

Consumer's guide to Digital Rights Management



Any side effects?

Things you should watch out for when buying CDs, DVDs
and online text, online music or online video

About this guide

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<http://www.indicare.org/consumer-guide/>

About INDICARE

INDICARE is the "Informed Dialogue about Consumer Acceptability of DRM Solutions in Europe", i.e. for an informed dialogue on the acceptability of DRM solutions for consumers in Europe. INDICARE has acquired an extensive body of experience and knowledge through its in-depth research and dialogue with industry stakeholders and other large scale interest groups. It initiated dialogue primarily through a peer-reviewed online journal, international expert workshops, interviews, and propelled by two major consumer surveys. The INDICARE project is conducted by the following partners:

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Preface

Once upon a time, in the pre-digital age, buying music and other audio-visual material was very simple. We bought records or cassettes, we owned them, we could play them on all players, and we could lend them out, give them away or even sell them. We could copy them too, but not very well.

Our rights as consumers were relatively clear and could often be enforced.

The new digital carriers, such as CDs, DVDs and other recording media, are very easy to copy, and here lies the problem. Creators, artists and authors cannot be rewarded sufficiently if their work can be copied freely without restriction and sold by the copier.

New rules and new regimes are needed to protect original work in the digital environment. Limits have to be put on how digital material may be used. This is done by DRM or digital rights management as explained in this Guide.

However, consumers who pay for digital works also have, or should have, rights. Sadly, as this publication shows, consumers actually have very few rights in the digital environment and

even those rights are under threat from the development of DRM. From industry and policy makers, consumers are continually bombarded with information telling them what they must NOT do online. We rarely hear any information telling consumers what they may do online.

This Guide is a helpful source of important information on DRM, which is having an increasing impact on all consumers. This is a good first step - consumers should know what is happening around them. I hope this Guide will also encourage consumers to demand from policy-makers and industry a clear set of digital consumer rights. We want a fair balance between the rights of “content holders” and consumers. We are a long way from achieving that balance at present and there are powerful forces working in the opposite direction.

Please draw your own conclusions from this Guide and make your voice heard.

Jim Murray
Director,
BEUC, the European Consumers Organisation
<http://www.consumersdigitalrights.org/>

1 Introduction

Recently in the news:

“The end of private copying”

Sony BMG released selected CDs with a DRM that restricts consumers to making only 3 copies of the CD. Another example of private copying restrictions are the terms of use for the music download service Napster: consumers may burn each track they purchase only seven times as part of any particular play list of songs.

See: Mark Russinovich: Sony, Rootkits and Digital Rights Management Gone Too Far, 31.10.2005, <http://www.sysinternals.com>

“CDs that do not play”

A consumer in France bought a CD distributed by EMI, one of the major music publishers. At home, he discovered that he was not able to play the CD on the computer or in his car's CD player. As he learned later from a friend, this has to do with electronic copy protection technology, a so called Digital Rights Management (DRM) system that EMI used on the CD.

See: Natali Helberger: Thou shalt not mislead thy customer! INDICARE Monitor, Vol. 2, No. 9, 25.2.2005, <http://www.indicare.org>

“CDs that install unwanted software on consumers' computers”

In 2005, Sony-BMG released a new DRM technology (XCP) that would install, without the knowledge of consumers, software on their PCs to control and monitor the way they use Sony's music.

More about the so called “Sony Rootkit Scandal” at: Electronic Frontier Foundation (EFF): Sony BMG Litigation Info, <http://www.eff.org>

“Privacy in danger”

One major complaint against the Sony-BMG XCP-DRM was that the software would collect information on when, how often and which songs consumers listen to and transmit this information to Sony-BMG.

See: Electronic Frontier Foundation (EFF): Sony BMG Litigation Info, <http://www.eff.org>

“DRM compromises computer security”

DVDs of the movie “Mr. & Mrs. Smith” released in Germany contained the so-called “Alpha-DVD” DRM technology. Consumers trying to play the CD on their computer reported system crashes, malfunctions of their DVD burner – even when burning other DVDs as back-up copies – or even a complete crash of the DVD burner.

See: Heise News: Sicherheitslücke durch Kinowelt-Kopiersperre, 13.2.2006, <http://www.heise.de>

“Consumers purchasing music downloads from major online suppliers are trapped...”

