



The European Consumers' Organisation

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Contact : Cornelia Kutterer
Email : cku@beuc.org
Lang : EN/FR

Digital Rights Management

OPENING STATEMENT

This is the BEUC position on Digital Rights Management. It was prepared in order to set out a clear consumer perspective on the issue. Too much discussion on DRM focuses on the protection of right holders, with the implication that consumers may have only those “rights” that are accorded to them by contract or license or by very limited “exceptions” permitted (but not mandated) by law. We reject that approach, and insist that consumers must have certain clear rights in the digital environment, rights that must be respected by right holders.

Bureau Européen des Unions de Consommateurs, Avenue de Tervueren 36, bte 4, B-1040 Bruxelles
Tel: +32(0)27 43 15 90, Fax: +32(0)27 40 28 02, consumers@beuc.org, <http://www.beuc.org>

Europäischer Verbraucherverband
Europese Consumentenorganisatie
Organización Europea de Consumidores
Organização Europeia de Consumidores
Organizzazione Europea dei Consumatori

Neytendasamtök Evrópu
Európai Fogyasztók Szervezete
Evropska potrošniška organizacija
Den Europeiske Forbrugerorganisasjonen

Euroopan Kuluttajaliitto
Europejska Organizacja Konsumentów
Ευρωπαϊκή Οργάνωση Καταναλωτών
Den Europæiske Forbrugerorganisation
Den Europeiska Konsumentorganisationen

I. Introduction

The arrival, and veritable explosion, of information and creative material in digital form has created many new possibilities and challenges. This paper deals with one of those challenges, Digital Rights Management (or DRM), the process by which right holders to digital material will seek to exercise usage rules and ensure that they are respected.

BEUC sees the challenge of DRM in a different light – how best to balance in the public interest the rights of right holders and consumers in the digital environment. DRM is - in the long run - essential for consumers as it is for right holders. Consumers will not gain from an environment in which commercial piracy can flourish or where the rights of right holders are not respected.

DRM has the potential to deliver the following outcomes:

1. A wider range of choices for consumers to access and use digital material in a wider number of ways.
2. Better and more effective means to combat commercial piracy and unauthorized file-sharing.
3. More information for right holders about consumers' use of digital material.
4. More control for right holders over the use by consumers of digital material – to limit uses that are currently legitimate and/or to support and copper fasten existing restrictions that are unjustified.

The first outcome above is potentially good for consumers. The second outcome is presumably neutral to good but could be very bad if the wrong means are used. The third would be potentially bad, e.g. in terms of privacy, and the fourth bad.

The challenge is to find an appropriate balance between rights holders and consumers in the digital environment.

In the High Level Group on DRM (HLG), a limited number of stakeholders¹ from the e-content value chain and chaired by Commissioner Liikanen, a consensus was reached on the issue of interoperability but BEUC could not and would not support the other two papers – on migration to legitimate services and on levies.² For these two papers we object both to their content and also to their omissions. Both papers reflected only an industry viewpoint; neither accorded any respect to the notion that consumers could have or should have any rights or ownership in relation to digital material. The sub-text of both papers seemed to imply that DRM issues should take precedence over all other considerations.

Therefore, at least one objective of the High Level Group was not achieved, that is, to address the issue of consumer acceptance and trust in the light of an assessment of the application of DRM.

¹ Members of the HLG on DRM included: GESAC, IFPI, Vivendi, Eurocinema, FEP – Federation European Publishers, BBC, France Telecom, Vodafone, Fast Web, Philips, Nokia, Alcatel, Hewlett Packard, New Media Council and BEUC.

² High Level Group on Digital Rights Management, Final Report March – July 2004.

II. DRM Technology, Business Models, and Consumer Demand

DRM has the potential to give right holders of digital material greater control over that material than is available for non-digital material. DRM systems can be attached to copyrighted works to monitor and control access and/or use of these works. Different technologies such as encryption, marking, rights expression languages, identification systems, and trusted systems can be used to specify and automatically enforce contractual conditions in relation to works.

From a business perspective, DRM allows more flexible and differentiated product offerings. New business models such as time-limited 'rentals', pay-per-view, pay-per-listen, subscriptions, or usage-metering are envisioned and deployed.

