fails to produce the content nonetheless, the trader will be liable towards the consumer for non-compliance pursuant to the applicable Directive. National law consequently determines the trader's right of redress and the effects of any disclaimers in the relationship between the trader and that service provider.[222]

By preventing traders and service providers from relying on their IP rights to overthrow the consumer's portability right, the Digital Content Directive essentially lays down a new (implicit) limitation to the exercise of these IP rights. This limitation is 'external'[223] in the sense that it stems not from IP legislation itself but from other

213 InfoSoc Directive, art 5(2)(b); see above at section II.5.a).

214 For further reading, see, among others, Gabriele Spina Alì, 'Intellectual Property and Human Rights: A Taxonomy of Their Interactions' (2020) 51 IIC 411, 427; Pascale Chapdelaine, *Copyright User Rights. Contracts and the Erosion of Property* (OUP 2017); Christophe Geiger and Elena Izyumenko, 'The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, but Still Some Way to Go!' (2020) 51 IIC 282, 296; Alessandra Silvestro, 'DRMS, Limitations on copyright and voluntary measures' [2005] AM 568, 568; Synodinou, 'Lawfulness for Users in European Copyright Law. Acquis and Perspectives' (n 175) para 63.

215 See the duty to warrant certain exceptions in the DSM Directive, at art 17(7); due to the wording used in some judgments, some scholars also identify a turn in the CJEU's approach to exceptions *de lege lata*: see CJEU, Case C-469/17 *Funke Medien NRW* EU:C:2019:623, para 70; CJEU, Case C-516/17 *Spiegel Online*,EU:C:2019:625, para 54; and, prior, CJEU, Case C-117/13 *Ulmer* EU:C:2014:2196, paras 43-44; see however Thomas Dreier, 'Grundrechte und die Schranken des Urheberrechts' [2019] GRUR 1003 (note), 1007.

216 cf Matthias Leistner, 'Towards an Access Paradigm in Innovation Law?' [2021] GRUR International 925, 925.

217 eg, InfoSoc Directive, art 6(4); DSM Directive, at art 17(7).

218 See above at section II.5.b).

219 Digital Content Directive, art 16(3).

220 Argument *e contrario* based on GDPR, art 20(4), which refers to 'the rights and freedoms *of others*' (emphasis added); see art 29 Data Protection WP, 12; Dix, para 18; Hans-Georg Kamann and Martin Braun, '[DS-GVO] Art 20. Recht auf Datenübertragbarkeit' in Eugen Ehmann and Martin Selmayr (eds), *Beck'sche Kurz-Kommentare Datenschutz-Grundverordnung* (2nd edn, CH Beck 2018) para 35 <http://beck-online.beck.de> accessed 31 December 2021; for a dissenting opinion, see Martin Munz, '[DS-GVO] Art 20. Recht auf Datenübertragbarkeit' in Jürgen Taeger and Detlev Gabel (eds), *Kommentar DSGVO – BDSG* (3rd edn, DFV Mediengruppe 2019) para 55 <http://beck-online.beck.de> accessed 31 December 2021.

221 cf *mut.mut.* in relation to the consenting rightholder for trade-mark exhaustion: CJEU, Case 144/81 *Keurkoop v Nancy Kean Gifts* EU:C:1982:289, para 25; CJEU, Case C-9/93 *IHT Internationale Heitztechnik v Ideal-Standard* EU:C:1994:261, para 34; CJEU, Case C-291/16 *Schweppes* EU:C:2017:990, paras 43-46.

