

Digital Rights Management from a Consumer's Perspective

Place the CD in the CD player, computer or car CD player, press "Play" and listen to the music. It can be as simple as that. Or rather it could. Although we may think this is still the case, in reality it is becoming a thing of the past. Anyone who buys a CD today can no longer be certain that it can be played on their computer, that it can even be played the day after tomorrow or more than 30 times, that it can be copied or that the music it contains can be converted into MP3 format.

The fact that things are not as simple as they used to be is more and more a question of "fair" Digital Rights Management (DRM). People's views on what is fair and what is not in this context still vary considerably, depending on whether they are looking from the perspective of rights-holders or consumers. However, all the parties involved, including consumers' representatives on the one hand and the media industry on the other, wholeheartedly agree that DRM can be the basis for new forms of digital services. The economic success of such services depends, however, on whether they are also acceptable for consumers.

For this reason, this *IRIS plus* deals with DRM from the consumer's perspective in an effort to enhance people's understanding of this aspect of DRM.

Strasbourg, August 2005

Susanne Nikoltchev
IRIS Coordinator
Head of the Legal Information Department
European Audiovisual Observatory

IRIS plus is a supplement to **IRIS**, *Legal Observations of the European Audiovisual Observatory*, **Issue 2005-08**



OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSTELLE

76 ALLEE DE LA ROBERTSAU • F-67000 STRASBOURG
TEL. +33 (0)3 88 14 44 00 • FAX +33 (0)3 88 14 44 19
<http://www.obs.coe.int>
e-mail: obs@obs.coe.int



Digital Rights Management from a Consumer's Perspective

Natali Helberger,

*Institute for Information Law, University of Amsterdam*¹

1. Introduction

Digital Rights Management is the term used to describe electronic systems designed to facilitate the management and marketing of rights to digital content. DRM technologies can be used in connection with both offline and online media. Examples are copy-protected CDs or DVDs, download services such as Apple's iTunes or Deutsche Telekom's pay-per-view service, T-Vision. DRM systems often use a form of content encryption designed to protect content from unauthorised access. Figuratively speaking, DRM systems put up electronic fences in order to keep unwanted visitors away and only provide access to invited guests. In addition, it is necessary to create a customer management infrastructure, often including payment information, which enables the user of the technology to determine in detail which consumers can access which content under what conditions.

The purpose of this article is to consider the impact of DRM on people's use of digital content and on its availability and accessibility for consumers. It deliberately uses the concept of consumer or user. In the wake of the advent of the "Information Economy", access to electronic content is increasingly becoming the subject of commercial exchange between content providers (publishing companies, portal operators, online music distributors) and recipients. The present article describes the area of conflict between the economic interest of the media industry to use DRM to protect rights to and marketing of digital content, and consumers' desire to use digital content in accordance with their own rights and legitimate interests without suffering any unfavourable consequences as they do so.

One advantage of DRM systems is that they can make it possible to adapt the way digital content is made available very specifically to consumer interests and demands. Whereas music enthusiasts previously had to purchase a complete CD by a particular band, they can now surf online services such as iTunes and download and pay for only the specific songs they want to listen to. Some content providers, music publishers and film companies will not even consider marketing their content online unless technology is in place to protect such digital content from piracy. DRM makes it possible to devise new, highly sophisticated business models which may otherwise not be at all realistic or affordable.²

This increase in control and controllability can also have its drawbacks – particularly for consumers and their representatives. Stricter controls over how digital content is used and who can listen to what music how often, when and where, almost inevitably represent an intrusion on the autonomy, anonymity and other legitimate interests of consumers. As explained in section 2 of this article, such interests are primarily dealt with in copyright law. However, electronic control over access to and the use of content also affects the general accessibility to digital information, the equal status of people with and without access to certain technology, the protection of personal privacy and freedom of choice, interoperability and a functioning economic system. These are aspects which, as shown in section 3, do not always fall within the scope of copyright law. Since the theme of DRM has, up to now, mainly been discussed in connection with copyright law, these other interests have generally been ignored by politicians and law-makers. Section 4 explains why the current approach, where DRM is considered to be exclusively a copyright

issue, is too narrow. It lists a series of equally important individual or informational interests which must be respected, linking DRM to the protection of consumers and access to digital content. Section 5 suggests how this theme might be usefully dealt with in the future. The article also refers to the important role that the Council of Europe could play in this process.

2. DRM, Consumers and Copyright Law – the Typical, but Incomplete View

Copyright law, as a form of protection for intellectual property, results from the weighing up of the rights of the creator of a work against those of the people marketing that work to exploit legally guaranteed and protected content.³ Opposed to this is the need to stimulate the general usage and distribution of creative content and thereby encourage creativity, innovation, education and science, or simply personal use. Efforts to strike a balance between these partially conflicting interests result in exceptions to copyright law, demands being placed on protected content, and time limits on the validity of copyright – to name the most important examples.

