Copyright Law

and Consumer Protection

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Policy conclusions of the European Consumer Law Group (ECLG) based on a study carried out by Dr. Lucie Guibault and Ms Natali Helberger, academic researchers at the Institute for Information Law, University of Amsterdam.

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Summary and ECLG Conclusions

The purpose of this study is to provide an overview of certain key aspects of the relationship between copyright law and consumer protection. More particularly, the paper concentrates on what would appear today as the most problematic issue, from the perspective of the consumer, understood in the narrow sense of the word, namely the implementation of technological protection measures (TPM) and digital rights management (DRM) systems and its implication for the exercise of the private use exemption.

Below are the policy conclusions which the ECLG draws from the study, focusing on areas where consumer organisations could play an important role.

- ## Regulatory action

The ECLG urges the European Commission to:

- Reassess the inter-relationship between the exercise of the private use exemption and the application of technological measures, pursuant to articles 5(2)(b) and 6(4) of the Directive.

- Consider that in view of the social importance of allowing consumers to make a small number of copies (3 to 5) of protected works for private purposes, the adoption by Member States of appropriate measures to ensure that right holders make available the means of benefiting from the private use exemption should not be left as an option, but should be made mandatory.

- Clarify that the legal protection of technological measures under copyright law does not apply to TPMs or DRMs that restrict uses that are exempted from copyright or that impose restrictions on acts or subject matters that do not fall under copyright law.

- Oblige users of TPMs or DRM more generally to respect the exceptions and limitations on copyright.

- Oblige users of TPMs or DRMs to inform consumers on whether TPMs or DRMs are used and how they affect the usability of digital content.

The ECLG asks the European legislator to regulate the formation and content of standard form contracts concluded in the context of digital content delivery, so as to enhance the fairness of terms and the consumers' confidence in his transactions concerning copyrighted content.

The ECLG underlines that with respect to the phasing-out of copyright levies as soon as TPMs/DRMs are 'available' in the market, consumer organisations occupy a key position for the collect of information regarding the consumer acceptability of such systems.

Furthermore, the ECLG urges the European Commission to adopt more generally specific rules on consumer protection regarding DRMs. Some important points to be addressed could be:

- Consumer friendly-design of DRMs in a way that DRMs do not conflict with legitimate rights and interests of consumers, notably the privacy, contractual autonomy and property.

- The design of DRMs in a way not to hinder the normal processing of content and not to hinder that consumers benefit from innovations and technical progress.

- The design of DRMs so that they respond to the needs of consumers with special needs in order to prevent social exclusion.

- Where TPMs cause damages to consumers' property, consumers should be able to hold TPM controllers liable for the damage.

- **Monitoring**

The ECLG is of the opinion that consumer organisations could play an active and important role in the monitoring and compliance of TPMs with legitimate consumer rights and interests.

- **Awareness**

The ECLG asks the Commission to ensure that consumer organisations are involved in the collect of information on the effects of TPMs/DRM use for consumers and in initiatives to create awareness for the consumer dimension of DRMs. They could participate in awareness campaigns for consumers and contribute to the process of improving the environment for consumers by testing consumer friendliness of services using DRM.

- **Transparency**

The ECLG stresses the need to enhance the transparency of TPMs and DRMS so as to ensure that consumers are in a position to choose the services that offer, in their opinion, the fairest terms and conditions.

- **Research**

The ECLG is of the opinion that a comprehensive research agenda with a view to gaining greater information about the effect of TPMs or DRMs on consumers is needed.

- **Self-regulation**

The ECLG underlines that since the market for digital creative content is still in an early phase of development, self-regulatory codes could play an important role. In any case it should be ensured that Consumer organisations are involved in the elaboration of codes of conduct.

Consumer protection and Copyright Law

Study by Dr. Lucie Guibault and Ms. Natali Helberger, academic researchers at the Institute for Information Law, University of Amsterdam
written for the ECLG

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1. Introduction

The deployment of the digital networked environment has transformed the manner in which works are created, used, transformed, and distributed on the mass market. The digitisation of creative content poses an unprecedented challenge to all parties involved. While it allows individuals to consume and enjoy works in new ways, digital technology does give them the capacity to flawlessly reproduce and redistribute these works worldwide, with or without the prior authorisation of the rights owner. At the same time, advances in digital technology provide copyright owners with a growing possibility to either restrict or charge for every use of their creative works. Indeed, after an initial period of hesitation, content creators, Internet service providers, and a wide range of different stakeholders are developing new business models for the distribution of creative content. New distribution methods see the light almost every month. Some rely strictly on copy-control techniques, while others rely on a combination of technical and legal elements in the form of digital rights management systems, or DRMs. Whereas the services of Apple iTunes and of On Demand Distribution Ltd. (OD2) enjoy great popularity today, it is still too early to know whether consumers will keep responding to these new modes of distribution with the same enthusiasm. On the other hand, the off-line distribution of copy-protected music CD's and DVD's has generated strong negative reactions from European consumers, who consider that the anti-copy mechanism frustrates their normal expectations.[1]

Since the market for the mass distribution of digital creative content is still emerging, it is capital that conditions be established to allow all parties involved, from the initial creator to the consumer, to make use of digitised content in all confidence. This presupposes that the new business models that are being put in place are as transparent and fair to everyone as possible. This holds true not only for the off-line distribution of protected content, such as CD's, DVD's and CD-ROM's, but perhaps even more for the on-line distribution of such content through DRM systems, the functioning of which relies on technological protection measures and contractual agreements. A lot has already been written on the subject of technological protection measures, DRM systems, and copyright law.[2] The purpose of this study is therefore to provide an overview of certain key aspects of the relationship between copyright law and consumer protection. More particularly, the paper concentrates on what would appear today as the most problematic issue, from the perspective of the consumer understood in the narrow sense of the word, namely the implementation of DRM systems and its implication for the exercise of the private use exemption. Of course, the implementation of DRM systems also has consequences for the exercise of several other limitations on copyright, which affect the interests of other categories of users of digital creative content. However, the study of these implications would go beyond the bounds of this report.

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1 See: Cour d'appel de Versailles 1ère chambre, 1ère section 30 septembre 2004 (EMI / CLCV); Tribunal de grande instance de Paris 3ème chambre, 2ème section Jugement du 30 avril 2004 (Stéphane P., UFC Que Choisir / société Films Alain Sarde et autres)

2 See: K. Koelman, *Auteursrecht en technische voorzieningen. Juridische en rechtseconomische aspecten van de bescherming van technische voorzieningen*, ITeR Reeks, Den Haag: SDU 2003; T. Dreier, Preliminary draft 'Study of legislation on private copying: existing legislative solutions and proposals for future development', paper to be presented at the ALAI Study Days, September 2003 in Budapest; and N. Helberger (ed.), N. Dufft, S. van Gompel, K. Kerényi, B. Krings, R. Lambers, C. Orwat en U. Riehm, *Digital Rights Management and Consumer Acceptability: A Multi-Disciplinary Discussion of Consumer Concerns and Expectations*, State-of-the-Art Report, INDICARE, December 2004.

This study is divided into five additional sections. The second section concentrates on the notion of private use: it first presents an historical overview of the concept. The section then follows with an analysis of the relevant provisions of the EC Directive on copyright and neighbouring rights in the information society.[3] In the following section, we have a brief look at the recent technical developments affecting the consumer's capacity to exercise the private use exemption. These include the application of technological measures, the deployment of digital rights management systems and the use of watermarking and fingerprinting techniques. In section four, we briefly consider whether the current European consumer protection law offers consumers sufficient guarantees for transparency in their transactions with digital content distributors and whether it provides effective protection against attempts on the part of content distributors to restrict the scope or the exercise of the private use exemption. This brief survey reveals that the European legislation, on consumer protection or copyright, could be adapted to take better account of the consumers' interests. On the basis of the findings of the three previous sections, section five discusses a number of selected key areas where action could be undertaken to ensure that the consumers' interests are better protected in the context of the access and use of digital creative content. To this end, a number of focus points within the scope of activities of consumer organisations have been identified, to serve as the basis for future initiatives.

All ideas and suggestions are summarised and classified into types of required action, in section six of this document.

The present study has been realised in less than a month's time. In view of the very strict time constraints and of the limited resources available for the completion of this study, the authors refrained from formulating policy recommendations and concentrated instead on providing an overview of a number of selected focus points. This study, conducted for and financed by the European Consumer Law Group, was written by Dr. Lucie Guibault and Ms. Natali Helberger, both academic researchers at the Institute for Information Law, University of Amsterdam. Although commissioned by the ECLG, this study was researched and written in complete independence from its sponsor.

[3] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, Official Journal L 122, 17/05/1991 p. 42, art. 5(1); and Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, Official Journal L 077, 27/03/1996 p. 20.

2. Notion of 'private use'

Traditionally, copyright owners have never held absolute control over the use of their works. Everyone has therefore always been free to read, listen to, or view a work for his or her own learning or enjoyment. In theory, copyright did not extend to acts of consumption or reception of information by individuals.[4] In fact, nowhere in the international instruments or the national legislation dealing with copyright or neighbouring rights is there a definition of the notion of 'private use' or 'private copying'. Some national laws do give a hint as to the extent of the exemption, but it is usually left to the judge to decide whether a particular use of a copyright protected work falls within the scope of the statutory exemption or not. In the following pages, we will briefly examine how the private use exemption has been considered through the years and how it has been recently regulated inside the European Copyright Directive.