222 Digital Content Directive, art 20; cf Illmer and Dastis (n 102) 115-116; see above at section II.3.

223 Regarding that concept, see Dreier (n 215) 1004-1007; Tatiana-Eleni Synodinou, 'Direct and Wider Implications of the CJEU's Decision in the Spiegel Online Case on Freedom of Expression and Other Fundamental Rights' in Tatiana-Eleni Synodinou and others (eds), *EU Internet Law in the Digital Single Market* (Springer 2021) 29; Stijn van Deursen and Thom Snijders, 'The Court of Justice at the Crossroads: Clarifying the Role for Fundamental Rights in the EU Copyright Framework' (2018) 49 IIC 1080, 1080-1082.

norms[224] (comparable to cases where rightholders cannot enforce their right because it would amount to an abuse of right in the given circumstances).[225] Like any limitation to an IP right, the inability to invoke IP rights to prevent portability amounts to an interference with its holder's fundamental right to property.[226] However, that interference is prescribed by law and constitutes an appropriate means to attain objectives protected in a democratic society, i.e. effective consumer protection and fair competition. Moreover, it is arguably proportionate to its objectives, as the limitation only arises when a consumer contract is terminated for lack of conformity. *Prima facie*, the interference therefore seems to stand the test in fundamental rights' protection law.[227]

b) Onwards transfers to third-party providers

Even when content is wrapped in an IP-protected format, the analysis above suggests that the consumer is entitled to receive their content pursuant to the data portability right in the Digital Content Directive. Where reception and storage of that content is concerned, the analysis of content protected by third-party IP rights is applicable by analogy. Indeed, consumers will often be entitled to perform those digital operations without the trader's or original service provider's consent because exceptions like the one for private use apply.[228] Hence, a consumer will also be allowed to store the data on the servers of a third-party cloud service provider and other platforms with reserved access. Moreover, the liability exemptions for hosting services will apply to the same extent as above.[229]

The Digital Content Directive's scope is not limited to cloud storage services and the like. It equally applies to digital services that allow for broad communication and diffusion of information, such as social media platforms. Given the rationale behind portability, consumers may want to provide (i.e. upload) their retrieved content to such public sharing services too. As explained above, the public dissemination of IP-protected content may entail acts of reproduction and acts of communication to the public that are not covered by exceptions, though.[230] Even if traders and service providers are not entitled to invoke their IP rights to turn down consumers' requests for portability, it ought to be assessed whether they could still prevent consumers from transferring and using their retrieved data to and on a third party's public platform.

At first sight, the aforementioned argument of effective consumer protection suggests answering that question in the negative. Nonetheless, there are more compelling arguments to the contrary. Preventing rightholders from invoking their IP rights to reject consumers' one-off access requests to retrieve their own data is one such argument, and allowing the consumer to keep performing otherwise exclusively reserved acts while using a competitor's service is another. Indeed, it is questionable whether depriving rightholders of effective means to enforce their IP rights in these contexts could still qualify as an interference with their (intellectual) property rights that is proportionate to the consumer protection objectives. Such drastic consequences would probably exceed the aim of ensuring portability as part of a consumer remedy.

Preventing traders and service providers from enforcing their IP rights in these circumstances would essentially bestow consumers with a possibly perpetual compulsory IP license without an explicit legal ground. In this respect an interesting compromise solution, suggested by Inge Graef, Martin Husovec and Nadezhda Purtova in relation to the GDPR portability right, exists in providing consumers with a paid-for compulsory license for resharing content under FRAND (fair, reasonable, and non-discriminatory) conditions.[231] That approach would require an explicit legislative base, however. Under current law, the result is that a consumer will indeed require permission from the original trader or service provider to perform protected acts in relation to subject-matter for which they hold an IP right, unless and insofar as exceptions apply. Alternatively, consumers might of course often be able to omit elements subject to others' IP rights when uploading their retrieved content to another platform.

III. Licensed or transferred IP rights

The content that consumers create on or provide to digital service platforms will often be IP-protected. Therefore, consumers are frequently required to bestow service providers and/or fellow users with a license to use all protected (non-personal) content that they create or provide when using that service, or even to transfer the rights that they have in that content. On inspection, it is even quite common to find licensing clauses in contemporary terms of service for (content-sharing) platforms.[232] The validity

224 cf Synodinou, 'The Portability of Copyright-Protected Works in the EU' (n 113) 228.

225 About abuse of rights and its application to copyright in the EU, see CJEU, Case C-597/19 *Mircom* EU:C:2021:492, paras 93-95; CJEU, Case C-392/19 *VG Bild-Kunst* EU:C:2020:696, Opinion of AG Szpunar, paras 87 and 89; CJEU, Case C-597/19 *Mircom* EU:C:2020:1063, Opinion of AG Szpunar, paras 78-81; cf Geiregat, *Supplying and Reselling Digital Content: Digital Exhaustion in EU Copyright and Neighbouring Rights Law* (n 19) ch 3, s 2.3.1.2.