As far as DRM is concerned, this has caused a controversy which still remains unresolved: DRM does not necessarily respect the deliberately imposed legal limitations of copyright law. Content encryption makes access to and use of such content more or less impossible, or at least dependent on the wishes of the user of the DRM technology – regardless of whether the time limit on exclusive rights has expired or whether the consumer is entitled to benefit from an exception to copyright.⁴ This throws up the question of whether and how consumers can enforce respect for existing exceptions and limitations to copyright law that are in their favour. Several recent court rulings in France and Belgium demonstrate the extent to which opinions differ. In these cases, consumers, represented by consumer organisations, have tried to defend existing exceptions, such as the right to make copies for private use. Whereas some courts have dismissed consumers' complaints on the grounds that copyright exceptions are not rights, but merely privileges,⁵ a French judge recently ruled that the right to exercise such privileges should be protected.⁶

The current version of the European Copyright Directive⁷ does little to clarify the situation. On the contrary, it appears to grant rightsholders the scope to use DRM to shift the legal situation in their favour. Article 6 of the Copyright Directive prohibits the circumvention of technological protection measures such as DRM. This considerably strengthens DRM users' legal and actual control over access to and use of digital content. Similar provisions exist at international level in Article 11 of the WIPO Copyright Treaty⁸ and Article 18 of the WIPO Performances and Phonograms Treaty,⁹ which paved the way for the circumvention provisions enshrined in the European Copyright Directive. The Council of Europe also encourages the use of technological protection measures, without currently laying down any conditions regarding how they should be used or whether they should be compatible with legal limitations to copyright law.¹⁰ The same applies in WIPO member states which, like Costa Rica, have incorporated the WIPO Treaties more or less word for word into domestic law. In Costa Rica, DRM users therefore enjoy unlimited freedom to prevent consumers accessing and using digital content. It could be argued

that this is their economic right. However, access to digital content and information is not only an economic issue, but also a cultural, social and political matter.

At European Union level, Article 6.4 of the Copyright Directive implies at the very least that, if rightsholders fail to take such measures, member states may oblige them to make it possible for consumers to benefit from individual limitations to copyright law. This provision at least attempts to balance the technical control and assertion of rights to digital content with the rights of third parties to unhindered access and use of such content. It is noticeable that the Copyright Directive does not force the users of DRM technology to respect existing exceptions to copyright law. Instead, it requires member states to "take appropriate measures" in order to ensure that these limitations can be benefited from in the future. Initial reports on the implementation of this provision, however, have shown how differently the member states have responded to it and how difficult it is to follow in practice.¹¹ More far-reaching is the provision in Article 6.4 of the Directive, which clearly allows DRM users to deviate from legally regulated limitations under the terms of a contractual, interactive business relationship with a consumer.¹² All in all, even in the European Union there is no guarantee that important consumer protection and informational objectives, such as the accessibility of content, equal opportunities to access electronic information, the promotion of individual creativity, diversity and the protection of human rights, will be achieved. These are objectives which the Council of Europe has undertaken to pursue.¹³

3. A Look at the Bigger Picture: DRM and Consumer Interests

DRM is often used to achieve more than the rather limited function of protecting content from unauthorised use. As already mentioned at the outset, DRM is a marketing tool and is usually employed as such. This means that the debate over DRM involves more than just copyright, even though it is often discussed within this narrow context. On a much broader scale, it is necessary to consider the relationship between DRM users and consumers. In this context, it has become clear that many consumer expectations regarding digital content are irrelevant to copyright, and are therefore not subject to legal protection under the copyright system.¹⁴ Examples are the possibility of playing tracks on different devices (computers, CD players, car radios, MP3 players, etc.), sharing music and passing it on to friends and family, reselling files, listening to music at any time and anywhere, and storing it in other formats. Legal experts have only recently begun to consider the impact of DRM on legitimate consumer interests that are not covered by copyright law.

Commentators recognised at a fairly early stage the conflict between DRM use and the related monitoring of consumer behaviour on the one hand and consumers' right to protection of their privacy on the other.¹⁵ Since last year, consumer organisations in France and Belgium have steered people's attention in a different direction through a series of complaints lodged on behalf of the purchasers of DRM-protected CDs and DVDs. The consumers complained that they were unable either to copy the CDs or DVDs or to play them on their car radios. In these cases, the consumer organisations cited, *inter alia*, consumer law, in particular the law on warranty for defects. As a result, the relationship between DRM use and consumer protection and the impact of DRM use on consumer rights have come under the spotlight. In this article, consumer protection is taken very generally

to mean legal rules the purpose of which is to improve and protect consumers' position as partners in commercial exchanges. Below is an overview of a number of important consumer interests that lie outside the scope of copyright law.¹⁶

3.1. Access to and Use of Content

The question of access to and use of digital content is closely linked to the aforementioned issue of the relationship between DRM and exceptions to copyright law. However, access to and use of content also plays a role outside copyright law. This is firstly the case with the control of content which is intentionally not the subject of intellectual property rights. This is content which is available to everyone because it belongs to the so-called "public domain". It includes content whose term of copyright has expired, such as the works of Alexandre Dumas or compositions by Chopin. It also includes content which was never protected by copyright law, but which can now be stored in databases and is only accessible to subscribers. Examples include factual information, legislative texts and court rulings. It may be necessary to protect free, unhindered access to information in the public domain.¹⁷ As the organisation ARTICLE 19, which is devoted to defending and promoting freedom of expression, put it: "Information is the oxygen of democracy".¹⁸ Regardless of copyright law, access to content, i.e. to information at all levels of personal, social, political and cultural life, is extremely important. To be informed is essential for the citizens of our "information society" and wide availability of content is both vital and worthy of protection. Accordingly, the second principle set out in the Council of Europe's Draft Declaration on Freedom of Communication on the Internet states that "Member States should foster and encourage access for all to Internet communications and information services on a non-discriminatory basis at an affordable price, as well as an active participation of the public, such as in the form of setting up and running individual web sites, which should not be subject to any licensing or other requirements having similar effect".¹⁹

The Council of the European Union expressly calls for measures to combat the exclusion of individuals or individual sections of the population and explains that one of the objectives in the fight against social exclusion is to exploit fully the potential of the information society and to ensure that nobody is excluded.²⁰ As mentioned before, DRM use may obstruct the achievement of these objectives and the freedom of information, including that which is not protected by copyright law.