2.1. Historical development

The view that copyright protection did not extend to the private sphere of the individual was well accepted by most early continental European copyright scholars.[5] In fact, some early commentators believed that legal provisions confirming that private use was outside of the right holders' exploitation monopoly was pointless, since private use was the indispensable corollary to the bequest of the work to the public through publication. Eventually however, the common view evolved, to hold that the regulation of private use inside the copyright act had become necessary because changes in society had blurred the line between public acts and private acts. Early 1900 versions of the Dutch and German copyright statutes did include exemptions for the reproduction of a work in a limited number of copies for the sole purpose of private practice, study or use of the person making the copies, whereas a specific provision regarding private use was introduced in French law only in the Act of 1957. It was always understood however that these 'private' reproductions must be neither put into circulation nor reach the public in any way. As Ricketson reports:

> 'Private use exceptions in national laws at that time were predicated upon the basis that these copies were made by hand or with the use of a typewriter, and that the quantity of such copying could not scarcely conflict with either the normal exploitation of the work or the legitimate interests of the author'.[6]

By the 1950's, the considerations at the root of the exemption allowing a user to make single copies of a work were put to the test with the development of more sophisticated techniques of reproduction. At the time of the Stockholm Conference for the revision of the Berne Convention in 1967, reprography of literary works and home taping of sound recordings were becoming wide spread among the population. And although no consensus could emerge on the introduction of a specific limitation on private use, delegations agreed to the adoption of the "three-step-test" of Article 9(2) and to specify, in Article 9(3), that "any sound or visual

4 Guibault 2002, p. 48.
5 Kohler 1907, p. 178; Lepaulle 1927, p. 7; and Leinemann 1998, p. 112.
6 Ricketson 1987, p. 484.

recording shall be considered as a reproduction for the purposes of this Convention". The Main Committee I of the Stockholm Conference has interpreted these provisions, both as a justification for the existence of the private use exemption and as the basis for adoption of home taping levy regimes:

> 'This clearly envisages that exceptions under Article 9(2) may take the form of either absolute exceptions or compulsory licences, depending essentially on the number of copies made. (...) As a matter of language, it also makes sense. The power under Article 9(2) is to permit the reproduction of works in certain special cases, and there is nothing in the wording of the provision which forbids the imposition of conditions on the grant of such permission, such as an obligation to pay for it (or to acknowledge the source of the work reproduced, for that matter)'.[7]

According to Ricketson, it also seemed clear from the Report of Main Committee I that 'unreasonable prejudice to the legitimate interests of the author' could be avoided by the payment of remuneration under a compulsory licence.

The introduction in 1965 of a levy system in Germany was triggered by two seminal decisions of the German Federal Supreme Court, rendered in 1955 and 1964 respectively, both of which involved the sale of sound recording equipment.[8] In the latter case,[9] the German collecting society, GEMA, asked the Federal Supreme Court to order that producers of recording equipment be obligated, upon delivery of such recording equipment to wholesalers or retailers, to request from the latter that they communicate the identity of the purchasers to the GEMA. First, the Supreme Court considered the question of whether the producers and retailers of recording equipment could also be held liable for copyright infringement, even if they did not realise the reproductions themselves, but only provided individuals the necessary means for doing so. The Court answered this question in the affirmative, pointing out that producers of recording equipment took express advantage of the popularity of private home taping. It decided however that the GEMA could not force vendors of home-taping equipment to oblige their customers to reveal their identity so as to enable the society to verify whether these customers engaged in lawful activities. In the opinion of the Court, although home taping formed an infringement of copyright, such measures of control would have undeniably conflicted with each individual's right to the inviolability of his home, as guaranteed by Article 13 of the German Basic Law.

With respect to sound and audiovisual recordings, the German Copyright Act was modified again in 1985 in order to introduce a levy on blank tapes, in addition to the long-standing levy on the sale of recording equipment. The main argument for the introduction of a levy on blank tapes in 1985 was that the remuneration collected on the sale of recording equipment no longer equalled the dimensions assumed by the legislator when the provision was enacted in 1965. The decrease in remuneration obtained from the sale of recording equipment could be explained by the fact that the average factory price in 1985 was far lower than in 1965. The collecting societies had stressed that, at the same time, this decrease of remuneration collected per unit contrasted sharply with the rapid increase of private home taping.[10] Contrary to the position that

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7 Ibid.

8 Note that the German Federal Supreme Court had examined the question of the reproduction of sound recordings in an earlier case, but not in the context of a private use, see: BGH, decision of 21 November 1952 – Aktz.: I ZR 56/52 (*Überspielen von Schallplatten auf Magnettonbänder*) in *GRUR* 03/1953, at p. 140.

9 BGH, 29 May 1964 - Aktz. : Ib ZR 4/63 (*Personalausweise*), in *GRUR* 02/1965, p. 104; see: Bygrave and Koelman 2000, p. 101; and Visser 1996, p. 50.

10 Collova 1994, p. 86.

had prevailed until then, the legislator agreed with the collecting societies that some legal responsibility for infringement of copyright by private home taping could be assumed not just by the producers of recording equipment but also by the producers of blank tapes and cassettes. The argument put forward in 1965, according to which it would be unjust to put a levy on blank material because no distinction can be made between blank material used for purposes affecting copyright and those used for other purposes, was simply put aside.

Today, most continental European countries have followed the German model and have granted authors, publishers, performers, and phonogram and videogram producers a remuneration right for the private use of their works, either under the home taping regime or the reprography regime. Only three EU Member States have not implemented a levy system for reprographic reproduction and home taping: Ireland, Luxembourg, and the United Kingdom. Since then, however, further technological developments have once again upset the delicate balance reached with regard to the private use and have made this exemption as controversial and as complex as ever. Digital networked technology now offers users the possibility to reproduce a work at low cost in countless amounts of perfect copies and to transmit these to an unlimited number of people across the globe, thereby posing a threat to the economic interests of rights owners.

2.2. Private use under the EC Copyright Directive

Before the adoption of the EC Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the Information Society[11], the private use exemption was regulated at the European level only with respect to computer programs and databases.[12] In fact, the two directives expressly exclude any possibility to make a private copy of a computer program or an electronic database. At the time, the motive of the European legislator behind this decision was twofold. First, reproductions made under the private use exemption of computer programs and electronic databases had gained economic significance for rights owners, who consider private uses as a primary form of exploitation of copyrighted material. Consequently, such reproductions should, to the greatest extent possible, be licensed directly to end-users. Second, encryption technology could already be used to reduce the traditional symptoms of market failure encountered in the analogue world, by making it possible to license and enforce copyright even in cases of mass distribution of copyrighted works. As a small concession to users of computer programs and electronic databases, both directives allow the lawful user to use the product 'in accordance with its intended purpose'.[13] The Computer Programs Directive also permits the making of a single back-up copy of a lawfully acquired computer program.[14]

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11 O.J.C.E. L 167, 22 June 2001, p. 10 - 19.

12 Council Directive of 14 May 1991 on the legal protection of computer programs (91/250/EEC), O.J.E.C. no. L 122, 17/05/91 p. 42, art. 5 and 6 [hereinafter 'Computer programs directive']; and Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, O.J.E.C. of 27/3/96 no L 77 p. 20, art. 6.

13 Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, Official Journal L 122, 17/05/1991 p. 42, art. 5(1); and Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, Official Journal L 077, 27/03/1996 p. 20, art. 6 (1).

14 Computer Programs Directive, art. 5(2); see: Koelman and Bygrave 2000, p. 105.

With the adoption of the EC Copyright Directive, the European legislator dealt with the issue of private use with respect to the remaining categories of works, in both analogue and digital form. This provision was one of the most hotly debated items of the entire Directive. Article 5(2)(b) of the Directive finally gives Member States the possibility to adopt an exception or limitation to the reproduction right:

> 'In respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right holders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned.'

The requirement that reproductions be made 'by a natural person for private use and for ends that are neither directly nor indirectly commercial' clearly excludes any form of commercial copying, be it for legitimate business-related purposes or ordinary 'piracy'. Moreover, article 5(2)(b) does not permit Member States to adopt exemptions allowing 'private' copying by or within business enterprises or other *legal* persons, even if such copying has no commercial purpose. Consequently, the scope of any exemption permitted by article 5(2)(b) is fairly limited, as must be any system of private copying levies directly associated with it.

Another requirement set out in article 5(2)(b) of the Directive concerns the payment of a 'fair compensation' to the rights holder, while taking the application or non-application of technological measures into account. Legal literature now generally agrees that levies, as a form of 'fair compensation' prescribed by article 5(2)(b), cannot serve to compensate right holders for losses incurred by acts not exempted pursuant to this provision. This would be the case for intra-company uses (e.g. back-up copying, archival copying or ephemeral copying), 'private' uses that exceed the scope of the exemption (e.g. peer-to-peer 'file sharing') or acts of piracy pure and simple (e.g. distributing unauthorised copies online or offline). Concomitantly, any levies due pursuant to article 5(2)(b) must relate directly to the media and/or equipment used for such limited purposes, absent of which the levy would not be legitimate.

Member States are mandated by the Directive to tailor the form and level of 'fair compensation' to 'the particular circumstances of each case'. Primary reference point for determining the 'possible' level of such compensation is the 'possible harm to the rights holders resulting from the act in question' or the 'prejudice to the rights holder'. The notion of fair compensation is thereby intricately linked to the notion of *harm* (damage), i.e. the prejudice suffered by a right holder due to acts of private copying. This is a clear departure from the notion of 'equitable remuneration', which is rooted in notions of natural justice and based on the theory, developed particularly in German copyright doctrine, that authors have a right to remuneration for each and every act of usage of their copyrighted works. Whereas 'equitable remuneration' may, therefore, be due in situations where rights holders suffer no (actual or potential) harm at all, Recital 35 clarifies that 'fair compensation' is required only when and if rights holders are (actually or potentially) harmed by acts of private copying. Consequently, one might argue that Member States are under an obligation to provide for compensation only if the likelihood of such harm can be reasonably established.[15] Recital 35 also establishes a *de minimis* rule, by stating that 'in certain situations where the prejudice to the right holder would be minimal, no obligation for payment may arise.' Examples of such

[15] Hugenholtz, Guibault, Van Geffen 2003, p. 36.

de minimis use are 'time shifting' (the recording of broadcasts for later perusal) and 'porting' (copying legally acquired content to other platforms, such as PC's, car stereos or portable media).

Of course, no 'fair compensation' is due at all for the vast quantities of internet-(web-)based content which are downloaded with the implied or express consent of the content providers, and therefore fall outside the scope of any private copying regime in the first place. Recital 35 confirms that the framers of the Directive have attempted to avoid double payment by consumers. No compensation is required 'in cases where right holders have already received payment in some other form, for instance as part of a licence fee'. Therefore, no levy is due for files copied by users of proprietary online services or (other) digital rights management systems. Also, insofar as a work or phonogram is distributed in copy-protected form, and the accompanying end-user license allows for private copying, no compensation is in order. In sum, most copies that end users of copyrighted works produce in practice, either on digital media or digital equipment, are likely either not to cause more than minimal harm to the right holders, or to fall outside the scope of article 5(2)(b) of the Directive altogether.

While article 5(2)(b) of the Directive directs Member States to take the application or non-application of technological measures into account for the determination of the 'fair compensation', article 6(1) and 6(2) of the European Directive prohibit acts of circumvention of a technological measure protecting a work, as well as the business of importing, selling or otherwise dealing with products or providing services which:

(a) are promoted, advertised or marketed for the purpose of circumvention of, or
(b) have only a limited commercially significant purpose or use other than to circumvent, or
(c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures.

