

10. Martsenko N. (2019). *Pravovyi rezhym shtuchnoho intelektu v tsyvilnomu pravi [Legal regime of artificial intelligence in civil law]*. Aktualni problemy pravoznavstva. 4 (20). URL: http://ippi.org.ua/sites/default/files/zbirnik_tez_19.12.2018-maket_3-converted.pdf [in Ukrainian].
11. Novytska N. B. (2016). *Poniattia ta vydy subiektiv pryvatnoho prava v zakonodavsti EU [Concepts and types of subjects of private law in EU legislation]*. Instytut zakonodavchyykh peredbachen i pravovoi ekspertyzy. URL: http://ir.nusta.edu.ua/jspui/bitstream/doc/1945/1/1838_IR.pdf [in Ukrainian].
12. Sahradian M. (2018). *Tsyvilna diiezdatnist fizychnoi osoby v Ukraini ta v zarubizhnykh krainakh [Civil legal capacity of an individual in Ukraine and in foreign countries]*. URL: <http://pgp-journal.kiev.ua/archive/2018/4/13.pdf> [in Ukrainian].
13. *Tsyvilnyi kodeks Ukrainy [Civil Code of Ukraine]* (Vidomosti Verkhovnoi Rady Ukrainy (VVR), 16.01.2003 r. № 435-IV). URL: <https://zakon.rada.gov.ua/laws/show/435-15> [in Ukrainian].
14. Kharytonov Ye.O., Saniakhmetova N.O. (2016). *Tsyvilne pravo Ukrainy: Pidruchnyk [Civil Law of Ukraine: Textbook]*. K.: Istyna. [in Ukrainian].
15. Khodyko Yu. Ye. (2017). *Poniattia rechi v konteksti vyznachennia obiekta rechovoho pravovidnoshennia [The concept of a thing in the context of defining the object of the property relationship]*. Vyp. 139. S. 78-85. URL: http://nbuv.gov.ua/j-pdf/Pz_2017_139_9.pdf [in Ukrainian].
16. Iastrebov O.Ia. (2018). *Pravosubiektmist elektronnoho osoby: teoretyko-metodolohichni pidkhody [Legal personality of the electronic person: theoretical and methodological approaches]*. Pratsi Instytutu derzhavy i prava. RAN. URL: <https://cyber.leninka.ru/article/n/pravosubektnost-elektronno-go-litsa-teoretiko-metodologicheskie-podhody> [in Russian].
17. India Declares Dolphins «Non-Human Persons» With Rights. URL: <https://reason.com/2013/07/08/india-declares-dolphins-non-human-person/> [in English].
18. Martsenko, N. (2020). *Determining the place of artificial intelligence in civil law*. Studia Prawnoustrojowe, (47). <https://doi.org/10.31648/sp.5279> [in English].

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DIGITAL CONSUMER – HOW TO PROTECT ONE IN BIG DATA ECONOMY

Досліджено проблемні питання захисту прав споживачів у процесі укладенні ними договорів постачання цифрового контенту в мережі Інтернет. Здійснено комплексне порівняльне дослідження концепції захисту прав споживачів у процесі укладення договорів постачання цифрового контенту за законодавством України та Європейського Союзу. Виокремлено та проаналізовано основні проблеми захисту прав споживачів у мережі Інтернет, зокрема: повнота інформації про цифровий контент, у тому числі інформування споживача про особливості надання ліцензій click-wrap та browse wrap; забезпечення доступу до цифрового контенту, несправедливі умови договору його постачання, розміщеного на вебсторінці постачальника, проблема захисту персональних даних споживачів у мережі Інтернет.

Ключові слова: цифровий споживач, договір постачання цифрового вмісту, великі дані, персональні дані, несправедливі умови, договори у мережі Інтернет.

Саванець Л., Стахира Г.