3.2. Interoperability

Interoperability is more closely connected with access to content than current EC law might suggest.²¹ Whether or not content is accessible also depends on whether the consumer's hardware supports certain DRM standards. Apple's iPod, which only supports Apple's DRM standard, FairPlay, is a classic example. iPod owners cannot play music files that are encrypted using RealNetwork's standard, Harmony, for example. Interoperability is also a matter of competition between the content of different providers, and therefore indirectly one of pluralism and diversity. If proprietary software or hardware prevents users from receiving certain content, particularly competitors' content, it harms the latter's competitiveness and the consumer's freedom of choice. For example, the High Level Group on Digital Rights Management, a group of experts set up especially by the European Commission, has specifically highlighted the significance of the problem of interoperability in the DRM sector.²²



3.3. Protection of Privacy

Apart from copyright, protection of privacy is probably still the most intensively discussed issue in relation to DRM.²³ The European Consumers' Organisation (BEUC), for example, has suggested that DRM technologies enable their users to observe exactly how digital content is used and to draw up consumer profiles. Consumers are often unaware of this.²⁴ Here the gathering of information about consumer behaviour is not only a means of combating potential breaches of copyright. Consumer data can also have economic value and be used or sold on for marketing purposes, for example.

Intensive monitoring of consumer behaviour can conflict with protection of privacy. The Council of Europe considers privacy to be a valuable, legally protected right, particularly in relation to freedom of expression: "Member States should respect the right of users of the Internet not to disclose their identity".²⁵

From a legal perspective, privacy is a right already protected by a number of regulations that also apply to DRM use.²⁶ These particularly include the European Data Protection Directive and Article 8 of the European Convention on Human Rights.²⁷ Incidentally, the example of the protection of privacy is interesting insofar as it demonstrates that conflicts between the interests of DRM users and consumers can be resolved by non-legal means. Indeed, it has been suggested that the problem of privacy should be dealt with by means of so-called Privacy Enhancing Technologies (PETs).²⁸

3.4. Transparency

The question of transparency was crucial in the aforementioned court rulings in France and Belgium. The courts had to consider the extent to which consumers are entitled to information about certain characteristics of the products they buy, such as CDs. Can the fact that a music publisher does not tell the consumer that a CD cannot be copied or played on certain CD players amount to a breach of consumers' protected interests? And does the failure to provide such information have legal consequences in the consumer's favour? A court in France, for example, decided that consumers are entitled to be informed if a CD cannot be played in a car radio because of a built-in copy protection facility. Failure to provide this information has legal consequences under the law on warranty for defects. In this particular case, the judge decided that the customer could demand a refund and that the music publisher should in future refer specifically and in detail on its CDs to the existence of any electronic protection measures and their consequences.²⁹

This ruling appears to be indirectly borne out in European legislation, in Article 6 of the Unfair Commercial Practices Directive,³⁰ which deals - albeit very generally - with misleading actions and the duty to provide certain information. A similar rule also appears in Article 95(d) of the German Copyright Act.³¹ This provision implies that works and other items that are protected by means of technological measures must be clearly labelled with details of those measures, as well as the name and address of the user of such measures.

3.5. Fair Contractual Conditions

An important priority from the point of view of consumer protection, competition and freedom of information is to create

conditions that enable consumers to choose freely from the most attractive DRM-controlled services. Such conditions are not met if, for example, consumer choice is unjustifiably restricted due to contractual provisions or to a lack of interoperability or transparency.³² The legislature may therefore be required to correct any market distortion and, if necessary, strengthen the position of consumers. An example of such legislation is found in European telecommunications law. The European Universal Service Directive contains specific provisions on consumer protection as well as suggesting areas in which national regulatory authorities may take action. It therefore aims to guarantee fair contractual conditions and reasonable pricing structures.³³ One reason why the example of the consumer protection rules in European telecommunications law is so interesting is because it shows that a reasonable pricing structure and fair contractual conditions are not only a matter of good economic conduct: important informational considerations are also at stake.³⁴ The conditions under which access to services is offered also determine their general accessibility and availability. In other words, excessive prices or unacceptable conditions of access or use can lead to whole sectors of the population being denied access to content (or, in the example of telecommunications law, to the communications infrastructure).

3.6. Users with Special Needs

An important and so far little researched aspect of DRM is the situation of users with special needs.³⁵ These include older people or children, who find it difficult to use complicated services or devices, and users with restricted vision or hearing, or with motor or learning difficulties.³⁶ One of the main worries here is the accessibility of content in a suitable format or the ability to manipulate content in order to make it accessible and compatible with the needs of particular population groups.³⁷ For this reason, Article 5 (3) (b) of the European Copyright Directive states, for example, that Member States may provide for exceptions or limitations to exclusive copyright for the benefit of people with a disability if the use is directly related to the disability and of a non-commercial nature, to the extent required by the specific disability. The use of DRM can, in practice, make this provision unworkable.³⁸

3.7. Safety and Ownership Aspects

Without wishing to delve too deeply into this area, which has also been given little consideration in relation to DRM, it should be pointed out that DRM use can have a significant impact on users' property, including its safety and integrity. A consumer who has bought a CD but cannot use it in the way they want is prevented from fully exercising their right of ownership of the CD. However, technical problems or even damage caused by the use of DRM to the user's equipment also fall into this category. Examples are malfunctions due to incompatibility, system breakdown and the associated loss of data or increased susceptibility to viruses.³⁹

