

ELI 2015 Conference

**From CESL to DSM:  
Special Features of Contracts on  
Digital Goods**

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# Characterisation (1)

## \* Sale, service or license?

- Digital goods are protected by copyright
- Use of goods by consumer requires authorisation by the copyright owner/supplier
- Practice of end user license agreements
- Characterisation as sales contract entails minimum rights of the buyer:
  - right to use (Dir. 2009/24, Dir. 2001/29)
  - resale (CJEU, C-128/11 – Usedsoft for software)
  - no termination
- Service contract: Consumer is in a weaker position
  - Content providers try to avoid sales contracts

## \* Commission initiative → generic approach

- Both sales and services are covered
- Typical features of sales contracts are used for service-type contracts: conformity/remedies

# Characterisation (2)

- \* **Different types of counter-performance**
  - Money
  - Personal or other data actively provided by the user (for example, by registration)
  - Data collected by the trader (for example, the IP address or statistical information)
  - Activity required by the user in order to access the digital content
    - The Commission's approach in the consultation is holistic
  
- \* **Consequences for other issues**
  - **Conformity: Strict criteria for conformity & disclaimers in case of non-monetary counter-performances?**
  - **Return of counter-performance after termination?**

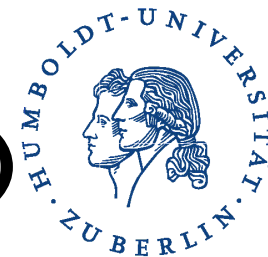
# Resale of Digital Goods (1)



## \* Resale under copyright law

- Any (re-)sale of physical copies is distribution (Dir. 2009/24, Dir. 2001/29)
- Resale of copies is permitted if first sale was made with the consent of the rightholder („exhaustion“)
- Resale of intangible copies is controversial
  - Software: CJEU, C-128/11 – Usedsoft → Resale is permitted under certain conditions (permanent license, sales contract, deletion of all copies after resale)
  - Other digital goods: Controversial, most commentators reject a resale right under the current rules (Dir. 2001/29), but many recommend an adjustment of the Dir. 2001/29
- Resale right cannot be excluded in license contract

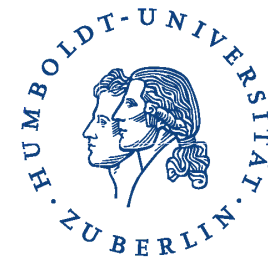
# Resale of Digital Goods (2)



**\* Should the resale right be regulated in the context of contract law?**

- The right to resell a digital good is a mandatory provision for sales contracts (as far as it applies)
- Resale right is a minimum right of the purchaser
- Resale rights fits well in a sales contract instrument, but not in a service contract setting
- Instrument on digital goods may need differentiated solutions

→ But this may incentivise content providers to shift their business models to pure service contracts



# Interoperability (1)

## \* Interoperability issues

- Arise between
  - software/software, e.g. OS and apps
  - software/hardware, e.g. OS and device
  - software/data format, e.g. video/audio files and software, office documents and new versions
- Constant source of worries for users
- Often unforeseeable at the moment of purchase

# Interoperability (2)

## \* Current approach: information duties

### - Dir. 2011/83

- Rec. 19: „The notion of relevant interoperability is meant to describe the information regarding the standard hardware and software environment with which the digital content is compatible, for instance the operating system, the necessary version and certain hardware features“

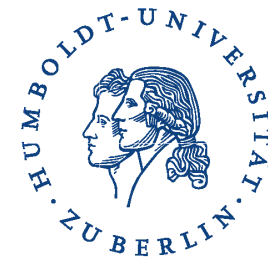
- Art. 5, 6: Information requirement – trader must provide interoperability information he is aware of or can reasonably be expected to have been aware of.

### - CESL

- Art. 13, 20

- Information on „any relevant interoperability of digital content with hardware and software which the trader is aware of or can be expected to have been aware of.“

- Efficiency of information duties is doubtful

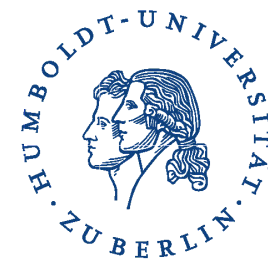


# Interoperability (3)

## \* More efficient tools?

- Conformity of digital goods
  - Information provided by the trader concerning interoperability is part of the quality of the product
  - Interoperability is objective criteria of conformity: Is the digital product fit for a normal use?
- Other legal tools
  - Copyright law: reverse engineering permitted Dir. 2009/24
  - Competition law: refusal to provide interface information may qualify as abuse of a dominant position under Art. 102 TFEU, see CFI, T-201/04 – Microsoft
- Political controversy over open standards





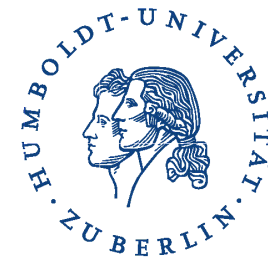
# Portability (1)

## **\* Art. 18 para. 2 General Data Protection Reg.**

**(as adopted by the Council in June 2015)**

**- „The data subject shall have the right to receive the personal data concerning him or her which he or she has provided to a controller in a structured and commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the data have been provided (...).“**

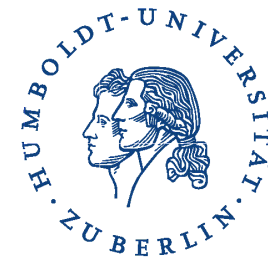
**- Consent of the data subject may be withdrawn at any time (Art. 7 para. 3). Contractual arrangement restricting portability are not binding.**



# Portability (2)

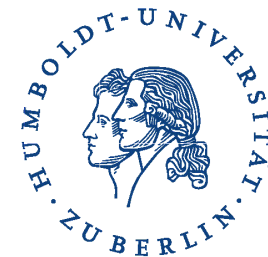
**\* Should portability be regulated in the context of contract law?**

- Portability is a mandatory right under data protection rules**
- For clarity, a future instrument on digital products could reaffirm its mandatory nature**
- Question 23 of the consultation: transfer of user generated content**



# Some Conclusions

- \* **Protection of consumers and other users of digital goods is still underdeveloped**
- \* **Some of the most urgent deficiencies concern cross-over areas of contract, copyright, competition and data protection law**
- \* **EU legislator should implement a holistic approach which addresses the consumer's concerns**
- \* **Future EU instruments on the purchase of digital goods should not be restricted to typical issues of sales and services contracts**



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