BEUC observes this "flexibility" with some reservations. The current course of DRM development seems to aim at creating a new relationship between right holders and consumers, with altered consumer rights, freedoms and expectations and towards the general replacement of copyright law with contract law and codes.³ Most DRM systems up until now do not support business models based upon the first-sale doctrine. DRM systems either prevent consumers from re-selling material, or they involve the conservation of data about the history of possession. The flexibility praised by industry is closely linked to the exploitation of every conceivable use of works based on different pricing models and supported by unlimited post-purchase control over the copies.

We therefore consider that DRM deployment causes serious risks to consumers and societal rights.

III. Consumer Acceptance

For BEUC, the following key elements are essential in the development of a balanced DRM regime.

1. Recognition of Consumer Rights

Consumers should have clear and express rights in relation to their use of digital material that cannot be restricted by DRM techniques. At the very least these rights should include those described in some jurisdictions as fair use rights. The "exemption" permitted under Article 5 (2) b of the Information Society Directive should be extended to all Member States, should be expressed in positive terms and should be protected from restriction by DRM systems or technical measures. Consumer contracts governing the use of digital material must be fair and transparent.

DRM is meant to protect against copyright infringement but it can go much further – to the detriment of consumers. Contracts and licenses can be used to the same bad effect. A licence is given to the consumer under the condition that he complies with the specific rules set up deliberately by the right holder. DRM enforces these rules and operates according to the "everything that is not permitted is forbidden" principle.

In any dialogue with right holders we must ask them to say if they accept that consumers may have any independent rights in relation to the use of copyright material. Many right holders seem to answer that questioning the negative.

³ In this paper, the term copyright is used in a broader sense, including neighbouring rights.

We think that consumers should at least have the following rights:

➤ **Right to Private Copy**

Even when consumers have the right (or the “exception”, as some say) to make private copies, DRM systems can effectively hinder consumers in exercising these rights.

The legal environment seems to support this bad practice: since right holders are legally not obliged to assist a user in exercising his right of copying for private use (as foreseen in respect to other exceptions), the right becomes illusory. For example, music companies have used new technologies to produce so-called “copy-protected” CDs – a practice challenged by some BEUC members. Furthermore, the Information Society Directive specifies that whenever copyrighted work is offered “on-demand” to the consumer, right holders are free to impose any conditions they wish through contractual terms. It is likely that through mass-market contracts/licenses - combined with the use of DRM systems - consumers will be impeded from making any reproductions for any purpose whatsoever. (In addition, they will not know which rights they have in relation to a cross-border transaction, given the diverse approach and the excessive room for manoeuvre of Member States in relation to private copying.)

➤ **Right to Fair Commercial Practices**

Secondly, usage restrictions - imposed through licenses and enforced by DRM - can hinder or restrain usage that is not relevant under exclusive rights, *i.e.* legitimate usages that can be exercised without reproducing or distributing to the public the work in question.

A problematic example is the regional code embedded in DVDs and DVD players. In this context, DRM is used to segment the global market for DVD players. It seems too that DRM will be used to reinforce market segmentation based on copyright and trade mark rules. Space-shifting and time-shifting restrictions would also belong to this category. It is important to take note that our request for interoperable and compatible DRM technology goes further than the consensus reached in the HLG on interoperability. DRM-protected works must be moveable from one system to another, in particular when taking into account the very short life-span of consumer devices today; otherwise they bear the risk that consumers are tied to a certain platform or appliance, or that the purchased product might vanish with the outdated device.

The legal environment may – if interpreted and implemented in a restrictive way – sustain usage restrictions that go beyond exclusive rights: the Information Society Directive makes it illegal to circumvent DRM technology whether or not protecting copy rights. The broad language used in relation to technological measures is the premise for unlimited extension of control. Circumvention of technical measures in specific cases, such as regional segmentation, must remain possible. (To be absolutely clear, we believe that consumers have the right to purchase multi-region DVD players and the right to adapt players they have bought and paid for so as to play DVDs from other regions.)

➤ **Right to be Informed and Refunded for Faulty Products**

Last but not least, while an easy-to-use interface is important for consumers, it must not deteriorate the consumers’ right to be informed when purchasing or accessing usage-impaired works. Providers must notify consumers that their products lead to a limitation of the users’ rights under copyright law and label their products accordingly. It should also provide guidance on consumer rights and national copyright exemptions.