3.8. Consequences of DRM Use for Institutions that Make Content Accessible or Are Dependent on Access to Content

An important issue, although it will not be discussed further in this article, is the impact of DRM use on institutions, such as libraries, which make content accessible, as well as those that work with content and rely heavily on its accessibility. The lat-

ter category includes universities, research institutes and schools. DRM systems can be beneficial, but also restrictive for these organisations.⁴⁰

Interim Conclusion

The above overview has shown that DRM use affects a very broad and diverse range of sometimes conflicting interests of producers of digital content, users and the state. These interests often have little or nothing to do with copyright, but rather with the situation of a consumer wishing to access or use digital content. A general distinction can be drawn between (a) issues concerning a person's individual situation (these might include reasonable prices, user-friendly DRM design, protection of property and privacy, the ability to benefit from exceptions to copyright law, etc.) and (b) aspects concerning other informational objectives and questions. Examples in the second category include public accessibility and wide dissemination of content, the possibility of unrestricted use of such content, such as in connection with creative activity or education and research, democratic discourse and free exchange of opinion. These are questions, however, which may also be relevant to copyright. Another important factor is the general balance of market players, including issues with respect to functioning, effective competition. Aspects of individual consumer protection and the achievement of more far-reaching informational objectives can be closely linked to one another, as demonstrated by the Universal Service Directive. There is currently very little on this subject in copyright law.

We also need to consider whether other areas of legislation are relevant to this theme, whether the law should deal with it, whether the interests of consumers and society need protection and, if so, by whom and how? Consumer protection rules (defined at the end of section 3, above) could play a key role in this, although a distinction must be made between general and sector-specific consumer protection law (consumer law). Examples of general consumer law include provisions on warranty for defects, contract law or certain rules on unfair competition. Examples of sector-specific consumer law include the consumer-related provisions in the Universal Service Directive, environmental protection law or the law on luxury foods and tobacco, and maybe even copyright law. Linked to the possible call for consumer protection in relation to DRM use is the idea that the conditions under which content can be used are increasingly being negotiated and implemented directly between digital content providers and consumers. The legal relationship between provider and consumer is therefore the logical starting point for the guarantee of reasonable contractual conditions and balanced negotiations between the parties. Consumer protection measures could therefore play an important role in protecting and implementing individual and informational interests in an increasingly interactive and commercialised information society.

The question of the need for as well as the form and practical implementation of consumer protection in relation to DRM remains largely unexplored in legal circles. It was the subject of a workshop entitled "Fair DRM Use", held in Amsterdam in May this year. Experts in different fields – law, economy, technology – accepted the invitation to discuss this theme. The aim of the workshop was to discover more about the possible role of consumer protection in relation to DRM. A number of important aspects emerged, which could point the way ahead for further discussion of this subject. The following section looks generally at this issue and, where relevant, refers to arguments that were put forward during the workshop.⁴¹

4. New Approaches to Consumer Protection in relation to DRM

We have already seen that consumer interests have so far played a secondary role in the regulation of DRM. This section sets out some thoughts on how, by whom and where a system might be created that is capable of reconciling the interests of consumers with those of DRM users. Particular emphasis is given to ways of strengthening the position of consumers both within and outside the field of copyright.

4.1. How: Market or Law

Before deciding whether additional regulation is needed, we should clarify whether the relationship between DRM and consumers would be better regulated by market forces or by law, ie binding rules on the protection of consumers or their interests. These could either be legislative provisions or self- or co-regulatory measures.

Regulation, whatever its form, should only be considered if the parties themselves cannot find a solution. Although it is impossible to answer in detail here the question of whether regulation is necessary, the following should be borne in mind: in a situation where competition is functioning perfectly and all parties have equal negotiating power, (exclusive) regulation by market forces ought to be successful. However, if competition is not functioning at all or only in a limited way because of technical and contractual lock-in situations, or a lack of transparency and the resulting restrictions on consumer freedom of choice, a free market alone cannot be expected to produce solutions that take into account the interests of all parties and are therefore considered "fair".⁴² In order to enable market players to regulate their own interests in content offered via DRM systems, the right conditions for properly functioning competition must be in place. Competition law could play a prominent role in this.

4.2. Who: Responsibility for Consumer Protection

Of equal importance is the question of who should be responsible for consumer protection: DRM users? The state? Consumers? The first solution – that DRM users should be responsible – is linked to a well-known idea from police law, i.e. the concept that whoever poses a threat to legally protected rights should be obliged to remove that threat at their own cost and under their own responsibility. For example, DRM users could be forced to use the technology in a way which does not conflict either with the legitimate right of users to protection of their property or privacy, nor with their right to benefit from exceptions to copyright law. The second solution, whereby the state is held responsible, is linked to the state's duty to protect and organise certain legally protected rights. This duty has been taken into account, for example, in constitutional law, which protects privacy, property and freedom of expression. There are also compromise solutions, such as regulated self-regulation.⁴³

The concept of consumer self-protection is not a new idea. It is based on the notion that consumers should have the main responsibility for their own protection. The legislature's task is therefore to create the conditions in which consumers can protect themselves. This means, amongst other things, demanding greater transparency in relation to DRM and introducing clear labelling obligations. The idea is that products using DRM systems should be identified in such a way that consumers are just

as well informed about their impact and consequences as about whom they should contact if they wish to make a complaint. Transparency was therefore an important topic at the Amsterdam workshop. According to the participants, the benefits of greater transparency include higher consumer confidence, better control mechanisms for consumers and incentives for properly functioning competition. The idea of greater transparency and consumer self-protection is commonly considered the most feasible solution where DRM is concerned.