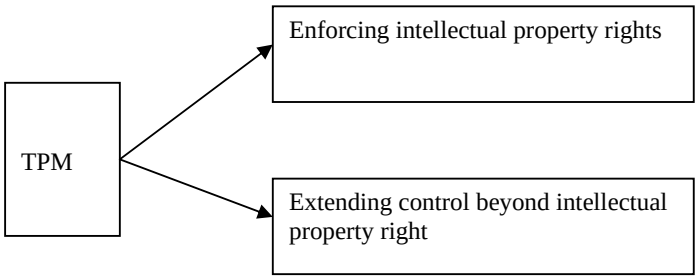
The issue of the intersection between TPMs and limitations on copyright and related rights is dealt under article 6(4) of the Directive on Copyright in the Information Society. It provides that, in the absence of voluntary measures taken by right holders, including agreements between right holders and other parties concerned, Member States must take appropriate measures to ensure that right holders make available the means of benefiting from a certain number of limitations, to the extent necessary to benefit from these limitations and where that beneficiary has legal access to the protected work or subject-matter concerned. However, Member States are given the option, and not the obligation, to adopt similar measures with respect to the private use exemption. Whenever, the reproductions made for private use have already been made possible by rights holders to the extent necessary to benefit from the exception or limitation concerned, Member States may not take any additional 'appropriate measure'.

However, the whole effect of this provision may be further undermined by the fourth indent of article 6(4) of the Directive. It provides as follows: 'the provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.' In practice, most contracts in the digital networked environment take the form of 'take-it-or-leave-it' licences, where users only have the choice of accepting or refusing the terms of the licence presented to them on the Internet.[16]

3. Technical developments

3.1. Technical Protection Measures (TPM)

The term Technical Protection Measure often refers to technical measures that protect against unauthorized access to data. An important example of such a technical measure is encryption ('locking up') of data, which can then only be accessed in combination with a decryption 'key'. This offers some protection, since even if one is able to copy an encrypted file, it is useless when it cannot be opened. However, such TPMs have only a limited functionality in enabling commercial distribution of digital information goods, since the information has to be 'unlocked' (decrypted) at one point or another to be used, and once the information is unlocked, the user can access the information, and can thus typically copy it as well.

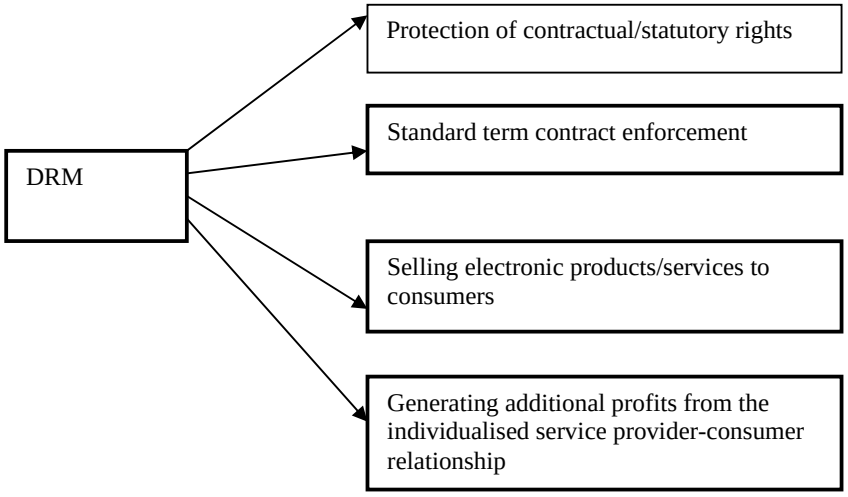


In relation to copyright-protected works the term Technical Protection Measure often denotes a measure primarily aimed at preventing or restricting the reproduction of the protected content (*copy protection*). For this purpose, files are marked in one way or another with data instructing the equipment that it is not allowed to copy the file ('flagging', 'tagging', 'watermarking'). Whereas access protection systems make *all* possible uses – including copying – impossible for unauthorized users, copy protection measures merely prevent copying.[17]

16 Guibault 2002, p. 203.
17 Koelman 2003, §2.2.2.

3.2. Digital Rights Management (DRM)

The terms Technical Protection Measure and Digital Rights Management (DRM) are often used rather indiscriminately. However, these terms should indeed be distinguished. DRM systems are typically able to offer broader functionality than simply protect content against unauthorized access or copying. As the words 'digital rights management' suggest, DRM systems are based on digital technologies that describe and *identify* content, and *enforce* rules set by right holders or prescribed by law for the distribution and use of content.[18] For the further analysis, it is helpful to distinguish the following functions:



Thus, the fundamental difference is that TPMs generally are designed to *impede* access or copying, while DRM systems do *not* impede access or copying *per se*, but rather create an environment in which various types of use, including copying, are only practically possible in compliance with the terms set by the right holders. Therefore, they usually do not *deny* access but rather *manage* access to content by combining technical measures with a payment mechanism. DRM-based business models ensure that consumers pay for actual use of content, and that the content is protected and cannot be accessed by unauthorized users.[19]

[18] In the context of 'digital rights management', the term 'digital' can refer to various aspects: (1) automated management (by digital means) of (2) rights which are specified by digital means with regard to the use of (3) digitally stored content. These aspects are typically – but not necessarily – all present in a single technical measure for a given platform. However, for the purposes of this study it is not necessary to strictly limit the scope of the DRM concept.

[19] Hugenholtz, Guibault, Van Geffen 2003, p. 3.

3.3. Watermarking and fingerprinting

Marking content can be achieved in a transparent manner, but can also be hidden from the user by 'water marking', *i.e.* embedding information in a way that is (nearly) imperceptible to the user, but recognizable by the playback device.[20] With such methods, identification of the work,[21] right holder(s), and licensee, license conditions etc. can be written into the file itself. With 'strong' watermarks, the identifying information embedded in files remains recognizable by equipment after (analogue) copying or tampering with a file. The 'strong' watermarking approach is therefore often complementary to access protection.

Various methods and technologies are used to identify a copyrighted work as such. Even if files are not marked at all, or if such marks have been removed or tampered with, the content may still be recognizable as a particular copyrighted work, much like humans can recognize a particular musical piece or movie just by hearing or seeing it. This technology is called 'finger printing'. Confusingly, the term 'finger printing' is also used to denote a very different DRM-related technology. In some DRM systems the identity of an authorised user of a copy is embedded in that copy, thus facilitating detection of the source of any illegal copying.

4. Application of existing EU consumer legislation

While the digital networked environment offers the perfect conditions for the growth of a contractual culture, the transaction costs associated with the negotiation of every clause of a digital contract remain prohibitive. As a result, shrink-wrap and click-wrap licences are becoming the rights owners' preferred mode of transacting with end-users for the use of their copyrighted works. With the combined use of contract and digital technology, rights owners are now in a position to unilaterally fix the terms of use of their work. Electronic standard form contracts for the use of copyrighted material are often written on the model of the 'shrink-wrap' licence and presented to the user on a take-it-or-leave-it basis. In practice, standard terms appear in various ways on the user's computer screen display. In some cases, the user obtains access to the protected work only once he has given assent, by clicking with the mouse in the appropriate dialogue box or otherwise, to the terms of the on-line screen licence. In other cases, the contract terms are simply made available via a hyperlink located somewhere on the site's home page. For example, the following notice may appear at the bottom of an Internet home page: 'Please click here for legal restrictions and terms of use applicable to this site. Use of this site signifies your agreement to the terms of use'. In principle, standard form contracts are accepted as valid in most European countries, provided that the purchaser of the good or the service is given the opportunity to review the terms of the licence and to give assent before completing the purchase. Of course, like for any other standard form contract, assent may be express or may be implied from the party's conduct.[22]

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20 Cox 2001, p. 3: "Watermarking is the practice of imperceptibly altering a work to embed a message about that work."

21 Examples include the Digital Object Identifier (DOI); the Universal Product Code (UPC), which currently identifies all audio CDs; the International Standard Recording Code (ISRC); and the Global Release Identifier (GRid), which was recently introduced by IFPI / RIAA, see http://www.ifpi.org/site-content/press/20030210.html.

22 Trompenaars 2000, p. 272.

With respect to the on-line distribution of music, the technology used by popular music download sites, such as those of Apple iTunes or On Demand Distribution Ltd. (OD2), typically allow consumers to make three transfers to a portable device, to burn one CD and play the downloaded music an unlimited number of times on a PC. As means of illustration, the Terms of Use displayed on the website of Wanadoo, a partner in the OD2 networked, grants the consumer the following permission:

> 'You agree that the material and content contained in, or provided by Wanadoo as part of, the Wanadoo Service is for your use only and may not be distributed to anyone and you are prohibited from using such content commercially without our permission.'[23]

Not all on-line content distributors are as accommodating to the consumers' expectations as these however. It is not uncommon to find some electronic licences that contain restrictions on use that purport to take away the privileges that copyright law normally grants the user. In fact, in some cases, the only use that would seem permitted would be the private use of a natural person strictly for non-commercial purposes:[24]

> 'Nothing in this publication may, without the prior written consent of the publisher, be communicated to the public or reproduced, including the reproduction by means of print, offset, photocopy, or microfilm or in any digital, electronic, optical or other form or (and if necessary this applies also as a supplement of copyright) the reproduction (i) for the purposes of an enterprise, an organisation, or an institution, or (ii) for purposes of private study or research that are not strictly personal or (iii) for the reproduction in any daily or weekly newspaper or periodical (whether in digital form or online) or in a radio or television broadcast.'

In such circumstances, consumers often lack the practical experience or the relevant knowledge necessary to express full assent to the terms of the standard form contract, as they lack the necessary bargaining power to influence the content of the contract. As copyrighted works are increasingly being distributed on the mass market subject to the terms of standard form contracts, consumers of protected material may be confronted with contract clauses that attempt to restrict the privileges normally recognised to them under copyright law, including the private use exemption. Moreover, as a series of recent cases in France have shown,[25] the sale of tangible digital supports equipped with anti-copy devices, which prevent consumers from making any copy for time- or place shifting purposes, may give rise to consumer protection issues. In the cases submitted to the French courts, the national consumer association "UFC - Que choisir" argued successfully that the sale of a digital support equipped with anti-copy devices without indication that the support may not be suited to play in certain equipment was misleading to the consumer.

Let us briefly consider whether the current European consumer protection law offers consumers sufficient guarantees for transparency in their transactions with digital content distributors and whether it provides effective protection against attempts on the part of content distributors to restrict the scope or the exercise of the private use exemption.