We need “fair use by design”, *i.e.* fair use rights must become an important element in DRM design and must be a paramount part of any standardization process. Proper consumer participation at all levels of the standardisation process is vital to ensure that the public interest is taken into account.

However, this alone will not be enough to ensure that consumers have the rights they should have in the digital environment.

2. A Fair, Competitive and Balanced Regime

It is in the public and consumer interest to ensure a fair return for creative endeavour in the digital environment. The key word, however, is “fair”. DRM can expect public support, e.g. in the protection of anti-piracy technologies, only to the extent that DRM systems respect the wider interests of public policy, public access, consumer rights, the promotion of competition and technological development. In all of these areas certain types of DRM systems can have negative effects.

BEUC recognizes that the digital format and delivery of content pose serious challenges to the content industry. However, there has been no evidence that the alleged economic harm caused by unauthorized file sharing leads inevitably to a decline in creative content.

This is an industry that has a tendency to alienate and criminalise consumers by accusing consumers of stealing millions of dollars from the industry while the industry has been reluctant to deliver the goods consumers want in the format they want it in and against a price that reflects the efficiencies that the internet as a delivery system brings. Consumer organisations have been arguing for this since the first cases against peer to peer-networks were brought by the industry. And now, five years later, while the world has seen an information boom, the High Level Group resists the consumer perspective on the way to ensure that a relevant scope of products is available and accessible for consumers over broadband internet.

DRM deployment to fight against unauthorized file-sharing should not supersede all other considerations, as seems to be advocated in the HLG paper on migration to legitimate services. The same paper contained no recognition of the lawfulness and benefits of private copying for consumers and the many options of peer-to-peer (P2P) networks for usages that are not illegal, *e.g.* for the promotion of content or the potential benefits of P2P networks for unknown/independent artist.

The very title of the paper “Migration to legitimate services” seems to assume that current consumer usages are illegitimate. We do not accept this assumption or the tendency to criminalise consumers by refusing to distinguish between piracy for commercial purposes and the individual acts of many private consumers.

We would argue also that acceptance of new services depends first and foremost on the supply and availability of fair and competitive services. The lack of speed in providing services and the lack of knowledge what consumers want is primarily responsible for consumers’ slow acceptance. Indeed, the Commission has drawn attention to the absence of useful innovative advanced services at a reasonable price for consumers.⁴ To make the situation worse DRM systems – as seen above - may force consumers to give up some, if not all, currently accepted or expected uses of copyrighted works. The wider range of choices for consumers to access and use digital material in different ways even at a lower price is not enough to balance the

⁴ Communication from the Commission – Connecting Europe at high speed: recent developments in the sector of electronic communications, COM (2004) 61 final.

losses for consumers in a market place with many potential competition bottlenecks. On the contrary.

The supply of a wide variety of economic choices for consumers may be stifled in a highly concentrated market where little incentive exists to engage in price competition. Also, where copyright protection is used to segment markets, cross-border competition does not exist. Another potential distortion to competition is the monopolistic structure of collecting societies who have shown some reluctance in allowing content owners to deliver their work online. Above and beyond, price reductions based on competition of different technologies or devices that interact with copyrighted works seem less likely if DRM protection effectively hinders innovation, research scientists, and the development of new technology and thereby forecloses legitimate competitors to enter the market.

It is also doubtful whether infinite DRM deployment would be advantageous for society in general. The increasing lock-up of creative works and information (whether copyrighted or not) and rigorous enforcement of anti-piracy law carries the risk to create barriers to technological development, innovation, and creativity. While digital information brings about new prospects for creativity, *i.e.* building upon many works on the global network, the deployment of DRM to enforce disproportionate usage rules is an impediment to the creative process. DRM bears the danger that it locks-up works in the public domain or works that are supposed to enter the public domain after termination of time-limited exclusive rights.

To reduce negative effects of this kind, policy makers need to secure a competitive market place with open standards and withhold any attempt to make DRM systems mandatory on any media whatsoever.

BEUC would like to see empirical evidence to demonstrate the alleged benefits of DRM for consumers and calls upon policy makers to reopen the discussion on the balance of interests at stake. We reiterate our demand for enforceable consumer rights which cannot be overridden by contract terms or deployment of DRM systems, or technical measures.

3. Right to Privacy and Private Data Protection

Privacy is a fundamental right. DRM must not inhibit or restrict that right, or make it harder to exercise. We expressly reject any implication that the rights of right holders are in any sense superior to, or may in any way supersede, the right to privacy.