It is quite possible that, given greater transparency, consumers would in practice take on the role of monitoring the fairness of the conditions under which DRM-protected content is offered (see also section 4.4). Supervisory responsibility would thus be decentralised. Consumers' trust in the way content is offered would increase and their awareness of it would be greater. An important point made by the participants in the Amsterdam workshop was that transparency should be accompanied by relevant information and education measures. Above all, consumers should be able to compare different products and decline those they find unacceptable. One drawback of the transparency solution, however, would be the fact that responsibility for user-friendly DRM systems would be shifted to consumers. Consumers would therefore have to be prepared to be actively involved and invest their energies in gathering and using information and selecting the right products. A system based on self-protection would also require a suitable degree of consumer freedom of choice. Effective competition is just as essential a condition as procedural rights for consumers and their representatives.

4.3. Where: Copyright Law or Consumer Law

If it is concluded that (additional) legal measures are appropriate, whether they already exist or not, the next question to consider is in which area of law they should be introduced. In particular, it will be necessary to choose between copyright law and consumer protection law (or possible combinations of the two). One reason to opt for copyright law and add more consumer-oriented regulations to this field of law is the fact that DRM was originally regulated under copyright law. In particular, it contains provisions protecting DRM from circumvention. As previously shown, these provisions currently favour the interests of DRM users. It could therefore be argued that copyright law should be supplemented in order that the rights of consumers are properly respected. For example, it could stipulate under what circumstances DRM should be considered to have been misused to the disadvantage of consumers and what obligations DRM users should have towards consumers (eg duty to provide information, allow users to benefit from legal limitations and refrain from withholding material in the public domain). In other words, new aspects of consumer protection could be added to copyright law.

The extent to which copyright law is the most suitable means of dealing with issues affecting the users of protected works is hotly disputed. The copyright law system appears to be predominantly aimed at protecting the rights of rightsholders rather than consumers. However, Professor Samuelson has shown that this is not necessarily the case by pointing out that current US copyright law contains some consumer protection provisions, albeit only a few.⁴⁴ Another question is whether extending copyright law to include consumer protection issues would conform with the provisions of international copyright law – this point was also raised in Amsterdam.

One argument for steering away from copyright law could be the fact that the way in which DRM systems are actually used goes far beyond just the protection of works against unauthorised reproduction. As mentioned earlier, DRM technologies are often multipurpose solutions designed to facilitate the management and marketing of digital content, particularly in the online sector. Therefore, the interests that are affected by DRM use as far as consumers are concerned are not exclusively copyright-related, but more generally linked to consumer protection. The portability of content from one playing device to another and related standardisation issues have as little to do with copyright as time restrictions on listening to or watching content, or the protection of privacy or personal property. Access controls provide another reason why copyright law is not the answer. Under copyright law, it is deliberately made clear that there are no exclusive access control rights. However, access to technically controlled content is probably one of the main problems. If these important issues were regulated in copyright law, there is a danger that they would extend beyond the scope of application of copyright law. Also, copyright does not tend to provide the necessary procedural framework for the protection of consumers' interests in the courts.

Interim Conclusion

It would therefore be perfectly justifiable to conclude that the position of consumers in relation to DRM should not be protected under copyright law, but that it is more generally a consumer protection issue. This leads to the question of whether the application of general consumer protection law already offers suitable solutions, or whether sector-specific provisions are called for.

4.4. General or Sector-Specific Consumer Protection Law

General national consumer protection law usually involves a number of instruments which could be used to deal with some of the problems mentioned in section 4, above. In Amsterdam, particular mention was made of issues such as information obligations, the law on warranty for defects, liability for misleading behaviour and the procedural rights of consumers and/or their representatives. A key concept in relation to the implementation of consumer protection is the idea of (justifiable) consumer expectation. What a consumer can usually expect from a product or service generally determines the level of legal protection available if that expectation is not met. Therefore, one of the problems with DRM is the lack of practical knowledge about what consumers expect and, just as relevant, when their expectations are justified. This is partly because there is still little case-law in this field and partly because little is known about how consumers use digital content and how DRM affects that use.

Providers render themselves particularly liable under the law on warranty for defects if they do not inform consumers before they buy a product that the product lacks certain characteristics that the consumer can normally/reasonably expect it to possess. In other words, a provider can avoid liability under consumer protection law fairly easily by including a relevant warning. This poses one of the main problems linked to the demand for greater transparency and more information in the DRM field (see section 4.2) and is linked to some general difficulties with the application of consumer protection law. Whoever takes responsibility for informing consumers can influence and even mould consumer expectations. In a recent survey carried out in seven European

countries, 72% of digital music users questioned said that they knew it was illegal to remove technical copy protection mechanisms from purchased CDs or data files.⁴⁵ This comparatively high figure shows the extent of the music industry's influence on the legal awareness and expectations of consumers. This is not necessarily a problem. For example, if the media industry informs consumers often enough that they are forbidden from copying even once the CDs they buy, or if it advises them that DRM protection means those CDs cannot be played, consumers will sooner or later come to expect little else from their CDs. Consequently, they cannot cite consumer protection law in legal proceedings designed to ensure that CDs function as they generally do today.

Another problem connected with the application of general consumer protection law to DRM cases is its applicability to all possible products and services. It was not written specifically for either informational or cultural content. However, the latter attracts particular attention under the law on account of its value to society and social, cultural and political life. In other words, as well as the individual rights of consumers to media services and products, there is also a public interest in media content and its general availability and accessibility.

Sector-specific rules are usually designed to take into account the specific characteristics of their subject-matter. We have already mentioned telecommunications law as an example. Another example is copyright law, which deals specifically with the exercise of exclusive rights to content, as well as with the limitation of exclusive ownership rights in the public interest, which is aimed at promoting the general availability and usability of content. These are aspects which general consumer protection law usually does not or cannot take into account. However, since DRM use extends beyond the framework of current copyright law in several respects (see section 4) and influences how digital content that is not covered by copyright law is used, the suitability of copyright law is limited.