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23 Available at: http://www.wanadoo.co.uk/terms/acceptable_use_policy.htm?linkfrom=terms__terms_selector&link=fsFWA_6_1Link1&article=TERMS_selector_links

24 Terms of use of the Dutch site 'Planet Internet', available at: <http://www.pi.net/planet/show/id=67898/sc=69a579> (site visited on 18 January 2005).

25 See: Appel Versailles (1ère ch., 1ère section), EMI Music France c. CLCV, 30 Septembre 2004, RG n° 03/04771.

4.1. EC Directives on distance contract and electronic commerce

The Distance Contract Directive and the Electronic Commerce Directive apply to both products and services and more specifically address online contracting. Both Directives contain transparency provisions that oblige the supplier to give certain information to the consumer before the completion of the transaction. The Directives also look at so called click-wrap contracts that may accompany a DRM scheme: in a click-wrap contract the consumer must agree to the contractual terms that govern software or a site by pressing a button or clicking on a link. These contracts are typical for online music sites like Apple's iTunes Music Store. The Distance Contract Directive[26] requires that, before the contract is concluded, the consumer be given information on, amongst other things, the supplier's name (Article 4(1)(a)), the main characteristics of the goods or services (Article 4(1)(b) and the total price (Article 4(1)(c). For most products and services, the consumer has the right to withdraw from the transaction without penalty or justification (Article 6(1)). Arguably, the right of withdrawal also applies to click-wrap licenses that accompany goods and services on the Internet. However, article 6(3) of the Directive provides that, unless otherwise agreed to by the parties, the right of withdrawal is expressly removed with respect to contracts for the supply of audio or video recordings or computer software which were unsealed by the consumer, and for the supply of newspapers, periodicals and magazines. As a result, consumers of copyrighted material enjoy, like consumers of any other type of products and services, a certain protection in terms of prior information from the licensor, but benefit from no reflection time once the distance contract is formed.[27] In practice, the terms of use agreement of on-line distributors of copyrighted content, like those of Appel iTunes or the OD2 partners, often stipulate that all sales are final. A 'no-return' policy also applies to unsealed CD's, DVD's or CD-ROM's purchased at a distance.

Consumers of copyrighted material get little additional protection under the new Directive on Electronic Commerce.[28] The Directive's main purpose regarding the formation of contracts is to ensure that the legal system of each Member State allows contracts to be validly concluded by electronic means. To this end, service providers have an obligation to provide certain information prior to the conclusion of the contract and contract terms and general conditions provided to the recipient must be made available in a way that allows her to store and reproduce them.[29] The Electronic Commerce Directive requires that the following information be provided to the other contracting party before the conclusion of the transaction: the name and geographic and electronic address of the provider of the service (Article 5(1) (a)(b)(c)), a clear indication of the price (Article 5(2)), information on which codes of conduct apply and where to consult them electronically (Article 10(2)) and the obligation to make the contract terms and general conditions available in a way that allows the consumer to store and reproduce them (Article 10(3)).

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26 Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts, Official Journal, L 144, 4 June 1997, p. 19-27, art. 2.

27 Guibault 2002, p. 207.

28 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), 17 July 2000, O.J.E.C. L 178/1, art. 9 and ff.

29 Id., art. 10(3).

In the light of the above, one can easily conclude that the obligations set out in the Distance Contract Directive and the Electronic Commerce Directive do not fully meet the information needs of consumers of copyrighted material. Imposing a duty on rights owners to disclose relevant information regarding the TPMs applied to the support or to observe specific formalities at the time of the conclusion of the standard form contract would contribute to reducing inequalities between parties, insofar as it would compensate for the lack of information or experience on the part of the consumer. However, such procedural requirements would not eliminate the risk that rights owners might abuse their economic and bargaining position by making systematic use of licence terms that are unfavourable to consumers.[30]

4.2. EC Directive on unfair contract terms

In principle, the provisions of the European Directive on unfair contract terms cover mass-market licences for the use of copyrighted material, provided that the conditions of application are met. Hence, for the Directive to apply, a first condition would be that the other party to such a licence is a 'consumer' as defined in the Directive, that is 'any natural person who, (…), is acting for purposes which are outside his trade, business or profession'.[31] In other words, the rules established under the Directive may offer some level of protection to physical persons, but they would in principle not apply to other categories of users of copyrighted material, such as small businesses, libraries, archives, educational institutions and the like. By contrast, the section on abusive clauses of the French Consumer Code is said to apply both to 'consumers and non-professionals', an expression which the courts have interpreted rather broadly, so as to include cases where professionals transact within their sphere of activity.[32] Moreover, the general principle expressed in Article 6:233 of the Dutch Civil Code and in Article 305 of the German Civil Code has been recognised to apply not only in contractual relations between a professional and a consumer, but also in relations between professionals. Legal persons and professionals, like small businesses, libraries, archives and educational institutions, would therefore be admitted to challenge the fairness of standard contract terms on the basis of these two general provisions.

Second, the Directive provides that the assessment of the unfair nature of the terms must relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration for the goods and services rendered. The same requirement exists explicitly or implicitly under the national provisions on standard form contracts.[33] However, neither the Directive nor the national legislation gives any indication of what is to be considered as the 'main subject matter of a contract'. A licence term may be deemed essential if it is of such substantial significance that without them the contract would not have been formed or that there would be no proper manifestation of intention. Such essential terms are thus excluded from the definition of a 'general condition' included in a non-negotiated contract, thereby escaping judicial review. In the absence of any relevant court decision on the issue, it is still unclear whether a term that restricts the privileges normally granted to users under copyright law would be considered as pertaining to the main subject matter of the licence.

30 Guibault 2002, p. 252.
31 Directive on Unfair Terms, art. 2(b).
32 Guibault 2002, p. 252-253.
33 French Consumer Code, art. L. 132-1, 7th par.; Dutch Civil Code, art. 6:231(a); and German Civil Code, art. 307(3).

Assuming both that the standard contract is concluded with a consumer and that the term under review does not touch on the essence of the performance, a term will be regarded as unfair under the Directive if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer. The list presented in annex to the Directive is meant to give an indication of the clauses that may be regarded as abusive or unfair. The only clause enumerated in the list that could apply in the context of a licence for the use of copyrighted material, is the one that 'irrevocably bind[s] the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract'. This type of clause relates more to the formation of the contract and to the accuracy of the consumer's assent to the obligations contained therein, than to the fairness of the contractual obligations themselves. As a result, consumers and professionals alike must turn to the open norm laid down in the Directive and in national private law. This principle may be invoked every time that the specific provisions on abusive clauses cannot be applied, because the other party is not a consumer, because the term has been negotiated or because the term under review relates to the main subject matter of the contract. Under both types of provisions, the fairness of a term is assessed by referring, at the moment of the conclusion of the contract, to all the circumstances that surround its conclusion, to the mutually apparent interests of the parties, to the common usage of the trade, as well as to all other clauses of the contract.[34]

A term included in a standard form contract is generally regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the other party. In order to determine whether a licence term that prevents the use of public domain material or that purports to restrict the privileges for users normally recognised under the copyright act is unreasonable or abusive, courts would have to consider all the circumstances that prevailed at the time of conclusion of the contract. Admittedly, the outcome of this type of inquiry may vary significantly from one country to another. Furthermore, the court may come to a different conclusion depending on whether the contested clause pertains to restrict the exercise of a limitation on copyright or the use of public domain material. Unfortunately, no relevant case law can provide us any guidance at this time.

4.3. EC Proposed Directive on unfair commercial practices

The protection of consumers in commercial transactions has been the subject of two green papers and resulted in a proposal for a new Directive on Unfair Commercial Practices. Although it has not been formerly adopted yet, the current text of this Directive reflects much of the current European general consumer protection policy and aims to amend current Directives in this field. It provides a single set of common rules to regulate business-to-consumer practices, both to take down cross-border barriers for companies and give consumers extra protection. It does so by establishing a common, EU-wide framework for the regulation of unfair business-to-consumer commercial practices (notably advertising and marketing), which harm consumers' economic interests. According to the European Commission, the centrepiece of this framework is a general prohibition of unfair commercial practices, based on common criteria for determining when a commercial practice is unfair.

[34] French Consumer Code, art. L 132-1 5th par.; Dutch Civil Code, art. 3:12, 6:233a); BGB, § 157 and German Civil Code, art. 310(3)(3).

For extra legal certainty, this is supplemented by further elaboration of two key types of unfairness, misleading and aggressive practices, and a blacklist of practices, which will always be unfair and are therefore prohibited up-front.[35]

While businesses, including digital content providers in general and DRM operators in particular, are always bound to act according to the principle of good faith, we fear that the proposed directive may have only limited significance in the context of the off-line or on-line delivery of copyrighted content. A practice will be deemed misleading under the proposed directive if it 'materially distorts the economic behaviour of consumers', in the sense that it uses a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise. Arguably, the failure to inform consumers about the application on a digital support of an anti-copy device, which prevents them from making any copy for time- or place shifting purposes, could amount to a misleading practice that would be prohibited under the proposed directive. This was in fact the conclusion of the French court in at least two cases.[36] The question is, however, whether the provisions of the proposed directive add anything to the existing general principles of civil law.

The proposed directive would also prohibit aggressive commercial practices, which cover those practices, which significantly impair the consumer's freedom of choice. Those are practices using harassment, coercion, including the use of physical force, and undue influence. Although it certainly is not excluded that individual digital content providers or DRM operators may engage at times in such misleading or aggressive advertising or marketing, the widespread use of restrictive contractual licences could hardly qualify as an misleading or aggressive practice.

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35 Communication from the Commission to the European Parliament, Brussels, 16.11.2004 COM(2004)753 final 2003/0134(COD), p. 2.

36 Tribunal de Grande Instance de Nanterre, 6e chambre, decision of 2 September 2003, Françoise M./EMI France, Auchan France; Appel Versailles (1ère ch., 1ère section), EMI Music France c. CLCV, 30 Septembre 2004, RG n° 03/04771.

5. Reconciling copyright law with consumer interests

In the light of the above, this section discusses a number of selected key areas where action could be undertaken to ensure that the consumers' interests are better protected in the context of the access and use of digital (on-line or off-line) creative content. To this end, a number of focus points within the scope of activities of consumer organisations have been identified, to serve as the basis for future initiatives.