226 Prot 1 ECHR, art 1; CFR, art 17; see above at section II.5.b).

227 cf, *inter alia*, ECtHR, Case 33202/96 *Beyeler v Italy* CE:ECHR:2000:0105JUD003320296, paras 108-114; ECtHR, Case 29309/03 *Gubiyev v Russia* CE:ECHR:2011:0719JUD002930903, para 76; ECtHR, Case 50200/13 *Vijatović v Croatia* CE:ECHR:2016:0216JUD005020013, paras 40-58; ECtHR, Case 2599/18 *Kasilov v Russia* CE:ECHR:2021:0706JUD000259918, para 47; CJEU, Case C-548/09 P *Melli Iran v Council* EU:C:2011:735, paras 113-114; CJEU, Cases C-8/15 P to C-10/15 P *Ledra Advertising v EC* EU:C:2016:701, paras 69-70; CJEU, Case C-686/18 *Adusbef* EU:C:2020:567, para 85; CJEU, Case C-393/19 *Okrazhna prokuratura – Haskovo* EU:C:2021:8, para 53.

228 See above at section II.5.a); cf Graef, Husovec and Purtova (n 43) 1380.

229 See above at section II.5.c).

230 See above at section II.5.a).

231 Graef, Husovec and Purtova (n 43) 1384-1385.

232 ibid; W Kuan Hon and others, 'Negotiated Contracts for Cloud Services' in Christopher Millard (ed), *Cloud Computing Law* (2nd edn, OUP 2021) 140; Kuschel and Rostam (n 7) para 30; Spindler (n 10) para 62; Johan David Michels, Christopher Millard and Felicity Turton, 'Contracts for Clouds, Revisited: An Analysis of the Standard Contracts for 40 Cloud Computing Services' (2020) Queen Mary University of London, School of Law Legal Studies Research Papers 40 <papers.ssrn.com/sol3/papers.cfm?abstract_id=3624712> accessed 6 April 2022; for illustrations, see Apple, 'Welcome to iCloud' (for Ireland) <https://www.apple.com/ie/legal/internet-services/icloud/en/terms.html> accessed 17 November 2021, section V(H)(1); Facebook, 'Terms of Service' <https://www.facebook.com/terms.php> accessed 17 November 2021, section 3(3); Nintendo, 'Terms of Use' <https://www.nintendo.com/terms-of-use/> accessed 17 November 2021, section 4(B); Reddit, 'Reddit User Agreement if you live in the EEA, United Kingdom, or Switzerland' <https://www.redditinc.com/policies/user-agreement-september-12-2021#EEA> accessed 17 November 2021, section 5; TikTok, 'Terms of Service [for the EEA, the UK and Switzerland]' <https://www.tiktok.com/legal/terms-of-service?lang=en#terms-eea> accessed 17 November 2021, section 9; Twitter, 'Twitter Terms of Service [for the

and effects of these clauses are a matter of national law, even when the service provider is the consumer's co-contracting party (the trader) within the meaning of the Digital Content Directive.[233] Licenses will generally be valid, at least in some EU jurisdictions, without prejudice to the harmonized transparency requirement for terms in consumer contracts that were not individually negotiated[234] and to national-law rules on formalities and interpretations of copyright licenses.[235] Hence the question of what happens to the licensed rights when the agreement between the consumer and the trader comes to an end.

The effects that follow from the ending of the contractual relationship is a matter explicitly left to Member State law by the Digital Content Directive.[236] Moreover, the Directive is explicitly without prejudice to IP[237] and lays down that the potential effects of the termination of one element of a bundle contract on the other elements of the bundle contract are governed by national law.[238] As a result, only national law will govern the fate of licenses in user-generated content in cases where consumers terminate a contract for the continuous supply of a digital service *ex nunc* when they are just no longer interested in the service, for instance. Indeed, that scenario has not been harmonized.