This is the conclusion BEUC, the European consumer organisation, draws from a survey they conducted. The study confirmed that music downloaded from MSN Music UK will not play on the Sony Network Walkman or an Apple iPod.

See: BEUC: Tests. Survey on Interoperability, 2005, <http://www.consumersdigitalrights.org>

These are negative examples of cases where consumers, who had bought digital content in the form of a CD, a DVD or in the form of music, text or video downloaded from the internet, suddenly encountered unexpected problems when using that content. A very likely reason for the problems is the implementation of so called “anti-copying protection” or “Digital Rights Management” systems in DVDs, CDs, or online services. As we will explain, there are positive examples of DRM use, too. In this Consumer's Guide to DRM you will learn more about the following:

- What is DRM?
- How can DRM systems affect the way you use digital content?
- How to recognise that a DRM is used?
- How is the DRM system protected by law?
- What are your rights as a consumer in conjunction with DRM systems?

Finally, we will provide a check-list that can help you to protect yourself against unpleasant surprises.

We will focus on the possible risks and side effects of DRM because availability of this information is limited. This is not to imply that DRM is inherently disadvantageous to consumers. Provided that DRM is applied in a way that also takes into account the interests of consumers, DRM can be the basis for a variety of attractive new services for consumers. If you want to learn more about the business potential of DRM, we recommend you read our Content Provider's Guide to DRM. This guide illustrates the different functions of DRM and how it can be used to offer new, consumer-friendly products and services.

2 What is Digital Rights Management?

What it is and where it is used

Digital Rights Management (DRM systems) systems are used to manage your use of digital content, and to protect digital content against unauthorised use. DRM can come in many different forms. They are embedded both in physical media (i.e. CDs or DVDs) and in content distributed online, such as music files, e-books, texts, images and games distributed online, or video on demand. Online distribution can take place via the internet, interactive TV networks and wireless communication. Some examples of services or products that use DRM are:

- CDs or DVDs with electronic copy protection;
- online services where you can download songs, videos, entire albums or electronic books, like iTunes, RealPlayer Music Store, Ciando, Movielink, Moviefone;
- a DVD that can be played only in certain countries, not in others;
- pay-TV, pay-per-view, or video-on-demand.

For example, the copy protection on a CD or DVD (i.e. offline media) is considered a DRM, as are encryption methods used in internet music stores (i.e. online media). This can lead to a song downloaded in a particular format, for example in Windows Media format, not being able to be reproduced on a popular player, such as an Ap-

ple iPod. In particular in connection with online media, DRM is generally used in combination with contracts; one task of DRM systems here is actually to enforce the contractual conditions on the extent of the utilisation opportunities (more about this in section 5).

DRM employs various techniques to manage and control the use of digital content, mainly encrypting, marking or selective incompatibility:

- Encryption: consumers can only access encrypted information if they have a key. This key is often included in the hard or software you use to access the content. An example is a DVD player: it contains a key to play DVDs.
- Marking: to communicate information about content – e.g. whether the data is copy protected, who the holds the rights, and what uses are authorized – the data is marked by the rights holder prior to sale.
- Selective incompatibility: by, for example, encoding errors into content on a CD, the manufacturer of the CD tries to determine whether a CD can be played in a computer, car radio, portable device, mobile phone, etc.

Is DRM good or bad?

DRM is in the first place a technology to market contents to you, the consumer, and as such it is not per se good or bad. DRM can be applied in different ways, some of which are good for the consumers, some of which are less advantageous or even harmful. As the examples above show, DRM systems are used in a whole range of new services – some of which might not have been offered without DRM. New distribution and pricing models, such as from iTunes, provide you with the choice of buying only a particular song on a CD that you like the most, without being forced to buy the whole CD. Another example is the online service Movielink, which enables you to download and watch a movie for a pre-defined time. In other words, DRM can be beneficial for consumers in many respects. On the other hand, as we describe in chapter 3, DRM also restricts the ways in which digital content can be used or the choice of buying content from different providers. DRM can conflict with your privacy, your property or the security of your computer. In some situations,

such restrictions are legitimate and justified, in other situations they can conflict with legitimate consumer rights and interests, in which case consumers might have recourse to the law. This aspect will be discussed in chapter 5.