5.1. Technological protection measures

Technological protection measures (TPMs) can be used to enforce existing copyrights or neighbouring rights. But the application of technological protection measures is not an accessory to the copyright protection. The controller of a technological protection measure is in principle free to impose his own terms and conditions, to restrict uses that are normally allowed under copyright law or to control use of assets that are not subject to intellectual property protection (works in the public domain, facts, mathematical formulas etc.). TPMs can also be used to enforce a controller's own usage restrictions for protected works, which go beyond the provisions of copyright law. Technical developments give content distributors the capacity to exercise a fine-tuned electronic control over the use of works and contents that are subject to intellectual property protection. TPMs allow rights holders to control who accesses and uses which works under which conditions, how many copies are made, if the work is re-distributed, how long a user can read/view/listen to a work etc.

Challenges:
Although TPMs are, according to the European Copyright Directive, legitimate means to protect and enforce intellectual property rights, this should not happen at all cost. It most certainly should not occur to the detriment of consumers and the realisation of traditional copyright law objectives, such as the promotion of innovation, the use of existing works for purposes of research, quotation, private use, etc. Lawmakers should be made aware of the fact that enforcement of intellectual property rights at all cost is a strategy that is most probably neither in the interest of content distributors nor acceptable to consumers. Consumer acceptability, however, is the key to successful TPM deployment. Moreover, perfect enforcement is not always desirable from an information policy point of view. Perfect enforcement can not only discourage creation, but also reduce the use of protected works, the public discourse and the free flow of opinions and ideas, as well as creative competition. If TPMs are designed in a way that consumers refuse to accept them or in a way that is not user-friendly, this could discourage consumers from using protected works. Also, the use of TPMs can touch upon other rights and legitimate interests of consumers, such as privacy and property rights. TPMs have the capacity to implement disproportionately drastic "sanctions", in cases where consumers go beyond the rules enforced by the TPM, such as to disconnect the user's Internet connection or to disable certain functions on his computer.

Goal:
TPMs should be designed in a consumer-friendly fashion. In this context, self-regulatory or co-regulatory initiatives that are developed in co-operation with consumer representatives, the industry and policy makers are an option that should be explored. Also, the viability of consumer-friendly, alternative forms of digital rights management, such as creative commons, should be investigated as well as other technological and business solutions.

Focus points:
Major points of interest in this context are a consumer-friendly design in general, the design of TPMs so that they respond to the needs of consumers with disabilities, as well as hardware and security issues.

Consumer friendly design in general
The use of TPMs to protect copyrights should not impede the use of works by consumers more than necessary. A major aspect in this context is the need to ensure that the application of TPMs does not hinder the normal processing of content, for example because of incompatibilities or because the TPM is not robust enough to work with current and future technologies. Forcing consumers to frequently update their hardware or software on their own initiative risks excluding or discouraging them, for financial or technical reasons, from access to, and use of digital content.

Interoperability is another important aspect, and more specifically the compatibility of the format in which the protected work is delivered with the consumer's hardware and software.

Finally, consumers should receive sufficient information on whether TPMs are used and how do they affect the usability of digital content. Again, information should be distributed in a way that is easily understandable and accessible for the average user. One example is the initiative of IFPI. Consumer organisations are well placed to drive the process of developing a standard for labelling of DRM protected contents.

Self-regulation
There are good reasons to argue that under certain circumstances self-regulation of the private sector could be more efficient, better fit the electronic environment, are more practical to apply on a global level or enhance voluntary compliance and therewith reduce rule-making and enforcement costs.[37] One of the reasons self-regulatory models seem so attractive in certain fields is the wish to stimulate the acceptance of and compliance with rules where traditional means of monitoring and enforcement are less effective or are too expensive. The idea is that the chances for voluntary compliance with rules are better where participants have an own interest in doing so, and/or where people feel that the procedure for enacting rules are fair and balanced. Direct participation in the rule-making process can be a factor to improve responsibility and acceptance.[38]

[37] See extensively e.g. in Perritt 1997; Schulz & Held, p. A-8.
[38] Interesting the analysis in Jensen, p. 540 subsq., with further references.

Responding to the needs of consumers with special needs

For the time being, little is known about the effect of DRM use regarding access to and use of digital content for consumers with special needs, for example elderly people, blind and deaf people, people with mobility impairments and learning disabilities.[39] There are, however, a number of groups that are active in this field, and that have already gained considerable experience, such as the World Blind Union (WBU), the International Disability Alliance (IDA), the American Foundation for the Blind (AFB), to name but a few. A more active involvement of these groups in the process of making TPMs more consumer-friendly is capital.

Hardware and security concerns

Hardware and security issues concern cases where TPMs come in conflict with other software installed on a PC, a situation that can lead to incompatibilities and application failures. Also, where TPMs require an online registration procedure or are remotely controlled, this should not confront consumers with the risk of external attacks. So far, no European legislation obliges TPM users to design TPMs in a way that these measures are secure when applied in the consumers' hardware.[40] TPM users must respect the consumers' property in their hardware and software. Where TPMs cause damages to consumers' property, consumers should be able to hold TPM controllers liable for the damage.[41] Further research should be carried out on the question whether such rules should be best implemented in copyright law itself or if an amendment to consumer protection law would be more appropriate. Further research is also needed concerning consumers' experiences with TPMs in this respect.

Respecting the right to privacy

Furthermore, TPMs should be designed in a way to respect the consumers' right to privacy. In this respect, the general rules on privacy protection apply also for TPMs. According to Article 6 and 7 of the European Directive on Data Protection, personal data can only be collected if this is necessary for a specific lawful purpose and based on legitimate grounds. Unless the consumer has given his unambiguous consent – which requires that he knows that the TPM collects and processes personal data – there must be a specific justification for the collection and processing of personal data. An acceptable justification can be the performance of a contract with the consumer (Article 7 b of the European Directive on Data Protection), compliance with legal obligations of the data controller (Article 7 c of the European Directive on Data Protection) or other fundamental interests of the data controller (Article 7 f of the European Directive on Data Protection). The question is how to monitor and enforce compliance with technical rules. The implementation of Privacy Enhancing Technologies (PETs) may be an interesting route to follow.

Respecting copyright limitations

Another aspect is that TPMs must be designed in a way that the exercise of existing limitations to copyright law, such as the private use exemption, remains possible, notably that users of protected works can benefit from the exceptions in copyright law. There is currently much scepticism as to whether TPMs can be designed in a way to respect the limitations on copyright law. Even if this is not the case, it is still no excuse to override existing limitations. TPMs must respect the copyright limitations, which are meant to safeguard the interests of consumer and meet public information policy objectives (Article 6 (4) of the Copyright

39 Clark 2002; Russel 2003; DPI 2004; Sloan 2001.
40 BEUC 2004, p. 8; and Mulligan, Han and Burstein 2003.
41 Cohen 2002.

Directive). Having said this, examples such as Apple's iTunes demonstrate that DRMs can be adapted in a way to allow for certain usages, such as copying, communicating to the public etc. Further research is needed to examine to what extent TPMs and/or the copyright limitations could be adapted to guarantee that the limitations on copyright will be respected also in a future with TPMs.

The uncertainty around the question of whether a consumer's activity constitutes piracy or not creates another difficulty. No consensus has yet emerged regarding the question of where a consumer's legitimate use ends and where piracy begins. This is also because some limitations in copyright law are formulated in rather vague terms. By contrast, TPMs allow fine-grained control over how a work is used. One example is the aforementioned difficulties in defining what "private copying" actually entail, and whether this is the making of one, five or ten copies. Provided that an agreement could be reached as to what constitutes a private copy, TPMs could be programmed to allow the respective number of copies. Further research would be needed to identify what the possibilities are to reconcile TPMs with the other limitations listed in the Copyright Directive.[42]

One suggestion was to delineate more clearly the boundaries between private and public interest and to carve out unambiguous 'rights' to perform certain permitted activities such as private copying, even when technological measures are applied. This is the approach taken by the German legislator in the context of the implementation act. In practice, this suggestion will probably have limited practical effect, as it meets a number of obstacles. Most importantly, it is unlikely that consumers will turn to the courts to claim the right to make a copy of a CD. Initiating court proceedings involves the risk of financial costs. Moreover, this very aspect makes it unlikely that consumers will be willing to make use of a "right to private copying" even if they had such a right.

An alternative and perhaps preferable option would be to hold users of TPMs liable for respecting the limitations of copyright law. Anyone who uses TPMs should do so within the existing boundaries of the law. Where intellectual property rights of users of TPMs are restricted or non-existent, the enforcement of the anti-circumvention rules of Article 6 of the Copyright Directive would be unjustified. Article 6 of the Copyright Directive in its present version leaves much legal uncertainty in this respect. It should be clarified. It should make sure that only such technological solutions are covered, which have been specifically developed to protect existing intellectual property rights, notably the right to control the making of copies and communication of works to the public. Controlling access to works is not a right that is protected under copyright law. Consequently, technological measures that control access to works should not be protected. Secondly, where copyright limitations apply, TM users should be obliged to make it possible to benefit from such exceptions, through contractual, technical or other means. In case they fail to do so, not only should protection against circumvention be denied, but judges should also have the possibility to impose severe fines. National procedural laws should provide the right for consumer organisations to initiate exemplary proceedings where TPM users do not respect their obligation to make certain uses possible. This would exercise additional pressure on the users of TPMs to find consumer friendly solutions. One occasion to revisit the scope of article 6 of the Directive is the revision of the Copyright Directive, which should occur in 2005. Consumer organisations

[42] In this context, it is worth mentioning that INDICARE will be organising in May 2005 a roundtable discussion to achieve more clarity about the delineation of "fair use" and piracy. The results of the workshop will be published at www.indicare.org.

could represent the consumers' side from an early stage on in the proceedings and suggest amendments to Article 6 of the Copyright Directive.

5.2. Copyright levies

Copyright levy systems have been premised on the assumption that private copying of protected works cannot be controlled and exploited individually. With the advent of digital rights management (DRM), this assumption must be re-examined. In the digital environment, technical protection measures and DRM systems make it increasingly possible to control how individuals use copyrighted works. Rights holders are now in a position to apply such systems to identify content and authors, set forth permissible uses, establish prices according to the market valuation of a particular work, and grant licenses directly and automatically to individual users. Unlike levies, DRM makes it possible to compensate right holders directly for the particular uses made of a work. Where such individual rights management is available there would appear to remain no need, and no justification, for mandatory levy systems.