The situation is different when a contract is terminated by the consumer pursuant to the remedies provided by the Directive. Insofar as the consumer's content is IP-protected and does not consist of personal data, two questions arise. On the one hand, one may wonder whether the platform provider and users can still rely on the license granted by the consumer to continue using the original platform (1). On the other, attention is due to the case where a consumer reuses their retrieved content on a third party's platform in defiance of such licenses (2).

1. Further use of consumer content on original platform

In cases where the termination of a contract ensues from the Digital Content Directive's remedies scheme, the effects of that termination on the user license granted by the consumer cannot be asserted without taking Art. 16(3) into account. That provision lays down that 'the trader shall refrain from using any content other than personal data which was provided or created by the consumer when using the digital content or digital service supplied by the trader', except in four scenarios. One of these four exceptions relates to content that was 'generated jointly by the consumer and others', where 'other consumers are able to continue to make use of the content'.[239] Another exception relates to data that has been 'aggregated with other data by the trader and cannot be disaggregated or only with disproportional efforts'.[240]

a) Default situation

The exact scope of the prohibition of further use is open for divergent interpretations. The substantial scope is limited to 'any content other than personal data'. These terms have already been discussed above.[241] The data concept in Art. 16(3) should be interpreted as including non-personal data that enjoys IP-right protection. Any other interpretation would severely limit this provision's scope and effectiveness. The result is that the Directive indirectly governs part of the effects that the remedy of termination has on the licenses that consumers granted to a trader in relation to IP-protected acts performed on content that they provided or created.

Indeed, the rules in Art. 16(3) imply that those licenses survive the (Directive-based) termination of the contract by the consumer when it comes to either cocreated or 'irreversibly' aggregated content. By contrast, traders are not allowed to make further use of non-personal, non-cocreated and not irreversibly aggregated content provided or created by the consumer who terminated the agreement.[242] Illustrations of the latter are copyright-protected images, pieces of text, or audio-visual fragments that the consumer had created on a social media platform. The Directive prohibits the trader from keeping such content available online and from otherwise using it, for instance for commercial advertising. Despite the lack of literal references to IP law and the statement that the Directive is 'without prejudice to [the] law on copyright and related rights',[243] the conclusion is that, even if licenses obtained from consumers were to survive the termination of the agreement,[244] traders cannot give effect to such licenses in order to continue using licensed IP-protected content following termination of the agreement with that consumer pursuant to the Directive.

Pursuant to the very wording of Art. 16(3), the prohibition to make further use is only applicable to *the trader*, and moreover only in relation to content provided or created when the consumer used the digital content or service of that *trader*. The delineation of that personal scope should not be taken too literally, though. Despite the double reference to 'the trader' and the Directive's personal scope,[245] the prohibition should probably be deemed to target not only the consumer's co-contracting party but also the actual service provider (in cases where these are two different parties).[246] This is the only interpretation that can guarantee the full effectiveness of the prohibition and its exceptions. Moreover, the portability right in Art. 16(4) forms a logical pair with the prohibition in Art. 16(3), so that both scopes ought to coincide: whoever holds the consumer's data should ensure that it is

EEA, the UK and Switzerland]' <https://twitter.com/en/tos> accessed 17 November 2021, section 3; YouTube, 'Terms of Service' <https://www.youtube.com/t/terms> accessed 15 November 2021, unnumbered section 'Your Content and Conduct'; note that not all services provided by these undertakings are necessarily within the scope of the Digital Content Directive.

233 See Digital Content Directive, art 3(6), read jointly with recital 34, second sentence; cf European Law Institute, 14-15.

234 Council Directive 93/13 on unfair terms in consumer contracts [1993] OJ L95/29, art 5.

235 eg, Wetboek economisch recht / Code de droit économique (BE), art XI.167, §1, 3rd and 4th indent (as created by Act (BE) of 19 April 2014 [2014] OJ 44352); Code de la propriété intellectuelle (FR), art L131-2, 1st and 2nd indent (as amened by Act (FR) 2016-925 [2016] OJ 158/1).