3 How DRM systems can affect the way you can use digital content

Digital content providers using DRM systems have many options of determining in a very detailed way what you may or may not do with digital content.

DRM can restrict your choice and freedom to listen to, read or watch content where and how you want

The freedom to use electronic content in any way you like has been fading with the emergence of DRM systems. In the case of DRM-protected files, you might, for example, not be able to rip a CD to convert the songs into a different format, let's say MP3, to copy a CD, to play a CD in your car stereo or on a computer. Some files are decrypted exclusively by the hardware of a particular operator, while other files may use measures restricting the number of copies you can make. Files can also contain an electronic expiry date, meaning you cannot use the file after a certain time limit. For example, you might be able to watch a movie you bought online from a video download site for 24 hours only. Another example is a situation in which your contract with the service provider does not give you a right to make backup copies; they will be disabled by the applied DRM system so that you are in danger of losing your collection when switching to a new computer or media player. This so called "forward lock" also prevents you from reselling your files, as you would do with, for example, used books, CDs, DVDs, etc.

Another aspect in this context is compatibility between the files you download and your hard- or software. A test recently conducted by the

European consumer organisation BEUC concluded that:

- In most cases, it is impossible or at least very cumbersome to play a downloaded music file in a certain format on players designed for another format.
- Download services often sell music in one single file format and therefore control what you can do with the music files and the devices they will play on.

This means, for instance, that when you download a music file in a certain format, such as the WMA (Windows Media Audio), this file may not play on all your portable devices. Also, in some cases it can be impossible to directly convert one format into another, i.e. you cannot, for example, directly convert WMA files into the AAC (Advanced Audio Coding) format which is used by Apple iPod. In respect of electronic off-line content as well usage restrictions and a lack of compatibility with the player hardware can mean that you may be barred from using your collection of CDs, DVDs, books, etc. on certain devices and computers. You can find the test conducted by BEUC on "interoperability between online music offers and portable players", <http://www.consumersdigitalrights.org/>

Privacy

In respect of online services in particular DRM is sometimes used to collect information about you: at what time you play which songs, how often do you play them, etc. The data can be used for checking adherence to the usage licence. It is also sometimes used for internal marketing purposes, in other cases it is passed on or even sold to third parties. Occasionally, CDs and DVDs can also use DRM to monitor consumer behaviour. One inglorious example was the so called XCP-DRM system used by Sony-BMG: if you wanted to listen to the CD on your computer, you first of all had to install software that allowed Sony-BMG to track when you listen to the CD, for how long, etc.. This information was then sent to Sony BMG via the internet.

Security

DRM systems can occasionally also cause harm to your computer or other devices. For example, some DRM systems can be incompatible with the settings of your computer and cause the computer to crash. Security issues are also at stake whenever a DRM system installs additional software on your computer. This software can interfere with your DVD drive (as was the case with the DVD “Mr. and Mrs. Smith” in Germany), your player software or other functions of your computer. If the software establishes a connection to the Internet, this can even create gateways that can be used by viruses, worms and Trojan horses to attack your system.

Important to remember:

DRM systems can affect the way you use digital content (music, video, text) that you have purchased. You might be willing to accept some restrictions if you like the price and conditions under which the content is offered to you. Some of the restrictions might not be acceptable or even interfere with your legitimate rights as a consumer (more about your rights in chapter 5). It is therefore important to know if DRM technologies are used, and if so, what this means for the DVD or CD that you are planning to buy, or the content that you are going to download. In the following chapter, we will provide some indicators that enable you to recognise whether a DRM system is used.

4 Recognising a DRM System

Sometimes it is quite hard to detect whether a content or service provider uses a DRM system or not. You can distinguish between two different situations: DRM on a tangible medium, like a CD or DVD, and DRM in content distributed online.

DRM on a CD or DVD

In some countries, the law obliges producers using a DRM system to indicate that a DRM is used. For example, in Germany companies are required to tell customers that a DRM is used, what properties it has, the company’s name and the address of the entity responsible for using the DRM. Legal labelling obligations for companies using DRM systems, like the German provisions, are still the exception. Most European countries do not have specific labelling obligations for DRM yet (note: there can be labelling obligations under general consumer protection law, as will be explained in chapter 5). Also, at a European level, no formal labelling guidelines for DRM exist.