Challenges:
Where levies coexist with such technical measures, consumers may end up paying twice for the right to make a private copy of a work – once by paying the levy, and once again by paying the right holder for the right to copy the work. Or consumers may end up paying a levy for a work that cannot be copied, for example, a motion picture on a copy-protected DVD. The EC Copyright Directive, which was adopted in May 2001, takes an ambivalent approach towards this issue. Art. 5.2(b) of the Directive attempts to reconcile the existing system of private copying levies with a future of individual digital rights management, by prescribing that in calculating the amount of 'fair compensation' for acts of private copying the 'application or non-application of technological measures' be taken into account. This provision suggests a gradual phasing-out of levies on digital media or equipment, as digital rights management systems enable content owners to control private copying, and set conditions of private use, at their discretion.

Private copies allowed under the Directive must be 'made by a natural person for private use and for ends that are neither directly nor indirectly commercial'. This excludes any form of commercial or institutional copying, be it for legitimate business-related or illegal purposes. The scope of any exemption permitted by Art. 5.2(b) is therefore fairly limited, as must be any system of private copying levies directly associated with it. Levies, as a form of 'fair compensation' prescribed by Art. 5.2(b), therefore cannot serve to compensate right holders for losses incurred by acts not exempted pursuant to this provision, such as intra-company uses, 'private' uses that exceed the scope of the exemption (e.g. peer-to-peer 'file sharing') or other illegal acts. Levies are not intended, as sometimes mistakenly believed, to compensate right holders for acts of illegal copying (piracy). 'Fair compensation' is due only in cases of legitimate private copying.

Goal:
Copyright levies should be maintained only with respect to blank support or recording equipment the primary purpose of which is to make private copying of copyrighted works, and only as long as DRM systems do not offer a viable solution allowing copyright owners to licence their work to consumers.

Focus points:
To preserve the legitimacy and the integrity of the copyright levy system, copyright levies should not be extended to cover all-purpose digital equipment, nor should it be extended to cover acts of file-sharing on peer-to-peer networks. Moreover, copyright levies should be phased-out as soon as DRM technology is available.

No expansion of levies in the digital environment
The levy systems should not be further expanded into the digital environment to cover peer-to-peer activities for example, and it should not be applied to multipurpose digital equipment, such as PC's, printers, and the like. Otherwise, the levy regime would lose its legitimacy since it would have no direct relationship to the media and/or equipment used for the purpose of making a private copy.

Existing levy schemes are rooted in notions of contributory liability of equipment manufacturers and traders. For this reason, most levy schemes are limited to equipment or media the primary use of which is to reproduce copyrighted works. How then to deal with multipurpose technology, such as personal computers and other digital equipment? In practice, PC's are used for a wide variety of purposes, many of which are irrelevant from a copyright perspective, such as word processing. Even if computers and their peripherals are used by many consumers for private copying of protected content, it is clear that this is not their primary use. Indeed, the *raison d'être* of the computer lies in its being a universal apparatus that can be programmed to perform just about any task imaginable. Seen in this light, legislatures and courts in Member States should think twice before 'automatically' expanding existing analogue levies to digital media or equipment.[43]

Applying levies to such general-purpose machines would, in our opinion, be unjustified and might have unwanted economic and social consequences. Levies on PC's or hard disks would no longer reflect the contributory liability rationale on which the levy system is based. It would also inevitably lead to further expansion of levies onto other memory-equipped hardware, such as radio and television sets, digital cameras, mobile telephones, digital watches, et cetera. In the end, an increasingly large number of users would end up paying a 'copyright tax' without actually using copyrighted content. Large numbers of consumers would be cross-subsidising a relatively limited group of 'private copiers.' Moreover, such an all-encompassing levy scheme would be perceived by many users as an 'unlimited license to copy'. We predict that such an expansion would eventually undermine the copyright system as a whole. Following a near-total 'levitation' of the copyright system, exclusive rights would effectively cease to exist. Right holders would instead become totally dependent on remuneration rights collected by collecting societies.

As mentioned in subsection 2.2 above, no levy should be imposed for intra-company uses (e.g. back-up copying, archival copying or ephemeral copying), 'private' uses that exceed the scope of the exemption (e.g. peer-to-peer 'file sharing') or acts of piracy pure and simple (e.g. distributing unauthorised copies online or offline). Any levy raised to cover such acts would be illegitimate.

[43] Hugenholtz, Guibault, van Geffen 2003, p. 37; Peukert 2004, p. 756.

Phasing-out levies

Where levies coexist with such technical measures, consumers may end up paying twice for the right to make a private copy of a work – once by paying the levy, and once again by paying the right holder for the right to copy the work. Or consumers may end up paying a levy for a work that cannot be copied, for example, a motion picture on a copy-protected DVD.

How then should we take 'account of the application or non-application of technological measures'? Since the language of article 5(2)(b) of the European Copyright Directive and its corresponding recitals offer little guidance in establishing the true meaning of the phase-out provision, we have attempted to come up with a sensible and practicable interpretation, which might be suitable for implementation by the Member States. What we propose is not to engage in any attempts to measure the *actual* 'application or non-application of technological measures' or 'degree of use' of such measures. We believe that such an undertaking will prove to be a fruitless and frustrating exercise, in view of the non-linear relationship between content, technical protection measure, media, equipment and levy, and absent any baseline to measure the 'degree of use' against it. Instead, we recommend a more sensible and workable interpretation, which is inspired by economical and practical considerations, and which is supported by the recitals preceding the Directive. In our proposal, levies are to be phased out not in function of actual use, but of *availability* of technical measures on the market place. The phasing-out of levies should be a decision based on technology assessment.

In our interpretation, technological protection measures are 'available' if and to the extent that they can be realistically, and legally, applied in the market place. Factors to be assessed might include: upfront costs to producers and intermediaries; incremental costs or savings for consumers; consumer friendliness and acceptance, as reflected e.g. in market share; incorporation of PET's in DRM systems; accessibility of DRM protected content by disabled users and users with special needs; et cetera. We propose that Member States vest the authority to set rates and designate media and equipment in a public body, which is competent to evaluate and adjust levy schemes and rates on a regular (e.g., annual or bi-annual) basis. Indeed, in several Member States such flexible mechanisms already exist or are in the making. A decision to phase-out levies for certain media or equipment would, most likely, be taken step-by-step.

Efforts should be made towards the appointment of public body, either at the national or the European level, entrusted with the task of keeping track of the evolution and the availability of DRM systems on the market, as well as setting rates and designating media and equipment subject to the payment of a fair compensation. This body should be competent to decide if and when levies should be progressively phased-out.

5.3. Standard form contracts

Ideally, if the market is allowed, parties will certainly be able to work out appropriate arrangements with due attention to the specific features of the acts covered by the exceptions and limitations on copyright.[44] In principle, standard terms significantly lower the transaction costs associated with the mass distribution of works, in that they save firms and their customers the cost and trouble of negotiating the terms of each contract individually. As

[44] Ficsor 2002, p. 561.

such, they should be recognised as valid and should be enforced. In practice, most contracts in the digital networked environment take the form of 'take-it-or-leave-it' licences, where users only have the choice of accepting or refusing the terms of the licence presented to them on the Internet. In other words, there is no guarantee that the parties will ever be able to 'individualise' their contract in a manner that takes due account of 'the specific features of the acts covered by the exceptions and limitations' so that everyone is better off.[45]

Challenges:
The problem lies in the fact that these licences may contain restrictions on use that go far beyond the bounds of copyright law, often to the detriment of the consumer. Moreover, studies have shown that the rules on copyright and the general limits on freedom of contract, including consumer protection law, prove insufficient to ensure that the legitimate interests of users of copyrighted material are taken into account in copyright licensing agreements.

Goal:
The formation and content of standard form contracts concluded in the context of digital content delivery should be regulated so as to enhance the fairness of terms and the consumers' confidence.

Focus Points:
Presumption of unfairness of restrictive licence clause
To limit the use of such potentially unfair licence terms, one option could be to extend the regulations concerning unfair consumer contract terms to cover copyright matters. For instance, a term included in a standard form contract could be presumed unfair if it departs from the provisions of the copyright act. This provision could be incorporated into the 'grey' list of contractual clauses that are presumed unfair under consumer protection law, list that derives from the Directive on unfair contract terms.
The suggestion to include, in the 'grey' list of the European Directive on unfair terms in consumer contracts, a presumption of unfairness of a term that derogates from the copyright act is actually inspired from the German legislation on unfair contract terms. Indeed, Article 307(2) of the German Civil Code specifies that 'in doubt, an unreasonable disadvantage is to be presumed, when a term is incompatible with the rationale behind the legal provision from which it differs; or when a term restricts the essential rights or obligations that flow from the nature of the contract to such an extent as to endanger the achievement of the contract's purpose.' Whether the fact that a term deviates from a legal provision is an indication of an unreasonable disadvantage depends, of course, on the nature of the relevant legal provision. A presumption of unfairness would have the advantage of having a broad application, since it would not be limited to a certain number of specific limitations. One inconvenient with this option is that it would only apply to consumers, that is 'any natural person who, (…), is acting for purposes which are outside his trade, business or profession'. It would in general not benefit legal persons and professionals like small businesses, libraries, archives and educational institutions that find themselves in a weaker bargaining position, unless the national law of the Member States would expressly provide so.

[45] Guibault 2002, p. 203.

Development of codes of conduct
Measures should be undertaken to encourage the development and acceptance of codes of conduct among copyright holders, DRM operators, Internet providers and the like, which would promote the adoption of fair contractual terms.
The Directive on electronic commerce already promotes the adoption of codes of conduct in relation to the conclusion of electronic contracts and the notice and take-down procedures elaborated with respect to the liability of on-line intermediaries. An additional aspect of this self-regulatory mechanism could deal with the issue of on-line contracting on copyrighted material. Such a code of conduct could promote the adoption of a clause written along the following lines: 'Every use of the work falling outside the scope of the copyright act requires prior written authorisation from the copyright owner. This applies in particular with respect to the reproduction, adaptation and communication of the work on an electronic system.' Such a clause would have the advantage of giving a clear indication to the user of the bounds within which he may make use of the work, since he would only have to refer to his national copyright act to know the extent of his action. Moreover, it is not inconceivable to think that a contractual clause couched in user-friendly terms might generate greater respect among users than a very strictly worded prohibition.

5.4. Development of DRM systems

While the marketing of tangible goods is based on the actual transfer of ownership, intangible goods are not sold in the same way. Instead, new solutions to 'packaging' and marketing information are needed. Using DRMs, service providers can send targeted content to subscribers based on geographical area, market segment, or personal preferences.[46] This also means, however, that providers of electronically controlled services can exercise considerable influence over market structures, competition, and individual access to and use of content. Operators of such services can determine who uses or accesses which content under which conditions.