236 Digital Content Directive, art 3(10).

237 Digital Content Directive, art 3(9).

238 Digital Content Directive, art 3(6), last paragraph, read jointly with recital 34.

239 Digital Content Directive, art 16(3)(d).

240 Digital Content Directive, art 16(3)(c).

241 See above at section II.2.a).

242 Spindler (n 10) para 64.

243 Digital Content Directive, art 3(9).

244 cf below at section III.2.

245 See above n 6.

246 cf Metzger and others (n 27) para 48.

transferred back on request[247] and refrain from using it. In short, even if the service provider had obtained a license from the consumer, and that license survived the terminated agreement, the provider would still be unable to use the consumer's content without infringing the Directive.

On top of that, Art. 16(3) should also be deemed to determine the extent to which the remaining users of the digital service are allowed to keep performing copyright-protected operations on licensed content that was provided or created by the consumer who terminated. Two arguments support that conclusion. First, only in this interpretation does the cited exception for cocreated content become operable and make sense. Second, it is common that the rights that allow users to perform acts with IP-protected content of fellow-users on a certain platform entirely stem from, and depend on, the service agreement that they concluded with the service provider.[248] Applying the *nemo dat* (or *nemo plus*) maxim,[249] remaining users will therefore usually not be able to lawfully continue using former users' content in cases where service providers are prohibited from doing so, anyway. Hence, the remaining users of the service are only entitled to make 'use' of copyright-protected digital content provided or created by the consumer – i.e. to make reproductions and acts of communication to the public that are not subject to exceptions – insofar as that content was irreversibly aggregated or jointly created.

Last, consumers' licensees (i.e. traders and service providers) might, in turn, have transferred or licensed their usage rights to a third party, for instance allowing that third party to use consumer-created content for commercial purposes. In fact, the ability for service providers to sublicense or transfer is often explicitly mentioned in their click-wrap or browse-wrap terms of service.[250] The fate of these onward transfers and (sub)licenses is open for discussion. On the one hand, the *nemo dat* principle implies that licensees cannot transfer anything that they do not have. On the other, Art. 16(3) of the Digital Content Directive should not necessarily be interpreted as invalidating consumers' licenses; it can be understood as merely prohibiting certain uses of licensed content by the very professionals that failed to comply with harmonized conformity requirements. Indeed, given the Directive's scope of harmonization, it is reasonable to state that the EU legislature did not want to regulate the issue of onward transfers and licensing by Art. 16 of the Digital Content Directive. As a result, the fate of transferred or sublicensed usage rights is a matter of Member State law. In this respect, national contract (and IP) law will be determining whether the termination of the contract by the consumer also terminates the licenses that the consumer might have granted, and the consequences in the relation between the consumer's former co-contractor and the third party.

b) Deviation by contract

In cases where consumers are required to grant licenses to use their provided or created content before being able to enjoy a service, the terms sometimes also provide for specific clauses about the effects that termination of the agreement may have on those licenses.[251] First, granted licenses can be declared (perpetual and) irrevocable.[252] It is for national law to determine whether the IP rights that a consumer is required to license are indeed all eligible to be licensed irrevocably. In any case though, the mandatory nature of the rules in the Digital Content Directive[253] implies that contractually agreed irrevocability can at least not be used as an argument to override the prohibition in Art. 16(3). In other words, such clauses do not entitle licensed service providers to continue using consumer content outside of the four exceptions in that provision, because that rule cannot be departed from to the detriment of the consumer.

Second, license agreements sometimes lay down more specific rules about the licenses granted by consumers. YouTube's set of terms, for one, states that these licenses 'continue for a commercially reasonable period of time' after removal or deletion of content by a consumer, and that 'YouTube may retain, but not display, distribute or perform, server copies of [user] videos that have been removed or deleted'.[254] Again, only national law will determine the validity of these terms when a consumer's contract with YouTube is ended in circumstances outside the scope of the Digital Content Directive. By contrast, in cases where a contract is within the scope of the Digital Content Directive[255] and was terminated in execution of a remedy in that Directive clauses like these should be held to contravene Art. 16(3) to the extent that they try to limit or exclude YouTube's duty to refrain from using consumer data as from the moment of termination.[256]