Interim Conclusion

It appears that neither copyright law nor general consumer protection law currently offers a common, comprehensive protection standard for users of electronically protected content. One reason for this is that both commercial and ideological interests are involved, although the latter are not the subject of general consumer protection law. This does not mean that sector-specific rules on consumer protection could not be used to pursue a higher objective. We have already mentioned the example of telecommunications law, in which the broad access, availability and free choice of communications services are aims that are supposed to be achieved by means of consumer protection rules. However, this objective, which extends beyond the protection of individual consumer rights, must be very clearly defined. The standards set in copyright law for the general availability and accessibility of content are only partially helpful.

4.5. The Next Steps

One of the most urgent tasks as far as regulating DRM is concerned therefore appears to be to agree which individual and more general interests should be protected and respected in the future. Initial ideas on this matter have been suggested by both the media industry and consumer representatives. The media industry has tried to develop sensible, consumer-friendly DRM

systems and to agree on transparency measures.⁴⁶ Meanwhile, consumer organisations such as the European Consumer Law Group (ECLG)⁴⁷ and BEUC have recently launched various initiatives in and outside Europe. In its position paper on the report by the High Level Group on DRM, BEUC highlights the importance of equal opportunities in an increasingly commercialised Information Society, including issues relating to the exercise of freedom of expression.⁴⁸ At international level, the A2K-Initiative (*Access To Knowledge*) has dared to set out some initial practical proposals. A2K is an initiative of the *Transatlantic Consumer Dialogue* (TACD), a forum of US and EU consumer organisations which develops joint recommendations to law-making institutions in the USA and EU for the protection of important consumer interests.⁴⁹ The second A2K meeting was held in London in May. Among the items discussed was the draft Treaty on Access to Knowledge.⁵⁰ Representatives from all fields, including culture, economy, the media industry, consumers, research and NGOs from different countries were involved in the discussions. As a result, the initiative was able to benefit from a tremendous amount of experience.

5. Conclusion

What is particularly noteworthy about the A2K initiative is its acknowledgement that DRM is not only a matter for copyright law, but also for competition law and consumer protection. It has recognised the need to protect individual consumer and more general interests as well as values in both the individual and general public interest. The A2K draft Treaty could serve as an initial starting point.

It is important to consider in what forum further active steps could be taken in order to protect consumer interests related to DRM. One idea is to discuss the issue at WIPO level and to negotiate a new WIPO treaty on the subject. The European Union could also be a suitable forum, not least because of its desire to promote a "knowledge-based economy". A knowledge-based economy without the guarantee of suitable access to such knowledge and its dissemination is hard to imagine. One possible reason why discussion of the "DRM and consumers" theme at European level has so far produced no concrete results may be related to the predominantly economic orientation of the European Union. On the other hand, an international organisation which has dedicated itself specifically to the protection of non-commercial aspects of the Information Society, access to information and the defence of human rights and individual values would offer a particularly suitable forum for setting out the way forward. The Council of Europe springs immediately to mind.

Compared to the European Commission, the Council of Europe has always been more active and experienced in the field of human rights and the protection of culture, knowledge and education in Europe. For a long time, the Council of Europe has been looking at the relationship between copyright law and access to information, as well as at copyright law in the broader context of new technological developments and the Information Society. Only recently, the newly created CDMC (*Steering Committee on the Media and New Communication Services*) acknowledged the importance of these topics and said it was considering possible future action in this field.⁵¹ For this reason and on account of its influence not only in EU Member States, but in all affiliated European states in which DRM will play a role sooner or later, the Council of Europe would seem to be a particularly suitable forum to take on the theme of "DRM and consumers" - ideally sooner rather than later.