Having said this, even in countries where no specific DRM legal labelling obligations exist, many producers of CDs and DVDs or providers of DRM-controlled online content voluntarily choose to indicate in some form or another whether they use a DRM system or not. One reason for this is that some court judgements in recent years have increased pressure on CD and DVD manufacturers to warn consumers if DRM technology is employed, and how this affects the use of the product. If they fail to do so, they can be held liable if the CD does not comply with the expectations of consumers (see more in detail in chapter 5). In the following, we will give you some examples of what such (voluntary) labelling initiatives look like, and what you have to look out for when buying a CD.

For instance, when you find the sentence “this CD is copy protected” on the back of the jacket of a CD, you know that a DRM system is used. Another example is when the following logo, which is increasingly common in Europe and in the US, has been placed on a CD or DVD:

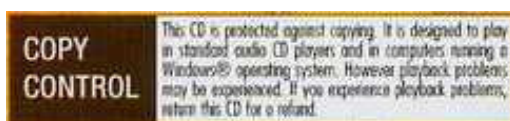


This logo has been designed by the International Federation of the Phonographic Industry (IFPI, <http://www.ifpi.org>). According to the IFPI la-

elling guidelines, producers should prominently indicate the devices or platforms on which the CD will play without problems, and which devices or platforms the CD cannot be played on, whether the disc can be used on a computer, what hard- and software requirements there are to use it. Producers should also provide information such as a website address or help-line number. This IFPI label is just one example of many of an attempt to standardise the labelling of DRM systems. Besides the IFPI label, there is still a wide variety of other labels out there. Some of the more common ones are:

Playability on / Abspielbarkeit auf / Lecture sur			
	CD Audio Home player / lecteur		
	Others / Sonstige / Autres	< 100%	PC, min. Win 95/64 MB RAM, Pentium II 233 
			Mac 
			Others / Andere / Autres 

Info: www.bmg-copycontrol.info



For an extensive overview, see: Campaign for Digital Rights: Copy protected CDs, <http://ukcdr.org/issues/cd/warnings/>

Important to remember:

Check the CDs and DVDs you buy carefully. In the future, it can be expected that an increasing number of CD or DVD producers indicate if a DRM technology is used. If you do not like the restrictions, you can choose not to buy the CD or DVD. Once you purchase the product, it might be difficult to argue successfully that the product does not meet your expectations, in particular if you

have been warned adequately by a label (more about this in chapter 5). However, you should also know that in what case a DRM-warning is adequate and sufficient or not is still disputed among lawyers, policy makers, consumer groups and industry representatives.

DRM Systems in Online Content (Downloads)

The IFPI label applies only to CDs and DVDs, not to music or other content which can be purchased online as a file. This makes it even more difficult to recognize whether DRM systems are used when shopping online. Still, there are some indicators that can help you to detect whether DRM technology is used or not:

There are some business models that are only offered in conjunction with DRM

Services that typically use a form of DRM are pay-per-view services or online-movie rentals. Also, most commercial online music download services will operate with DRM, such as Real Networks or iTunes. In other services, you might not easily expect the presence of DRM systems: the previous version of Napster once allowed you to download music for free. Now, the new Napster enterprise uses DRM technology in order to make sure that you use the content you purchase only in accordance with the licensing conditions. Sometimes, such services also use logos that give you a hint that DRM is applied, such as the “Plays For Sure” logo by Microsoft.

Usage restrictions can indicate that DRM is used

An indication that a DRM is used is that uses of a file are restricted in certain ways (e.g. you can only make a limited number of copies, you are not allowed to forward songs to someone else). Another indication is that the files you purchased online will play only on particular portable players (for example, Apple’s iPod only plays songs that have been downloaded from iTunes, but no protected files from other providers – unless they are not DRM-restricted).

Read the terms and conditions

A good way to learn more about using a DRM system have a look at the terms and conditions of the online service, also known as end-user license agreements (EULA). If the licence says that you are only allowed to make five copies, use it on two different players, or listen to it only for an hour, etc. it is most likely that DRM is in play. Another possible indication that DRM technology is being used is if the contractual conditions inform you that you have to download special player software from the provider offering the content.