Цифровой потребитель – как защитит права человека в экономике «больших данных»

Статья посвящена исследованию проблемных вопросов защиты прав потребителей при заключении ими договоров поставки цифрового контента в сети Интернет. Авторами осуществлено комплексное сравнительное исследование концепции защиты прав потребителей при заключении договоров поставки цифрового контента в законодательстве Украины и Европейского Союза. Выделены и проанализированы основные проблемы защиты прав потребителей в сети Интернет, среди которых: полнота информации о цифровом контенте, в том числе информирование потребителя об особенностях предоставления лицензий click-wrap и browse wrap; обеспечение доступа к цифровому контенту, несправедливые условия договора его поставки, размещенного на веб-странице поставщика, проблема защиты персональных данных потребителей в сети Интернет.

Ключевые слова: цифровой потребитель, договор поставки цифрового контента, большие данные, персональные данные, несправедливые условия, договоры в сети Интернет.

Savanets L., Stakhyra H.

Digital consumer – how protect one in Big data economy

Article is devoted to issues of protection digital consumer rights in case of conclusion contracts for the supply digital content. The authors analyze concept and main features of digital consumer, conducts a comparative analysis of it under Ukrainian and European Union law.

In the article authors also taking into account main problems which consumer can meet in process of concluding digital content contracts. Above-mentioned problems include: information problems, connected with click-wrap license, browse wrap license, when consumer agree with all provisions, represented by supplier without any possibility to change it. Authors concentrate also on problem with the access to digital content, which includes technical access issue, lock-in and lock-out situation that are the result of product bundling. Taking into account that access issue and lack of information closely connected with unfair terms in contract of the supplying digital content, the authors analyze the most widespread unfair terms, such as reservation to unilaterally change the conditions of contract, exclusion of liability for several types of damage, provision stating that product only works with software or hardware provided by the same vendor or supplier proffered the vendor. Authors point out the problem of protection consumer's personal data in cases of concluding contracts for the supply digital content in Internet. The borders of using consumer's personal data, collection and further using it for sell and selection of contextual advertising are researched.

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In the article, authors pay special attention to the need for novelization of Ukrainian legislation in the field of protection the digital consumer rights, special when it is a tendency for building Big data economy world, and in the light adaptation Ukrainian legislation to aquis communitare European Union.

Keywords: digital consumer, contract for the supply digital content, Big data, personal data, unfair terms, digital contracts.

Formulation of the problem. Technical progress which arose early in the 20th causes significant changes in the latest law-making process. Fixed law doctrine concepts for 60 years in gradually lose its relevance. Internet began to influence on ordinary person daily life. Today, no one can imagine his existence without checking e-mails, downloading films, listening music on-line, playing online role-playing games, ect.

The things, which exist only in material form, change it on new special form of digital content. This process closely connected with uprising of a new type of economy - digital one or in other words - Big Data Economy.

Creation of digital word, digitalization of things, which exist only in material form triggered the appearance of digital consumer. Today there are no necessity for consumer to go to the shop in order to have some goods or service, only one thing that he need to have – some device and connection with the Internet.

In this regard, the legislator meet new problem – to develop, test and adopted an effective legislation for protection digital consumer rights. This task is complicated by the fact that digital consumer are not tethered to one country borders, in overwhelming majority of cases there are cross-border contract concluded through the Internet.

Analysis of recent research and publications. In the article authors are taking into account the works of Pormeister K., Manko R., Helberger N., Schultse R., Loos M., Guibault L., Mak C., Pessers L., Cseres K., van der Sloot B., Tigner R.

The purpose of the article is to determine the difference between consumers in classic legal doctrine and digital consumer, to analyze the main problems which consumer meet when it concludes the contract for the supply digital content, and create some effective suggestions for change Ukrainian legislation in the field of protection digital consumer rights.

Digital content – what consumer should know

Digitalization of everyone life contributes to the emergence of a new definition of things which supply to consumer in non material form. Instead of going to the book store and buying paper book, consumer can buy it in electronic form, download it on his computer and print it by himself. Similar situation with music: consumer can buy tangible CD- , but in the same time he can play mp3 online, ect.

The doctrine calls such things, which lose its material form as digital content, and contract in which such goods and services are fall to the consumer as contract for the supply digital content.

First of all, to protect the consumer rights in case when it concludes a contract for the supply digital content, it should be created one clear and understandable definition of digital content. Many years both legislator and doctrine try to give common definition. In the first report for Europe Economics we employ the following one: “All content which the consumer can access either on-line or through any other channels. Such as a DVD or CD, and any other services which the consumer can receive on-line” [1].