Facebook's terms of service constitute another example of explicit rules on licenses. Contrary to YouTube's terms, they stipulate that consumer's licenses 'end when [the] content is deleted from [their] systems'. Yet, they also clarify that definite deletion on their servers may take up to 90 days and that licenses granted by consumers 'will continue to apply' to content that 'has been used by others in accordance with [those] license[s] and they have not deleted it', 'until that content is deleted'.[257] Unless there is national law to the contrary, the latter provision is most probably valid. In cases where the contract is terminated as a consumer remedy, it is certainly in keeping with the exception for cocreated content in Art. 16(3)(d) of the Digital Content Directive.

2. Use by consumer on third-party platform

Following the termination of an agreement for lack of conformity pursuant to the Digital Content Directive, consumers may want to start using the services of another

247 cf above at section II.3.
248 See above at section II.5.a).
249 On the history and normative value of the *nemo plus iuris* principle, see Franciszek Longchamps de Bérier, 'Remarks on the Methodology of Private Law Studies: The Use of Latin Maxims as Exemplified by *Nemo Plus Iuris*' (2015) 21 Fundamina 63, 63-83.
250 For illustrations, see the terms of service by Nintendo (s 4(B)) and by Reddit (s 5) (both cited in n 233).
251 Spindler (n 10) para 62.
252 For illustrations, see the terms of service by Nintendo (s 4(B)), by Reddit (s 5) and by TikTok (s 9) (all cited in n 232).
253 Digital Content Directive, art 22.
254 YouTube, 'Terms of Service' (cited in n 232), unnumbered s 'Your Content and Conduct'.
255 See Loos (n 171) 108.
256 Spindler (n 10) para 64; cf Kuschel and Rostam (n 7) para 33.
257 Facebook, 'Terms of Service' (cited in n 232), s 3(3).

provider and upload (provide) content to those services which was previously (created or provided, as well as) licensed to the first provider. Above, it was argued that service providers cannot successfully rely on their own IP rights to turn down a consumers' portability request pursuant to Art. 16(4) of the Digital Content Directive.[258] *A fortiori*, it follows that a service provider should not be entitled to do so on the basis of IP licenses that they acquired in relation to the very content that a consumer wants to retrieve on the basis of their portability right. However, could the service provider, in its capacity as a licensee or as the lawful acquirer of the consumer's IP rights, prevent consumers from 'reusing' their content on a competitor's platform?

Practice shows that most terms of service only attributes service providers with a non-exclusive license in the consumer's content.[259] When that is the case, service providers are not entitled to prevent consumers from reproducing and communicating their content on, to, or through a third party's platform. Hence, the issue is only relevant if the consumer either transferred their IP rights or granted an exclusive license.

Pursuant to the Digital Content Directive, Member States determine the consequences of termination of consumer agreements beyond the harmonized scope. Moreover, the Directive is 'without prejudice to IP rights'. Consequently, national IP and contract law ought to resolve whether licenses for and transfers of consumers' IP rights are simultaneously terminated when the consumer terminates a corresponding contract for the supply of digital content or a digital service. In this respect, contract-law theories like that on 'linked contracts' may provide for answers.[260] Moreover, the outcomes of the analysis might be different when consumers have transferred or exclusively licensed their IP rights free of charge or in return for a remuneration (i.e. royalties).[261]

Whatever the outcome of the national-law IP contract analysis may be, it must not be overlooked that traders and service providers are not allowed to make use of consumers' content after termination, unless when an exception applies. If these professional parties retain the transferred rights or exclusive licenses in that content with a view to uniquely enforcing them themselves, this essentially means that they can only invoke them to either avoid consumer reuse of cocreated or irreversibly aggregated content that still is available through their platform, or to prevent certain IP-protected content from being used anywhere, via any other service whatsoever. However, as remarked above, a realistic alternative scenario is that they have in turn transferred or (sub)licensed their rights to a third party.[262] In such cases, the entitlements of those third parties in relation to the consumer's content will entirely depend on national law.