Look at the file format

If you see that a file is in the AAC format then it is very likely encrypted with Apple's "Fair Play" DRM system. If the file extension is "wma" or "asf", then the file is likely wrapped into Microsoft's DRM system. You can configure your operating system in such a way that file extensions are always visible. Information on how to do this on your specific system should be available in the help file; the key search words are "file extensions" or "file name extensions".

5 DRM and the law

You might have heard stories of music companies suing consumers who tried to circumvent the DRM-locks on digital songs. At the same time, you might have learned of cases of consumers going to court to against the users of DRM systems, or technology magazines reporting that DRM systems can violate consumers' rights. The legal status of DRM systems and of consumers in this connection is unclear in many respects. To shed some light on it, in this chapter you will find some answers to the following questions:

- Is it illegal to circumvent or disable DRM?
- Do you have a right to make private copies?
- How is consumer privacy protected?
- Can consumers demand that their CDs play on any device?

and more.

Most legal provisions have their origin in European Union law. For the time being, there are no European rules that directly protect users of DRM protected content. However, existing copyright law and consumer protection law might go some way in giving consumers legal standing in defending their interests against DRM systems employed by companies. Therefore, we will focus on the rules laid down in European law. This way, we can give you an initial indication of what the rules in your country might look like. It is important to bear in mind, however, that the European directives usually do not give consumers direct rights in their home country, but they oblige the national legislators to include the European regulations into national law. The way EU member states implement European law can vary from country to country. For the precise situations in your country, check with your national consumer organisation.

Offline or online: a major difference

From the legal point of view, there is a major difference between offline and online forms of distributing content. Let's say you buy a book, a normal printed one. After buying it, you own that book. What you can do with it is regulated by general property law and copyright law: you can sell it, lend it to someone else, or make copies of it. You are, in most cases, not allowed to sell copies of it or scan it and put it on the internet. As we will explain later, in addition certain regulations of consumer protection law apply only to material products and not to digital content, which has been downloaded from the internet.

In the case of digital content that is provided online, in contrast, you acquire a licence for this content, i.e. an eBook. Here, as well, copyright law applies. In addition, the conditions in your licence, that is to say in your contract with the service provider, can specify what you may or may not do with the content that you purchased online. If it is controlled by a DRM system, the devices you need to read the e-book can control your use of it – and they can even prevent uses allowed by copyright law, like making a private copy of the text. According to the presently applicable law in Europe, DRM can even over-

ride legitimate privileges that consumers have under European copyright law (see chapter 5). What you can or cannot do with the file is specified in the licence and do not have to be in line with the legal privileges available to you under the valid copyright law. The licence is a contract between you and the service provider, which allows you to do certain things with the content that you purchase online.

For example, according to your contract with the service provider you may have the right to listen to a piece of music for one week, make not more than five copies, play it only on three different devices, etc. Other common examples are that you are not allowed to send the file via email to a friend, resell it or remix it, etc. Some of these restrictions may go too far and might not be legal (as to the legitimacy of some contractual terms, see chapter 5). Be sure to check the “terms and conditions” of services such as Napster, iTunes, Realplayer Music Store, Movie-link and other online services.

DRM systems are protected by law, but consumers are protected against some DRM rules

The anti-circumvention provision

The so called anti-circumvention provisions in the European Copyright Directive prohibit you from circumventing a DRM system (i.e. hacking) or assisting others in so doing. The ban on circumvention even applies in situations where you believe that you have good reasons to do so because, under your countries laws, you would normally be allowed to make copies of a CD, convert its contents to MP3 format, or distribute the contents for classroom use – to give just some examples. Irrespective of whether you have these entitlements or not (more about this in chapter 5) with DRM protected media: if the content is DRM-controlled, you are not allowed to remove or circumvent the DRM. This is equally true for DRM-protected content that you download from the internet, like songs that you bought from an online store. Moreover, it is forbidden to commercially distribute a device that enables circumvention of a DRM system. The definition of such a device is commonly

very broad, encompassing not only software that can be used to circumvent DRMs, but also providing information on how to circumvent DRM systems, or advertising such tools or guidelines.

Depending on the law of your country, and whether you circumvent devices for commercial or private purposes, possible sanctions can range from civil sanctions to criminal punishment (fine, jail terms, etc.). It is also important to know, however, that there is still much legal uncertainty and controversy about these provisions.

Your privileges under copyright law...