Challenges
DRMs affect the individual user of content in his position as a consumer. DRM is also about marketing contents to consumers. From the perspective of consumers, this raises a number of questions. One of them is whether DRM-controlled products generally meet consumers' expectations. Where the application of DRMs affects the functionality and usability of the thus protected content in a way that the consumer cannot use it according to his expectations, the DRM in place could be said to conflict with legitimate consumer expectations. Examples of such a practice are the cases where consumers purchase a copy-protected CD and are not able to play it (as it is possible with other CDs) in the CD player of the car radio, or where consumers cannot rip the contents of a CD to make MP3 files for their MP3 player. The question is to what extent such expectations are legitimate and worthy of protection, with the consequence that consumer protection law should apply.

As a general rule, a consumer may expect a product to have certain characteristics that have been either contractually agreed upon or that are in conformity with what can be customarily expected from a product. For example, courts in France and Belgium have found that the ability to play a CD on different devices constitutes such a legitimate expectation. In such circumstances, and upon failure from the service provider to inform consumers properly, a

[46] O'Driscoll 2000, p. 14.

consumer may have the right to return the product and obtain a refund, since the product is considered defective.[47] However, for the time being there is only little experience with the application of consumer protection law in DRM cases. More research is needed to assess whether consumer protection is suitable to protect legitimate consumer expectations regarding their consumption habits of digital content.

Another question is to what extent general consumer protection law is able to protect also far-reaching public information policy objectives and long-term goals. Obviously, it is also a political question to decide under which conditions the control of certain forms of consumptive uses is still fair. Arguably, there are situations in which it is, from a social and an information policy point of view, not desirable that DRMs prevent certain uses or access to protected content. In this context, it should be noticed that DRMs are not only used in connection with digital music, but also with other contents, such as news products and broadcasting (pay-TV).[48] Particularly with broadcasting products, there are a number of public information policy objectives relating to the broad availability and accessibility of such content. In this context, the traditional categories of permissible uses under copyright law are not very helpful from a social and public information policy point of view. Having said this, as it currently stands, legislative interference would seem premature, for a lack of sufficient information regarding the consumer use of digital content, the way the competitive the market for DRM protected products and services will evolve, and how responsive services will be to consumer demand and preferences.

Goal:
DRM protected contents or services should meet the legitimate expectations of consumers. Accordingly, the conditions should be given for a competitive market for such products and services, so that consumers are offered a choice from a range of different products and services and can make a decision for the product that meets best the consumers' expectations concerning quality and price of the product.

There are different ways to promote the realisation of this goal. One way is to perform representative and independent consumer surveys and evaluate the outcome accordingly. In addition, market developments should be monitored closely, as the market is a discovery mechanism, too. Arguably, consumers are the ones who should decide what forms of usages are most important to them, and where they consider terms and conditions offered to be unfair.

Current market trends suggest that DRMs will be the basis for a range of new electronic services based on content, and that these developments have the potential to lead to more differentiated and secure exploitation schemes for electronic content that consumers find attractive and useful. In a functioning market place, it is in principle in the interest of service providers to offer services that correspond with consumer's expectations and demand. DRMs can allow rights holders to further differentiate existing rights and, in so doing, promote the creative industry and dissemination of such contents. DRMs give the technical possibility to anticipate user interests and customise DRMs in a way that provides consumers with a range of differentiated choices. The services dealing with digital music, for example, differ considerably in the permissions they grant, concerning the number of CD burns per purchase, whether CD ripping, excerpting and sampling is allowed or not, whether format conversion is

47 Extensively, INDICARE, State of the Art Report, p. 118-119.
48 Helberger, Controlling Access to Information, to be published.

allowed or not, whether sharing is allowed etc.[49] In addition, DRMs can be used to price differentiate, where downloading a song with the possibility to make five copies would cost less than downloading a song with the possibility to make an unlimited number of copies etc. The precondition for offering choice and diversity to consumers is a functioning market place.

Focus points

Competition

The private management of an individualized relationship between service providers and consumers can influence the chances of rival service providers of gaining access to consumers, just as it can influence the subscribers' willingness or ability to switch to a more competitive offering. In other words, the operator of a DRM system can occupy a gateway position for access to the consumer base. To give but one example: Apples iTunes. iTunes operates an online music download service, using Apples proprietary DRM standard FairPlay that can only be processed by Apples iPod, and not by any other music player. Apple does not licence FairPlay to competing download service providers either. Apple competitors that wish to access consumers who have bought an iPod may find it difficult to sell services to those consumers, unless these consumers are willing to buy an additional MP3 player that can play music in the format of the competitor. In turn, the ease with which consumers can switch between the services offered by one of iTunes competitors will probably influence their decision to do so. Factors that may be relevant for them are the compatibility of the two services with the MP3 player they have (technical lock-in), whether they are bound to a provider by a long-term subscription contract or can terminate the contract any time (contractual lock-in), whether they can afford to subscribe to both services at the same time and, last but not least, whether they have sufficient information about the services available to them so that they can make an informed decision (transparency).

Technical lock-ins

Probably the most effective and viable way to deal with technical lock-in situations is standardisation. This is not to say that interoperability solutions are always beneficial.[50] Mandated interoperability solutions could stifle innovation and discourage investment. To give one example, owners of the Sony Playstation certainly profit from the fact that Playstation is competing with the Microsoft X-Box, not only in the field of hardware, but also by producing more and more attractive games. One may wonder whether Microsoft and Sony would invest the same effort if their game consoles were compatible. In other words, the interoperability approach could remove important incentives to invest in ever more advanced technologies and new applications. Standardisation could have the effect of firmly establishing standards that are technically not optimal, but are the result of a political decision. Also, the experiences gathered in other fields, such as the pay-TV sector, demonstrate that the practical difficulties of enforcing interoperability can also be considerable. One aspect that makes interoperability enforcement so difficult is the fact that interoperability solutions will often have to be enforced against the will of the incumbent, provided he has chosen this particular (proprietary) standard for strategic reasons. For example, in the case of DRM, control over a dominant conditional access standard can be an effective means of monopolising large parts of the service market.

49 Mulligan, Han and Burstein 2003; Stiftung Warentest 2004.

50 A concise overview of the different economic arguments is given in Van Geffen, De Nooij, Theeuwes 2002, p. 55-64.

On the other hand, if the devices were compatible, more consumers that have the iPod could buy songs from Real Networks, Musicload, AOL, to give but some examples, and thereby stimulating the demand for more services from different sources. Also, more third party service providers could feel inclined to offer services that are compatible with both platforms. It is also unclear how much innovation consumers are willing to support. Will consumers constantly buy the newest hardware or software updates? Or will the majority of them be content with durable and rather easy to use devices? The decision of whether or not to impose interoperability[51] is, thus, also a question of policy objectives for each sector.[52] Arguably, from the point of view of consumers, consumer interests may be better served if consumers were to have access to a broad range of information services without the need to invest in ever new hardware, rather than to profit from the most innovative and sophisticated technology. This would be an argument in favour of pushing DRM interoperability where competition and general public interests require so.

Contractual lock-ins

Examples of contractual lock-in situations can be found in pay-TV, where DRM is used to protect, inter alia, the remuneration interest of pay-TV providers. In this context, the duration of the subscription contract is important. Binding consumers to long-term subscription contracts, for pay-TV (usually twelve to twenty-four months) may have a negative effect on their mobility and willingness to switch to a competitor before the end of their initial contract. Further research is needed to determine how long the duration of a contract must be before it discourages a consumer from entering into a second contract. Subscription contracts frequently contain very far-reaching[53] provisions[54] about their automatic extension that are not always easy to detect. Contractual conditions that 'sanction' a termination of the contract can also have a discouraging effect. Examples include an obligation to return a set top box at the end of the contract, or the loss of an email address. Here, terminating the contract has the additional consequence of effectively barring consumers from receiving any digital, access-controlled or other information services before they have invested in new equipment and/or services. Such contractual conditions may be legitimate, reasonable[55] and common in other sectors (e.g. mobile phone subscriptions), but they can prevent competing providers of pay-TV services to reach the critical mass of consumers necessary to render their service economically viable.[56] On the other hand, music download services via the Internet usually do not require subscription or long-lasting contractual commitments. Here, the problem of contractual lock-ins will be less relevant.

Transparency

An important factor for consumer choice is information about what is on offer under which conditions and for which prices.[57] This is the aspect of transparency. In the telecommunications sector, it is an acknowledged fact that functioning competition and consumer choice between different operators depend on the availability of adequate service

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51 This can also be the general obligation to make systems or services interoperable or compatible, without actually deciding on one particular standard.

52 See also the comprehensive discussion in Larouche, Competition Law and Regulation, p. 382-388 and 388-398.

53 See e.g. BBC World, Terms and Conditions, No. 2 (Terms): 'The Agreement shall be automatically extended for further periods of twelve months, subject to payment of the Subscription by the Subscriber, unless terminated by either party giving to the other party not less than fifteen days written notice to expire on the last day of the then current term.'

54 See: http://www.canalplus.nl: Note in the small print that the contract must be terminated by registered letter.

55 See e.g. Bakos & Brynfolfsson 2000, p. 15.

56 See Shapiro 1999, p. 8; Shapiro notes that eventually exclusivity provisions can work against the first mover, namely if a second entrant is sufficiently strong and consumers decide to enter into an exclusive relationship with him, p. 10.

57 Fritsch & Wein & Ewert 1999, p. 294.

information.[58] It is not sufficient that consumers are free to switch between different services and interoperable platforms; they must also be able to access information about the choices available to them. For consumers to be able to compare terms and conditions and choose the service that offers the most attractive conditions to them, they need answers to the following questions:

- Are DRMs used?
- How are DRMs used and how do they affect the usability of works (are they used to collect personal data, do they allow private copying, forwarding, sampling, etc.)?
- What are the terms and conditions governing DRMs?
- Who is the operator of DRMs? How to contact this operator?

Imposing a duty on rights owners to disclose relevant information regarding the TPMs applied to the support or to observe specific formalities at the time of the conclusion of the standard form contract would contribute to reducing inequalities between parties, insofar as it compensates for the lack of information or experience on the part of the consumer. European consumer protection law contains relatively elaborate provisions to ensure transparency, obligating service providers to give certain information to the consumer, such as the service provider's name,[59] the main characteristics of goods and services[60], the price,[61] and the obligation to make the terms and general conditions available in a way that allows the consumer to store and reproduce them.[62] Those obligations also apply to service providers that distribute DRM protected contents or services. Furthermore, where a service provider fails to supply the consumer with the information necessary to take an informed decision, such behaviour could constitute misleading behaviour in the sense of Article 7 (1) of the proposed Unfair B2C Commercial Practice Directive. In a recent court case in France, the judge found that insufficient labelling of a CD, indicating that DRM is used, would constitute misleading behaviour.