Consumer contracts governing the use of digital material should not require consumers to give up their rights to privacy. If information about a user is required in certain transactions, for instance, to provide for secure electronic payment, that information should be collected (and retained no longer than is necessary) in a manner that respects the user's right to privacy. DRM systems should generate no more data than necessary.

DRM systems boast the capability to generate, transmit, and store vast quantities of data about the use of copyrighted works. DRM systems technically allow content providers to monitor private consumption of content, create reports on consumption, and profile users within the private sphere in an unprecedented way.

Data protection laws are in place and must be respected. There may be some exceptions to the right to privacy, for example, in the interests of law enforcement in certain cases, but these exceptions should be limited, and they should be expressly permitted in law and subject to appropriate checks, balances and judicial control.

However, the consent-based approach of the European data protection regime bears the risk that privacy terms imbedded in click-wrap agreements may bypass privacy regulation. Although unambiguous consent must be given under European data protection laws, in a mass market

consumers are forced to abandon privacy as the price for access to content. They may have access or privacy, but not both.

We recall the eEurope 2005 Action Plan objective:

*“The goal is to promote take-up of e-business with the aim of increasing the competitiveness of European enterprises and raising productivity and growth through investment in information and communication technologies, human resources (notably eskills) and new business models, **whilst ensuring privacy**. eEurope 2005 will be instrumental in making this policy work.”^b
[emphasis added]*

DRM systems should ensure the privacy of the individual. Electronic footprints are to be avoided. Inevitable footprint data must be deleted after an appropriate time. DRM systems should not allow disclosure of information about the consumer to unauthorized people and should indicate clearly to whom information is given. Security of information - sent, stored, received or deleted - must be ensured. The level of security should be clearly stated to the consumer beforehand.

The process of setting DRM standards therefore must ensure that privacy is addressed as an important layer in its design. We believe that privacy is an added value in DRM design and insist on DRM standards that take account of privacy enhancing technology for consumers. Privacy advocates must be part of this process to ensure that the interests of data subjects are considered in an adequate way. The maintenance of anonymous access whenever possible must, however, remain a key objective.

This clearly would not release policy makers from putting effective data protection enforcement measures in place. BEUC also calls upon the Article 29 Data Protection Working Party to issue recommendations on data protection in DRM systems.

4. Right to Free Speech

DRM must not restrict consumers' fundamental human rights to free speech

The potential adverse effect of DRM on citizen's civil rights (and legitimate scientific research) can be estimated when considering the recent developments in respect to information technology research and its dissemination under the U.S. Digital Millennium Copyright Act (DMCA).

Distribution of information based on DRM-supported content delivery could allow users of DRM to control how and who gets access to information thereby limiting journalistic investigative activity, commentary, and other fair uses without which the fundamental human right could not be exercised.

Authentication measures must not become technological locks that could potentially infringe the freedom of speech.

5. Prevailing over the Digital Divide

⁵ Communication from the Commission – eEurope 2005: An information society for all, COM (2002) 263 final.

DRM cannot in itself address all the problems of the “Digital Divide” but at a minimum DRM should not widen that divide. A range of measures are needed to ensure appropriate public access to digital material, including information, educational and cultural material.

BEUC welcomes the Commission’s engagement in projects to close the digital divide that foster the extension of broadband coverage in remote areas to ensure access to information for all.⁶

However, it appears that the key note of the eEurope 2005 Action Plan – the stimulation of demand - has been interpreted by policy makers in the sense of fostering distribution of content entirely controlled by content providers and users of DRM.

We therefore recall its core objective, an information society for all:

“eEurope 2005 puts users at the centre. It will improve participation, open up opportunities for everyone and enhance skills This means that the goal of the eEurope 2002 action plan of achieving an ‘information society for all’ remains valid for eEurope 2005.”⁷

The technological lock-up of content through technological measures may counteract the objective of closing or reducing the digital divide.⁸ It is a basic consumer right to have access to products and services. Discrimination exists if elderly people and people with disabilities cannot use mainstream consumer products and services. DRM technologies should be compatible with assistive technologies for consumers with disabilities.