Copyright law normally allows for certain uses of content without having to ask the rights holder (the record company, the movie studio, the publisher, etc.) for prior authorisation. In this chapter, we will explain what these privileges are. Please note, though, that we have to simplify in this connection and may not be able to address all the questions you may have. For sources of more detailed information see the links at the end of this brochure.

The law recognizes so-called exceptions to the copyright of the copyright owner. These exceptions allow consumers to perform certain acts, which would otherwise constitute an infringement of copyright, if they have not been approved by the copyright holder. In most European countries these exceptions include, among others:

- Private copying exception: it allows you to make a back-up copy, for your own research or study, or to make a copy for your family or good friends of yours. The purpose of the copy may not be commercial.
- Exceptions for educational and scientific purposes: you may copy or communicate a text, film, song, etc. as an illustration when you are a teacher or a scientific researcher. The purpose may not be only commercial.
- Exceptions for citation: you may quote from an article, book, report, film, etc. to express criticism, or review the work under certain conditions when the work has already been published.

- Exceptions for parody: you may quote from a texts, songs, films, etc. for the purpose of caricature or parody.

The exceptions in copyright law are meant to benefit consumers, but they are not rights in the sense that they grant consumers an individualised right of enforcing them directly. The result is that a judge, when deciding whether an exception applies, will first have to weigh the interests of the person benefiting from the exception against the exclusive rights of the right holder. This is why we called them exceptions or “privileges” and not “rights”.

... and how these privileges are restricted because of DRM systems

The problem with all these privileges is that it is still unclear how you can enforce these privileges if a DRM system is in place and you are prohibited from circumventing it. Most national laws and European law do not yet provide an answer. European law obliges rather vaguely national states to ensure that consumers can actually make use of these exceptions even if a DRM system is used – without specifying how to achieve this. Only a few member states have adopted rules to protect the interests of consumers of digital content.

In France, for instance, there has been much debate about possible legal initiatives to strengthen the private copying exception. German copyright law obliges the rights holder to supply to the consumer the necessary means to use works for purposes of study, parody or illustration and (to a limited extent) for private copying. In Denmark, an arbitration procedure has been established to help consumers who want to make certain legitimate uses but are prevented from doing so by a DRM system. Portuguese copyright law explicitly states that DRMs may not obstruct fair use. Rights holders in Portugal should take voluntary measures to guarantee this, but consumers can also appeal to an arbitration board. These are just some examples. It still remains to be seen how effective these rules will be in practice and whether other countries will follow, or whether European legislators will

work out additional rules that clarify the situation for the consumers.

But even in the case where you do have privileges under your national law, your rights can probably be signed away with a contract between you and the provider of the service or content. Freedom of contract implies that it is permissible to sell products with certain restrictions. The provider can determine that these privileges defined by the law do not apply. There is still much controversy about this question. The abovementioned privileges are often “signed away” by clicking on the ‘accept’ button during an online transaction. This is why it is so important for you to read the terms and conditions carefully when you buy content, particularly when you buy content online.

Important to remember:

Copyright law has exceptions that may benefit you. However, it is still unclear how you can enforce them. Producers and service providers enjoy the right to change conditions contractually, therefore you need to read the terms and conditions carefully. In case you do not agree with the conditions, you are free to not accept them. However this ultimately means not buying this product. This might seem not much of a choice if the content is not available elsewhere. On the other hand, consider that not acquiring a product or service that dissatisfies you is at least a powerful statement towards the provider of the product or service, namely that consumers are not willing to accept unfavourable or overly restrictive conditions. It helps the market to understand better your wishes and preferences. This does not mean, however, that you as a consumer cannot enforce some rights against the *unfair* use of DRM systems. In the next section, we will explain how you can defend your interests under consumer protection law.

DRM and consumer protection law

Introduction

Consumer protection law protects consumers when doing business with parties selling them goods or services, e.g. a CD or online content. It protects consumers at different stages:

- Before the purchase: sellers are obliged to provide certain information; they are prohibited from using certain misleading behaviour.
- When concluding the contract: contract law applies.
- After the purchase: after consumers received the product, they are protected by the rules on defective products and product liability.

In addition, there are specific obligations, such as the duty to protect consumers' privacy.