The aforementioned provisions are general consumer protection law provisions, and they are not specifically drafted with DRMs in mind. Further research needs to be done whether existing provisions are sufficient to create a satisfactory degree of transparency, and if not what additional initiatives might be needed. Some inspiration can be derived from a US proposal for Digital Media Consumers' Rights Act, requiring manufacturers to inform

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58 Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, 24 April 2002, OJ L 108, p. 51 (Universal Service Directive)

59 Article 4 (1)(a) of the Distance Contract Directive; Article 5 (1) a-c of the E-Commerce Directive. For a concise overview, see INDICARE, p. 51-56.

60 Article 4 (1)(b) of the Distance Contract Directive.

61 Article 4 (1)(c) of the Distance Contract Directive; Article 5 (2) of the E-Commerce Directive.

62 Article 10 (3) of the E-Commerce Directive.

consumers on what kinds of uses are allowed and on which platforms.[63] A provision in the German Copyright Law goes in a similar direction.[64] Further research should also be done to assess what information exactly should be provided to consumers, and how much information is useful.

Another question is how to provide consumers with an easily accessible overview of the conditions of different services, so that they can actually compare the terms and conditions of each service and whether these are attractive to them.

63 The draft of the Digital Media Consumers' Rights Act is available at: http://www.house.gov/boucher/docs/dmcrahandaout.htm .

64 Article 95(d) of the German Copyright Act.

6. Summary

The previous sections have given an overview on the subject matter and the different issues involved. To summarise, some suggestions are given below of how consumer organisations could effectively contribute in realising the protection of consumer interests in a future with DRMs.

1. Participation in the regulatory process

Revision EC Copyright Directive

Consumer organisations should actively participate in the relevant legislative processes and consultations regarding the elaboration of a proper legislative framework underlying the deployment of TPMs. One of the most important legislative processes coming-up shortly is the revision of the EC Copyright Directive, pursuant to article 12 of the Directive. In this context, it seems desirable to clarify the scope of the Directive, so that TPMs are not used to the detriment of legitimate consumer interests. More specifically, consumer organisations should urge the European Commission to reassess the inter-relationship between the exercise of the private use exemption and the application of technological measures, pursuant to articles 5(2)(b) and 6(4) of the Directive. In view of the social importance of allowing consumers to make a small number of copies (3 to 5) of protected works for private purposes, the adoption by Member States of appropriate measures to ensure that right holders make available the means of benefiting from the private use exemption should not be left as an option, but should be made mandatory. Legal protection of technological measures under copyright law should only reach as far as technological measures are being used to protect intellectual property rights. The legal protection of technological measures under copyright law should not apply to TPMs that restrict uses that are exempted from copyright or that restrict access to/use of public domain material. Only such technological solutions should fall under the anti-circumvention rules, which have been specifically developed to protect existing intellectual property rights, notably the right to control the making of copies and communication of works to the public. Users of TPMs should be obliged to inform consumers on whether TPMs are used and how they affect the usability of digital content. Information should be distributed in a way that is easily understandable and accessible for the average user. Consumer organizations should have a right to appeal if TPMs users fail to make TPMs compatible with copyright law

Whereas Member States are under no obligation to take appropriate measures to ensure that right holders make available the means of benefiting from the private use exemption if works are made available to the public interactively on agreed contractual terms, consumer organisations should also make sure that the rules on contract law and consumer protection law are sufficient to protect consumers in their on-line transactions with content providers. Hence, consumer organisations should urge the European legislator to regulate the formation and content of standard form contracts concluded in the context of digital content delivery, so as to enhance the fairness of terms and the consumers' confidence.

Specific rules on consumer protection regarding DRMs

Finally, there are good arguments to put forward in favour of a more general consumer protection agenda concerning DRMs. Some important points on such an agenda could be that DRMs must be designed and applied in a way that they do not conflict with legitimate rights and interests of consumers, notably the right to privacy, contractual autonomy and property. The use of DRM should not hinder the normal processing of content, for example because of incompatibilities or because the TPM is not robust enough to work with current and future technologies. TPM users must respect the consumers' property in their hardware and software. Where TPMs cause damages to consumers' property, consumers should be able to hold TPM controllers liable for the damage. Furthermore, DRM design must respond to the needs of consumers with special needs in order to prevent social exclusion.

Phasing-out copyright levies

A corollary issue to the reassessment of the inter-relationship between the exercise of the private use exemption and the application of technological measures, and to which consumer organisations should give attention, concerns the possible phase-out process of copyright levies. The phasing-out of levies should be a decision based on technology assessment, more specifically on the 'availability' in the market place of TPMs/DRMs that allows rights owners to individually licence and charge for the use of their work. One of the criteria of the 'availability' of such systems is the consumer acceptability. Consumer organisations occupy a key position with respect to the collect of information on this issue.

Interoperability

There are different initiatives involved in finding interoperability solutions for DRMs, such as the OMA alliance. Consumer organisations are in a particularly good position to represent the interests of consumers in these discussions.

2. Monitoring

One major problem is the monitoring and compliance of TPMs with legitimate consumer rights and interests. In this respect, consumer organisations could play a crucial role. There is already a set of specific and general laws that protect legitimate consumer interests in being able to perform certain uses that are exempted from copyright protection, legitimate expectations of consumers in the quality and integrity of products and services they purchase, privacy and property of consumers, transparency, etc. It is disputable, and to a large extent also still unclear, to what extent these initiatives are applicable and effective in protecting consumer interests in a TPM/DRM environment. Another question, however, is the question of monitoring TPM/DRM users whether they act in compliance with existing laws. Consumer organisations in France and Belgium have launched first initiatives to submit TPM/DRM users to judicial review, by initiating proceedings in front of national courts. This approach is intended to:

a) Stimulate the awareness of the public in general, and consumers and DRM/TPM users in specific for the need to obey the existing legal order;
b) Test the effectiveness of copyright law and general consumer protection law to achieve a fair balance between the interests of consumers and TPM/DRM users;
c) Represent consumer interests, where consumers will not or cannot do so themselves.

This requires, however, that national procedural laws foresee possibilities for consumer organisations in doing so.
National procedural laws could provide, where this has not already happened, for the possibilities for consumers to become actively involved, and such involvement could be encouraged.

3. Creating awareness

At the present stage, little information is known about the effects of DRMs on consumer rights and interests, and about the potential of the technology itself or the underlying business models to address these matters. The level of awareness among industry players, law- and policy makers, but also among consumers themselves for the consumer dimensions of DRM is still very low.

To be effective and taken seriously, initiatives in this field must be based on solid information. Consumer organisations are well placed to collect information on the effects of DRM use for consumers and to create more awareness for the consumer dimension of DRMs. They could contribute to the process of improving the environment for consumers by testing consumer friendliness of services using DRM. Possible criteria to be taken into consideration concerning the friendliness of particular services could be the following:

a) the consumer friendliness of the design,
b) whether they observe the needs of consumers with special needs;
c) the presence of any hardware or security problems;
d) the price;
e) the privacy policy;
f) respect for limitations on copyright;
g) the enforcement of contractual terms;
h) the uses made possible;
i) the support for interoperability solutions; and
j) transparency.

Consumer organisations could then make the results publicly available, seek the dialogue with representatives of consumers with special needs, take part in the dialogue regarding where legitimate use ends and where piracy begins, and develop an own point of view.

Issue awareness campaigns for consumers, making consumers aware of what DRMs are, what benefits they have and how they affect the usability of content.

There is need for a broad dialogue around what legitimate consumer expectations are with respect to DRM protected content. This dialogue should involve the consumers themselves, as well as industry representatives and policy makers. Can a consumer legitimately expect to be able to play a CD on different devices, rip the content of a CD, sample a piece of music, play a movie across national borders, etc? Consumer organisations are in an excellent position to drive the process of identifying legitimate consumer expectations and communicating them to the industry, and the policy and lawmakers.

4. Transparency

Transparency is a crucial precondition for a functioning competition and for allowing consumers to choose the services that offer, in their opinion, the fairest terms and conditions. Only where DRM-controlled products and services are clearly labelled, do consumers have a realistic choice between DRM-controlled and alternative business offers. Where DRM-controlled services are forced to compete with non-DRM-controlled services, this may stimulate the former to pay more attention to consumer acceptability issues.

When a DRM is in place, this aspect of transparency concerns the question of how the DRM affects the use of that particular content or service. Furthermore, it would be helpful if consumers were able to get information about the conditions the DRM enforces, and how to contact the DRM operator.

In this respect, self-regulatory models are interesting. One example is the initiative of IFPI.[65] Consumer organisations are well placed to drive the process of developing a standard for labelling of DRM protected contents.

Consumer organisations can also play an important role in enhancing transparency, and thereby improving the chances of consumers to make informed decisions, and stimulating a competitive market place. While existing consumer protection law foresees various transparency obligations for service providers, including such that use TPMs/DRMs, those provisions are little effective where consumers find it difficult to access and, most importantly, compare the information provided.

5. Research

Still, there is a considerable lack of knowledge as to how TPM/DRM use affects consumer interests. Further research is needed in fields such as:

a) Hardware and security concerns involving DRMs, and how to best address them.
b) How 'fair' are the business rules enforced in the major DRM-based services in Europe?
c) How to reconcile the interest in TPM use and the existing limitations in copyright law?
d) What are legitimate and protection-worthy consumer interests?
e) Establishing the accuracy and effectiveness of general consumer protection law to protect legitimate expectations of consumers.
f) How TPM/DRM operators impede the functioning of competition?
g) What information do consumers need in order to make well-informed purchase decisions?

Consumer organisations could stimulate the drafting of a comprehensive research agenda.

65 See: http://www.ifpi.org/site-content/press/20020917.html

6. Encouraging self-regulation

Since the market for digital creative content is still in an early phase of development, self-regulatory codes are particularly important because too often primary legislation is not equipped to keep up with constant developments. Self-regulation should serve as a complement to existing laws, jointly elaborated by all parties in the sector. Consumer organisations could participate in the elaboration of different codes of conduct, which could address the following topics:

a) Standardisation;
b) Interoperability;
c) Standard form contracts;
d) Consumer friendly design of DRMs;
e) Consumers with special needs;
f) Labelling;
g) Development of TPMs and DRMs compliant with copyright law.

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