- 1) Natali Helberger (helberger@ivir.nl) would be pleased to receive any comments, questions or suggestions.
- 2) See also Duft 2004 for alternative, non-DRM-based business models in: N. Helberger 2004 et al. (ed.); Dufft Nicole; Gompel, Stef; Kerényi, Kristóf; Krings, Bettina; Lambers, Rik; Orwat, Carsten; Riehm, Ulrich, *Digital rights management and consumer acceptability. A multi-disciplinary discussion of consumer concerns and expectations*, State-of-the-art report, Amsterdam, December 2004, pp.104 et seq., available at: <http://www.indicare.org/soareport>
- 3) Possible moral rights will not be discussed any further here.
- 4) For more information about this, see, for example, K. Koelmann, *Auteursrecht en technische voorzieningen. Juridische en rechtseconomische aspecten van de bescherming van technische voorzieningen*, SDU, The Hague, 2003; S. Dussolier, *Droit d'auteur et protection des œuvres dans l'environnement numérique*, Editions Larcier, Collection Creation Information Communication, Brussels, 2005; P. Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, Berkeley Technology Law Journal Volume 14 Number 2, 1999, p. 519; J. Cohen 1998, Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management", Michigan Law Review, Vol. 97, Number 2, 1998.
- 5) Tribunal de première instance de Bruxelles, L'ASBL Association Belge des Consommateurs TestAchats/SE EMI Recorded Music Belgium, Sony Music Entertainment (Belgium), SA Universal Music, SA Bertelsmann Music Group Belgium, SA IFPI Belgium, decision of 25 May 2004, No 2004/46/A du rôle des référés; Tribunal de grand instance de Paris 3^e chambre, 2^e section, Stéphane P., UFC Que Choisir/Société Films Alain Sarde et, decision of 30 April 2004, available at: <http://www.legalis.net/>
- 6) Cour d'appel de Paris, decision of 22 April 2005, M. Stéphane P., UFC Que-Choisir c/ Universal Pictures Video FR, SEV, Films Alain Sarde, Studio Canal, available at: <http://www.juriscom.net/documents/caparis20050422.pdf>
- 7) Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Copyright Directive), OJ L 167, 22 June 2001, p.10.
- 8) World Intellectual Property Organisation (WIPO), WIPO Copyright Treaty, adopted by the Diplomatic Conference on 20 December 1996, Geneva.
- 9) World Intellectual Property Organisation (WIPO), Performances and Phonograms Treaty, adopted by the Diplomatic Conference on 20 December 1996, Geneva.
- 10) Council of Europe, Recommendation No. R(2001)7 of the Committee of Ministers to Member States on Measures to Protect Copyright and Neighbouring Rights and Combat Piracy, Especially in the Digital Environment, Strasbourg, 5 September 2001, Paragraphs 12 and 13.
- 11) U. Gasser and M. Girsberger, *Transposing the copyright directive: Legal protection of technological measures in EU Member States*. Cambridge, MA: Berkman Center for Internet & Society Research Publication Series (no 2004-10), 2004, available at: <http://cyber.law.harvard.edu/publications/>; M. Groenenboom, *Comparing the EU/EC implementation of various Member States. A review*, INDICARE Monitor, Volume 2, Number 1, 2005, available at http://www.indicare.org/tiki-read_article.php?articleId=88 See also <http://www.euro-copyrights.org/>
- 12) N. Helberger, *Fence as Fence Can - Why 'Mind Your Own Fence' is not Synonymous with Property Regulation*, in L.F. Asscher (ed.), *Coding Regulation. Essays on the normative role of information technology*, Information Technology & Law Series (IT&Law Series) by T.M.C. Asser Press, The Hague, Netherlands, 2005.
- 13) Council of Europe, Declaration of the Committee of Ministers on a European Policy for new Information Technologies, Strasbourg, 7 May 1999.
- 14) Dufft 2005, *op.cit.*, pp. 23 et seq. ; D. Mulligan and A. Burstein 2002, *Implementing Copyright Limitations in Rights Expression Languages*, Proceedings of 2002 ACM DRM Workshop, available at: http://www.law.berkeley.edu/cenpro/samuelson/papers/other/ACM2002_Paper_111802.pdf ; D. Mulligan, J. Han and A. Burstein, A.J. 2003, *How DRM-Based Content Delivery Systems Disrupt Expectations of "Personal Use"*, Proceedings of the 2003 ACM Workshop on Digital Rights Management, Washington, D.C., available at: http://www.sims.berkeley.edu/~john_han/docs/p029-mulligan.pdf
- 15) C. Cohen 2002, *Overcoming Property: Does Copyright Trump Privacy?*, University of Illinois Journal of Law, Technology & Policy, Volume 2 Number 2, 2002, pp. 375 et seq. .
- 16) The list is based, *inter alia*, on a report that was published as part of the INDICARE Project, Helberger 2004. The EU-funded INDICARE Project studies the implications of DRM for end users. INDICARE stands for Informed Dialogue About Consumer Acceptability of DRM Solutions in Europe and has set out to provide a platform on which the theme "DRM and Consumers" can be debated. For more on the INDICARE Project, see <http://www.indicare.org/>
- 17) Discussed in detail in Helberger 2005, *Controlling Access to Content. Regulating Conditional Access in Digital Broadcasting*, Kluwer International, The Hague, 2005, pp. 59ff.
- 18) Article 19, *The Public's Right to Know. Principles on Freedom of Information Legislation* (International Standards Series, London, 1999), available at: <http://www.article19.org/>
- 19) Council of Europe, Draft Declaration on Freedom of Communication on the Internet, Principle 2 (Removal of barriers to participation of individuals in the information society). See also Council of Europe, Recommendation 91(5) on the Right to Short Reporting, Explanatory Memorandum, Recital 47; Council of Europe, Recommendation No. R(91) 14 on the Legal Protection of Encrypted Television Services, Explanatory Memorandum, Recital 8.
- 20) Council of the European Union, Fight against poverty and social exclusion: common objectives for the second round of national Action Plans, Brussels, 25 November 2002, SOC 470, Annex to Annex 2, Objective 2 (a).
- 21) In Europe, interoperability questions are primarily dealt with in relation to telecommunications law, which expressly states that it has nothing to do with content-related issues, Recital 5 of the Framework Directive, Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24 April 2002, p. 33. For criticism, see Helberger 2005, *op.cit.*, pp. 204 et seq. .