On our opinion such wide definition not reveals all features of digital content, and can't give consumer full important information, which he should know about this special type of goods.

But European legislator try to find optimal definition, and in 2011 concept of digital content for the first time appears in the Directive 2011/83/EU of the European Parliament and of the Council on consumer rights, and defined as: “data which are produced and supplied in digital form, such as computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means” [2].

Near the same definition appears in the Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law, under which digital content means data which are produced and supplied in digital form, whether or not according to the buyer's specifications, including video, audio, picture or written digital content, digital games, software and digital content which makes it possible to personalize existing hardware or software; it excludes:

- financial services, including online banking services;
- legal or financial advice provided in electronic form;
- electronic healthcare services;
- electronic communications services and networks, and associated facilities and services;

• gambling;
• the creation of new digital content and the amendment of existing digital content by consumers or any other interaction with the creations of other users [3].

Such uncommon position of European legislator on the way of development and approval legal definition of digital content contributes to the emergence of new, special act, which was created for narrow regulation supply digital content contract. It was a new Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content.

Under Art. 1 of new proposal digital content means:

- data which is produced and supplied in digital form, for example video, audio, applications, digital games and any other software,
- a service allowing the creation, processing or storage of data in digital form, where such data is provided by the consumer, and
- a service allowing sharing of and any other interaction with data in digital form provided by other users of the service [4].

But the newest Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services enshrines another approach to the definition of digital content as “data which are produced and supplied in digital form” [5].

The new proposed definition differs from previous ones. It includes not only contract for providing audio, video, pictures and writing content in electronic form but also gaming contracts, social networking services, contracts enabling the consumer to create new digital content and to moderate and review existing digital content or to otherwise interact with the creations of other consumers, contracts for the provision of digital content that enables the consumer to personalize existing hardware or software [7, p. 44].

The main points which shows the difference between the Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content and both Directive 2011/83/EU of the European Parliament and of the Council on consumer rights, Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law is that supply of digital content it is not only sale transaction in which consumer receives digital content from the supplier, but also digital service contract [7, p. 45]. In the same time newest Directive 2019/770 provide two different category digital content and digital services. But the most important part is that these categories have common regulation.

Another important difference concerns possibility to supply digital content via a tangible medium. Under the Directive 2011/83/EU (Consumer rights directive) supply is included in the concept of sale. But problem appears when digital content is supplied on tangible medium (CD-, DVD-. Memory card, ect). Digital content embedded in tangible goods under Consumer rights directive would be considered as sale of goods anyway [8, p. 12].

Analyzing Ukrainian legislation, we should notice, that it is still a gap in legal definition of digital content and development of legislative regulation of the contract for its supply. Without creation of such regulation national e-consumers remained defenseless. In case of violation of their rights arising important problem about the type of contract which consumer conclude, rights and duties such contract sides, possibility of directing damages and compensation of losses to supplier, and requirements to him in court.

Consumer vs Digital consumer

It is all known fact that with the development of Internet technologies more and more consumers conclude different type of contract throw the network. It arises the expected question whether the consumer and the digital consumer the same or legislator need to create special regulation for the last one?

Under the legislation of Ukraine there is no legal special definition for e-consumers. But is this a problem at all? Question concerning the rights of consumers regulates The Law of Ukraine “On consumer rights protection”, under which consumer is physical person, which purchases, orders, uses or intends to purchase or order products for personal needs that are not directly related to entrepreneurial activity or the performance of the duties of a hired employee [9].

At first sight this definition can be used when we talk about digital consumer. But technology sometimes erases the border between trader and consumer in classic form. Digital technology allowed anyone to become a producer and distributor of digital content (services). Many types of programs are available on the Internet (even for free) that allows anyone to create his own music, video, audiovisual content, ect. Many people use such programs for creation some content for their blogs (i.g. Instagram). In the same time they can sell some advertising

in such blogs, and now we have important question: should we qualified such person as a consumer or now they become a business and provision about protection of consumer rights doesn't work with them anymore.

But are the digital consumer such unprotected as we think? Interesting thing that Internet created to protect the consumer is review system. Each consumer can easily find the reviews of other users about some goods and services. There are existed some technical solutions, among them default settings, technologies of privacy enhancing, special filters, and meta data which created "consumer protection by design" [6].