We demand the Commission to review the negative effects of wide-spread DRM deployment on the digital divide and to foster the promotion of projects to develop electronic access to works in the public domain.⁹

6. Right to maintain the Integrity of Private Property

DRM must not be used to alter consumers’ computers or other equipment in such a way as to affect the consumers’ use or enjoyment of the equipment, or at least not without the full, informed and prior consent of the user.

Security is an important element of DRM deployment and of paramount interest to content providers. However, DRM technology in computing systems may interfere with the use of the hardware equipment. An operating system may, for instance, not permit “non-trusted” programs on the computer when protected content is installed. For trusted computing to work, it may become necessary to alter settings of the operating system. The right of consumers to set security policies for their computers can be denied by DRM systems, without the consent or even the knowledge of the consumer. This constitutes a direct interference with the private property rights of the consumer.

⁶ Communication from the Commission – A European Initiative for growth – Investing in networks and knowledge for growth and jobs – Final report to the European Council, COM(2003) 690 final.

⁷ Communication from the Commission – eEurope 2005 – An information society for all, COM (2002) 263 final.

⁸ The Commission refers to a potential technological lock-up of content through technological measures in its communication on collective rights management; Communication from the Commission - The Management of Copyright and Related Rights in the Internal Market, COM (2004) 261 final.

⁹ Further actions to possibly address negative effects of DRM on the digital divide were announced in the Commission Communication “Connecting Europe at High Speed” and by the eEurope Advisory Board on May 26, 2004: the Digital Divide Forum (Action 2) and e-inclusion (Action 13).

DRM must not undermine the position of the consumer to control its devices. In addition, BEUC calls upon policy makers to dismiss any attempt to allow for direct attacks on devices of consumers in the context of alleged copyright infringement. "Technological self-help measures" of this kind interfere with property of consumers and must be fiercely rejected.

7. Levies

The current levy system is unfair and should be ended quickly.

We welcome the acknowledgement of the High Level Group that levies have nothing to do with piracy but this only serves to make their unfairness even more apparent. Levies operate as a tax on all purchasers, irrespective of whether engaged in private copying or not. Supporters of levies argue that they are meant to compensate for private copying while also arguing that consumers have no right to private copying. (There was no reduction in the levies on private copying for consumers who bought CDs that could not be copied.) Where DRM-based download services allows for private copies, the consumer will presumably have to pay extra for this "service" and pay twice in cases where levies are imposed on blank CDs. Where DRM-based download services effectively restrict private use rights, double payment does occur, for example, when levies are imposed on PCs.

The paper of the High Level Group completely ignores the consumer perspective on levies.

Unfortunately and wrongly levies continue to be imposed on an increasing number of multi-purpose devices in some Member States. This development does not take into account the substance of recital 35 of the Information Society Directive according to which the actual harm of private copies must be assessed when determining the compensation:

"In cases where right holders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the right holder would be minimal, no obligation for payment may arise."

We welcome the clear statement of the HLG that double payment must be avoided. This statement is meaningless however, given the failure of the group to say clearly by whom and how it should be judged that DRM solutions are fully operational such that levies may be abandoned. Recital 39 of the Information Society Directive gives clearer indication: technical protection measures shall be taken into account when they are available. The phasing-out of royalty systems must not be left on the discretion of content providers.

IV. Concluding remark

In a perfect world, competition would provide for economic choices and consumer power would lead to consumer-friendly and privacy-enhancing business models. Regrettably, in a mass-market with atomized consumers, this outcome is not likely to happen without any safeguards for consumers.

BEUC has witnessed a constant extension of copyright protection and the deterioration of societal rights within a new copyright protection framework over the past years. On present trends DRM will make a bad situation worse.

[Content owners claim that “fair use” rights do not exist in European jurisdictions. We see this differently. Fair trading is an important pillar of business-to-consumer transactions. European consumers have a right to be treated fairly and consequently to fair use of purchased products.]

Making content as widely available as possible in ways that satisfy consumer demand and expectations must be the paramount objective to achieve an information society for all. Consumer preference in respect to functionalities must be balanced with the legitimate interest of proper copyright protection. Frustrated consumers will not embrace new technology.

The shortcomings and potential negative effects on consumers and society of the current copyright framework and of the current deployment of technical protection measures highlighted in this paper must be addressed by policy makers and all stakeholders. Any further conclusion drawn by the Commission as regards the need for action and possible policy initiatives must take into account the rights of consumers as well as the cultural and social perspective.

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