IV. Conclusions

In spite of the text of its Art. 3(9), the Digital Content Directive cannot actually be said to be 'without prejudice' to copyright law.[263] Undoubtedly, the drafters of the Directive did not want to make any textual alterations to IP legislation.[264] However, as predicted by industry players as early as at the occasion of the European Commission's impact assessment preceding the Directive proposal,[265] the novel regime does have an impact on IP rights.[266] This article substantiated this statement by highlighting some points of impact that are likely to be felt when consumers exercise their remedy to terminate the agreement for lack of conformity.

Overlaps with IP rights are imminent in relation to the consumers' right to retrieve the content, other than personal data, that they provided or created when using the digital content or service supplied by the trader. As demonstrated, overlaps arise when the content subject to portability is protected by copyright (or other IP rights, *mutatis mutandis*). One interesting point of overlap is caused by the fact that one individual can, and in fact often will, simultaneously wear a consumer hat and a copyright-holder hat. If that it is the case, then national-law copyright prerogatives might occasionally assign the consumer with content recovery entitlements exceeding those that stem from the just-cited 'portability right'[267] – sometimes even notwithstanding any contractual clause to the contrary.[268] Thus, some jurisdictions could for instance allow consumers to retrieve the copyright-protected content that they had provided, even if it consists of personal or irreversibly aggregated data.

Another series of overlaps exists where consumer-provided content is protected by IP rights held by third parties. On the one hand, the novel portability right complements the existing exceptions and limitations in copyright and neighboring rights law, in that it does not merely exempt consumers from obtaining rightholders' authorization to perform a certain act but effectively entitles them with an enforceable claim to retrieve even IP-protected content.[269]

On the other hand, IP law also frustrates the enforcement of the portability right. Indeed, by absence of indications to the contrary in the Directive's text, theoretically neither the actual contents of the portable data, nor the consumer's objectives are relevant for the application of the portability

258 See above at section II.6.a).
259 Kuschel and Rostam (n 7) para 30; this holds true, eg, for all the licenses granted by the terms of service listed in n 232.
260 See, *inter alia*, Tâm Dang Vu, 'Tot de dood ons scheidt? Over verbonden overeenkomsten' [2017] TBH 913, paras 39-45; Grünberger, 'Verträge über digitale Güter' (n 8) 290; Andrea Giardina, 'Les contrats liés en droit international privé' in Comité français du droit international privé (ed), *Droit international privé : travaux du Comité français de droit international privé, 13e année, 1995-1998* (Persée 2000) 97-101 <https://www.persee.fr/issue/tcfdi_1140-5082_2000_num_13_1995> accessed 6 April 2022; Ilse Samoy and Marco B M Loos (eds), *Linked Contracts*, vol 103 (Intersentia 2012).
261 cf Graef, Husovec and Purtova (n 43) 1381.
262 See above at section III.1.a).
263 Kuschel and Rostam (n 7) para 35.
264 cf Koukal (n 8) 55.
265 See EC, Impact assessment accompanying the document Proposals for Directives of the European Parliament and of the Council (1) on certain aspects concerning contracts for the supply of digital content and (2) on certain aspects concerning contracts for the online and other distance sales of goods, 9 December 2015, SWD(2015)274 final, 47; cf Schmidt-Kessel (n 10) 6.
266 Grünberger, 'Verträge über digitale Inhalte – Überblick und Auswirkungen auf das Urheberrecht' (n 14) 74; Spindler (n 10) para 68.
267 See above at section II.2.b).
268 Insofar as it is applicable, aforementioned Urheberrechtsgesetz (DE), § 25 (see at n 81) is considered nonwaivable, eg; see Thomas Dreier, '[UrhG] § 25. Zugang zu Werkstücken' in Thomas Dreier, Gernot Schulze and Louisa Specht (eds), *Urheberrechtsgesetz Kommentar* (6th edn, CH Beck 2018) para 2 <http://beck-online.beck.de>.
269 cf Leistner, 'Towards an Access Paradigm in Innovation Law?' (n 216) 928-931.

right. Despite the theoretical blindness for these circumstances, operationalizing the portability right might sometimes amount to IP infringements entailing liabilities of the consumer or of digital service providers. In scenarios where the consumer is not the rightholder or not the sole rightholder, the origin of the content and the purposes of the consumer's actions in fact will precisely constitute essential elements in determining, on a case-by-case basis, whether any copyright exceptions apply to the transfer of the content to the consumer and to subsequent acts of uploading to a third-party platform.[270] In relation to cocreated content in particular, the result is that the portability right's ultimate goal of diminishing lock-in effects will often not be attained in practice, especially when exercised in relation to sharing platforms like social media.