- 22) High Level Group on Digital Rights Management, Final Report, pp. 5 et seq., available at: http://europa.eu.int/information_society/europe/2005/all_about/digital_rights_man/doc/040709_hlg_drm_final_report.doc
- 23) Cohen 2002, *op.cit.*; S. Bechtold, *The Present and Future of Digital Rights Management - Musings on Emerging Legal Problems*, in: Becker, Buhse, Günnewig, Rump (eds.), *Digital Rights Management - Technological, Economic, Legal and Political Aspects*, Berlin, p. 617, available at: http://www.jura.uni-tuebingen.de/bechtold/pub/2003/Future_DRM.pdf
- 24) See also M. de Cock Bunning et al., *Consumer@Protection.EU. An Analysis of European Consumer Legislation in the Information Society*, Journal of Consumer Policy, Vol. 24, 2001, pp. 287, 311 et seq. .
- 25) Council of Europe, Draft Declaration on Freedom of Communication on the Internet, Principle 5 (Anonymity).
- 26) See European Copyright Directive, Recital 57.
- 27) For a detailed overview, see Helberger 2004, *op.cit.*, pp. 60 et seq. .
- 28) BEUC - Bureau Européen des Unions de Consommateurs/European Consumers' Organisation 2004, *Digital Rights Management, Position Paper contributed to the informal consultation of the final report of High Level Group on DRM of the European Commission, DG Information Society*, Brussels; available at: http://europa.eu.int/information_society/europe/2005/all_about/digital_rights_man/doc/beuc.pdf, p. 7, and European Copyright Directive, Recital 57.
- 29) Tribunal de Grande Instance de Nanterre 6eme chambre, judgment of 2 September 2003, Françoise M. / EMI France, Auchan France; Tribunal de Grande Instance de Nanterre 6eme chambre, judgment of 24 June 2003, Association CLCV / EMI Music France.
- 30) Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149, 11 June 2005, p.22.
- 31) *Gesetz über Urheberrecht und verwandte Schutzrechte* (Act on Copyright and Related Rights - UrHG), of 9 September 1965, most recently amended by Art. 1 G of 10 September 2003 I 1774; 2004, 312.
- 32) Helberger 2005, *op.cit.*, pp. 36 et seq. .
- 33) 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 (Universal Service Directive), OJ L 108, 24 April 2002, p.51, Articles 20 to 31. See Helberger, 2005, *op.cit.*, pp.200 et seq. , 261 et seq. .
- 34) Universal Service Directive, Recital 26.
- 35) Two relevant studies are currently under way. Firstly, the British Royal National Institute of the Blind (RNIB) is investigating whether and how the use of DRM is impeding access to content for blind or partially sighted people. More information can be found at http://www.rnib.org.uk/xpedio/groups/public/documents/PublicWebsite/public_rnib003590.hcsp#P50_4874 The second study is being conducted by the European Accessible Information Network (EUAIN), which is funded through the European Commission 6th Framework Programme and concentrates particularly on people with reading difficulties. Further information is available at: <http://www.euain.org/modules/wfsection/index.php?category=215>
- 36) For an overview of this subject, see Orwat, in: Helberger 2004, pp. 29ff and Orwat, in: Helberger 2005a, *A Multi-Disciplinary Discussion of Consumer Concerns and Expectations State of the Art Report - First Supplement* by Natali Helberger (ed.), Nicole Dufft, Margreet Groenenboom, Kristóf Kerényi, Carsten Orwat, Ulrich Riehm, Digital Rights Management and Consumer Acceptability, May 2005, available at: <http://www.indicare.org/>, p. 6, with further references.
- 37) Disabled People International 2004, point 4; World Blind Union 2003; World Wide Web Consortium 2004 (Web Content Accessibility Guidelines Working Group (WCAG WG); ENABLED 2005.
- 38) See also J. Clark, *Accessibility implications of digital rights management*, Media Access, 4 September 2003; available at: <http://joelclark.org/access/resources/DRM.html>
- 39) Helberger and Guibault, *op.cit.*, p. 18; Mulligan 2003, *op.cit.*, p. 112.
- 40) For a detailed overview, see Helberger 2004, *op.cit.*, pp. 33 et seq. and 37 et seq. .
- 41) A report on the workshop will soon be available at <http://www.indicare.org/>
- 42) Helberger 2005, concerning the example of access controls in digital television, pp. 45 et seq. , and more generally in relation to DRM, pp. 282 et seq. .
- 43) More on the theme of self-regulation can be found in W. Schulz and T. Held, *Regulierte Selbstregulierung als Form modernen Regierens*, commissioned by the Federal Minister for Cultural and Media Affairs, final report, working paper of the Hans-Bredow-Institut, Hamburg, 2002. See also IRIS Special: *Media Co-Regulation in Europe*, European Audiovisual Observatory, Strasbourg, 2003.
- 44) Samuelson, *Amsterdam Workshop report*, to be published, *op.cit.*
- 45) Duft 2005, in N. Dufft, (Lead analyst), A. Stiehler, D. Vogeley, T. Wichmann, *Digital Music Usage and DRM. Results from an European Consumer Survey*, INDICARE Survey, May 2005, pp. 42 et seq. , available at: <http://www.indicare.org/>
- 46) See, for example, the initiative of IFPI at: <http://www.ifpi.com/site-content/press/20020614.html> or of Microsoft at "Plays for sure"; <http://www.playsforsure.com/>
- 47) European Consumer Law Group (ECLG), *Copyright and Consumer Protection*, Policy Report, Brussels 2005, available at: <http://212.3.246.142/1/CKNNAMACBGEMCECOKLNAPPEPDB19DYBYCY9DW3571KM/BEUC/docs/DLS/2005-00181-01-E.pdf>
- 48) European Consumers' Organisation (BEUC), *Digital Rights Management, Position Paper*, Brussels, September 2004, available at: http://europa.eu.int/information_society/europe/2005/all_about/digital_rights_man/doc/beuc.pdf
- 49) For more information: <http://www.tacd.org/>
- 50) A copy of the draft can be downloaded at: <http://www.cptech.org/a2k/consolidatedtext-may9.pdf> A report on the meeting is available at: http://www.indicare.org/tiki-read_article.php?articleId=102
- 51) Steering Committee on the Media and New Communication Services (CDMC), 1st meeting of the CDMC, 21 - 24 June 2005, CDMC(2005)012 fin., available at: http://www.coe.int/T/E/human_rights/media/4_Documentary_Resources/CDMC%282005%29012FIN_en.asp#TopOfPage