When we analyzed European Union solution to this issue, we saw that in art. 2 of Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services consumer defined as any natural person who, in relation to contracts covered by this Directive, is acting for purposes which are outside that person's trade, business, craft, or profession [5].

On our opinion this definition is more specific. Description that person not considered as a consumer when it uses digital content for person's trade, business, craft excludes from list of consumers persons which provides monetized blogs.

In this field the problem is more acute in case when consumer buys digital content online (downloaded it) and in case when digital content is on material carrier (CD-, flash card, memory card). In this case using Law of Ukraine "On consumer rights protection" will be effective only when there is some inconsistency with material carrier, but not digital content. All the above once again confirmed urgent need development and implementation of special legislation in the field of supply digital content in Ukraine.

Digital consumer concerns. Interacting with digital content consumer meet amount of problems which closely connected with the non material specific of digital content. We want pay close attention to the most common of them.

Information problems. In order with the research which was conducted within the framework of European Consumer Centres Network in the vast majority of cases when consumer concludes contract for supply digital content throw the Internet they feel incompletely informed [10, p. 43].

Viewing content of popular Internet resources in Ukraine, when consumer can get digital content (contsert.ua, olx.ua, tikets.ua) we can say that in most cases in order to get some important information about consumer protection, rights and duties of trader, consumer faced with that information hidden in terms of use or completely missing.

Lack of information (or in some cases incomplete, incomprehensible information), preferably such as ways of report the problems with digital content to suppliers, the need of a license for an additional fee, information about the warranty essentially substantially affects the protection of digital consumer rights. In order to protect them, national legislator should develop legislation in the area of digital consumer protection, and foresee a requirement the obligation to provide for consumers all necessary information in the clearest way.

Assess problems. When consumer buy digital content online, he justified expects that it will work properly. But for some technical or other reasons consumer find that digital content does not work properly. Consumer hasn't a possibility to watch, play, listen digital content on different types of devises. Such problems call *technical access issues*.

There are very similar problems, which calls *issues of social exclusion*, and main feature of it is the need to purchase additional equipment or hardware to enable the service (e.g. Apple devices).

Can not be turned down the problem of *bundling*. Its main feature access to a particular piece or service of digital content is made conditional upon the purchase of additional products or services. In the vast majority of cases we are dealing with *lock-in or lock-out* situations [6].

Some companies, which sells online music or video using Digital rights management technology, which makes impossible to consumer turn on the music or video throw some other music player than recommended (in most cases produced) by that particular company.

Another important problem closely connected with geographical position of the consumer. Some countries use special codes which block certain programs, and makes impossible using some digital content for consumer [10, p. 47].

Unfair terms. One more important problem which we should notice is unfair terms and conditions for digital consumers. We want just noticed the most widespread unfair terms for consumers in contract for the supply digital content.

First of all it is reservation for suppliers change the terms and conditions of contract. This situation harm consumer even if he has already purchased digital content. For example, supplier can prohibit copying music or e-books, even if them already on consumer computer.

Second, it is wide range of disclaimers, which exclude the responsibility of supplier for several types of damage on consumer software or hardware.

Third, connected with access problem and it is a provision stating that digital content works only with soft – or hardware provided by the same supplier, or by the vendor to which the supplier directly indicates.

Next – the suppliers of software reserve the right to make update of it distantly and without warning.

All the above unfair terms should be forbidden in special legislation such that substantially violate the rights of digital consumers.

Data protection issues. Concluding contracts for the supplier digital content consumer often need to register on web-page in order to get some digital content "for free". But here is a logical question for what reason supplier collects our personal information.

At first sight supplier want just identify the consumer. But later the consumer can notice that web-pages, which he attends, are full of context advertising.

Consumer can get e-mails which he doesn't want to get. But what much worse – suppliers can collect and sell consumers personal data to other supplier (for possibility to send new advertising).

Big problem arise from unregulated provision which permits suppliers collect personal information of consumers without special consent. Sometimes, we can see little message on the web page, which sets up next rule: "by accessing the website of a service provider, or using digital content, the consumer automatically agrees to the terms of use of his personal data". Such provision must be forbidden by legislator as such which significantly violates human right to protect their personal data.