Further complications arise when the consumer's interests conflict with IP rights held by the original trader or service provider at the time of termination of the contract for lack of conformity. In this respect, it was argued that the portability right essentially lays down new limitations to the exercise of these rightholders' IP rights. Indeed, traders should not be allowed to turn down portability requests by waiving their rights, regardless of whether they had acquired these IP rights or whether they are the original rightholders. Other interpretations would undermine the portability right's rationales. By contrast, it would probably be disproportionate to additionally allow consumers to perform IP-protected acts with that content on platforms held by competing service providers.

These findings demonstrate how the relationship between IP and portability rights is far from straight forward. As Inge Graef et al. put it, 'IP rights send a signal to their beneficiaries that the activity they engage in will be rewarded through exclusive rights. . . . Data portability policies can conflict with this signal in several ways when data is IP-encumbered'. This is the case because rightholders are forced to share subject matter that the law had exclusively reserved to their benefit.[271] These unavoidable frictions were not addressed throughout the legislative process preceding the Digital Content Directive. Hence, it will be a matter for the judiciary to strike the right balance *ex post*.

Finally, things get even more entangled where consumers were compelled to transfer the IP rights in their content or to grant a license in those rights, to the benefit of the service provider. The fate of these transfers and licenses is primarily a matter of national (contract and IP) law. When a consumer agreement is terminated for lack of conformity though, Art. 16 of the Digital Content Directive intervenes. It was argued that the mandatory rule in that article implies that traders, service providers and other service users can give further effect to those transfers and licenses, if and only if one of the four exceptions in Art. 16(3) applies. Cases where either the consumer wishes to reuse the transferred or licensed content, or where these transfers or licenses were transferred or (sub)licensed to third parties in turn, are a bit muddier. The fate of those transfers and licenses seems to be a matter for national law.

In sum, it seems fair to conclude that the Digital Content Directive was enacted with an overly simplified image of business practice[272] and IP practice in mind.[273] Admittedly, there is no easy solution to reconcile IP with consumer interests in the text of the Directive. As illustrated by the lukewarm reception[274] of the explicit reservation for 'the rights and freedoms of others' added to the GDPR data portability right,[275] merely inserting one or more similarly vague phrases into the Directive would most likely only add to the uncertainties. Probably, the only way forward is a more comprehensive legislative intervention aimed at the establishment of harmonized rules on copyright and neighboring right licenses,[276] and on end-user license agreements (EULAs) in particular.[277] Given the lack of ambition demonstrated by the 2019 DSM Directive,[278] however, daring and holistic steps like that are highly unlikely to be proposed at EU level any time soon.

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270 cf Graef, Husovec and Purtova (n 43) 1381.
271 ibid.

272 Grünberger, 'Verträge über digitale Güter' (n 8) 288; Metzger and others (n 27) paras 46-48; Wendehorst (n 8) 85.
273 Spindler (n 10) para 68.
274 See, *inter alia*, Leistner, 'Towards an Access Paradigm in Innovation Law?' (n 216) 927.
275 GDPR, art 20(4).
276 cf Leistner, 'Towards an Access Paradigm in Innovation Law?' (n 216) 929, suggesting a more harmonized approach of IP limitations and exceptions.
277 cf Metzger and others (n 27) para 49; Wendehorst (n 8) 78.
278 Séverine Dusollier, 'The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition' [2020] CML Rev 979, 1026-1029; Simon Geiregat, 'Digital exhaustion and internal market law: *Tom Kabinet*' (2021) 58 CML Rev 1207, 1227-1228.