Among the providers of digital content services, there is also another form of consent for the processing of personal data of users. It consists in occurring on the page of the supplier of the list of terms of use consumer data. In this case, access to digital content is provided to the consumer only if he expresses consent of the proposed conditions, by clicking on the "I agree" button, or by setting the appropriate mark in the dialog box that appears. This type of consent to the use of personal data in the literature is called "click-wrap license" and "browse wraps license" [11, p. 21].

Usually, by concluding digital content contracts in the above manner, the consumer gives the service provider the consent to collect, store, use, store and distribute personal data in full. Another problem connected with form of expression of such consent, which in the case of a "click-wrap license" involves at least the formal pressing of the "I agree" key, while in the case of the "browse wraps license" consent to the processing of personal data is provided automatically by download web page.

Conclusions. Development of new technologies puts new demands on the legislator. Nowadays, in order to protect his citizen, legislator should adapt to the appearance of new objects of legal regulation and create an effective legislation.

In order to protect consumer in the age of big data technology European legislator create a sets legal act which should set the rules for development digital economy, and protection digital consumers.

Unfortunately Ukraine is still on a stage of development effective legal doctrine and legal acts in this field. Ukrainian legislator should use European experience, and as soon as possible pass a law which regulates contracts for the supply digital content. Such law not only protects Ukrainian digital consumers, but will be a one of steps on way of harmonization national law with European Union law under the Association program of Ukraine.

References

1. *Europe Economics Digital content services for consumers: Aessment of problems experienced by consumers (Lot 1), Report 4 : Final Report.* (2011). Retrieved from <https://ec.europa.eu/futurium/en/content/digital-content-services-consumers-assessment-problems-experienced-consumers-lot-1-report-4> [in English].
2. *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 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.* (2011). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0083> [in English].

3. *Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law COM/2011/0635 final - 2011/0284 (COD)*. (2011). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52011PC0635> [in English].
4. *Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content COM/2015/0634 final - 2015/0287 (COD)*. (2015). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015PC0634> [in English].
5. *Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services*. (2019). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2019.136.01.0001.01.ENG [in English].
6. Loos, M., Helberger, N., Guibault, L., Mak, C., Pessers, L., Cseres, K.J., van der Sloot, B. & Tigner, R. (2016). *Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts. Rinal report. Comparative analysis, Law & Economics analysis, assessment and development of recommendations for possible future rules on digital content contracts with an executive summary of the main points*. Retrieved from <https://bartvandersloot.com/onewebmedia/Final%20Report.pdf> [in English].
7. Schultse, R. (2012). *Common European Sales Law (CESL): Commentary*. Munich: CH Beck [in English].
8. Manko, R. (2016). *Contracts for the supply digital content. A legal analysis of the Comissions proposal for a newdirective*. European Parliamentary Reseaech Service [in English].
9. *Pro zahyst prav spozyvachiv. Zakon Ukrainy vid 12.05.1991 № 1023-XII [Law of Ukraine "On consumer rights protection" from 12.05.1991 № 1023-XII]*. (1991). Retrieved from <https://zakon.rada.gov.ua/laws/show/1023-12> [in Ukrainian].
10. Helberger, N. (2005). *Controlling access to content. Regulating Conditional Access in Digital Broadcasting*. Den Haag: Kluwer International [in English].
11. Pormeister, K. (2017). Informed consent to sensitive personal data processing for the performance of digital consumer contracts on the example of '23andMe'. *Journal of European Consumer and Market Law*, 1, 17-24 [in English].

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КРИМІНАЛЬНО-ПРАВОВА ХАРАКТЕРИСТИКА КАМКОРДИНГУ

Досліджено кримінально-правову характеристику камкордингу як одну з форм, у якій може вчинятися злочин, передбачений ст. 176 Кримінального кодексу України «Порушення авторського права і суміжних прав». Розглянуто передумови криміналізації камкордингу як різновиду інтелектуального піратства. З'ясовано основні об'єктивні та суб'єктивні ознаки складу цього злочину, а також проблеми, які виникають у зв'язку з його кваліфікацією.

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