The duty to inform consumers about DRM

General consumer protection law specifies the kind of information that must be conveyed to consumers. In the context of digital content and DRM systems, sellers of goods and services have to provide all information that consumers need to make an informed decision. This includes, but is not limited to, the following:

- the fact that DRM technology is being used;
- whether this means that you can play CDs, DVDs or downloaded pieces only on a particular player device, and or with particular software;
- whether you can make copies of files or not;
- whether a product installs additional software on your computer;
- specific software or hardware requirements;
- whether the DRM monitors your behaviour;
- whether there are restricted listening time in case of online-content;
- whether you can burn a downloaded content only a certain number of times.

If the seller keeps back such information – and you make a decision that you would not have made if you had known these facts – a court could consider the behaviour of the seller impermissible.

Unfair contractual terms are prohibited

EU member states should provide for national regulations that regard a contractual term as unfair if it causes a significant imbalance in the parties' rights and obligations arising under the contract and if the contract has not been individually negotiated. This applies in particular for so-called "standard contracts", which leave no room for individual negotiation. Either you accept them, or you cannot use the service. In respect of almost all contracts that regulate the sale of digital content such standard contracts are involved.

Here is a list of some suspicious conditions in consumer contracts that can lead to imbalances in the relationship between you and the provider of the service provider (the list is not complete, and some elements still have to be confirmed by court decisions):

- The reservation to unilaterally change the terms and conditions of the contract: this reservation is used by iTunes, for example. As a consequence, Apple can change the number of copies of a song you are allowed to make even after you bought the song and downloaded it onto your PC.
- Although some DRM systems may pose a risk to your PC, the vendor may use a wide-ranging disclaimer through which it can exclude liability for several types of damage.
- The vendor may place restrictions on the possibility of criticising the product publicly.
- Through the sale of the product the vendor will be able to monitor your usage behaviour.
- The product only works with software and/or hardware provided by the same vendor or a supplier preferred by the vendor.

DRM-protected CDs and DVDs that do not meet legitimate consumer expectations

Consumer law was the basis for some legal claims against record companies. These were above all cases where consumers bought a CD or a DVD that did not meet their expectations, for example, because they could not make a copy for another member of their family or listen to it on the car stereo. The general rule under consumer protection law is that a consumer has certain expectations the purchased product has

to meet. If these expectations are not met, the product can be considered as not complying with the contract. The entitlement to expect certain qualities may have several reasons:

- the way the product is regularly used,
- Note that we will focus in the first place on the possible risks and side effects of DRM, because this is information that you are less likely to be informed about elsewhere. This is not to say that the use of DRM is automatically disadvantageous to consumers, provided the DRM is applied in a way that also takes into account the interests of consumers. the way the product was advertised,
- an agreement with the provider (i.e. a contract), or
- the consumer has certain rights under the law, as is the case with the private copying exception.

In case of the product or service failing to meet your legitimate expectations, and you have not been informed accordingly beforehand, the product can be considered defective, and you may have the right to return the product and to receive your money back. What can you reasonably expect from a CD or DVD? This question is still largely unanswered. Only a few court decisions exist, there are even less for online services. Therefore, no basic rules can be given here. Current court decisions suggest that consumers can legitimately expect CDs to play on all possible devices, including computers, laptops or car stereos. Much more controversial is the question of whether consumers can legitimately expect to be able to make a copy for family members. Not all copyright regulations of the member states currently include an exception for private copying.

Presently, the rules on non-conformity or non-compliance in most countries apply only to tangible products such as CDs and DVDs, not to online services, such as music downloaded from the Internet or pay-TV services. This is another loophole in the protection of consumers against unfair use of DRM systems.

Important to remember:

The obligation to inform the consumer that certain restrictions apply also means that once you have been warned, you are in a much weaker position to argue that the product does not meet your expectations. If you are informed about the restrictions of the product, you can no longer claim that you did not expect certain restrictions. In cases of doubt the product is no longer 'flawed' or 'defective', but complies with the terms of your contract with the seller. This is why it is important that you carefully check the CDs, DVDs and the contractual conditions of the online service provider.

DRM and product liability

According to the European directive on the liability of defective products, EU member states should guarantee consumers certain rights when they suffer damage caused by defective products. The directive is only applicable to tangible goods causing damage, such as CDs and DVDs. A product is seen as defective when it does not provide the safety a user is entitled to expect, taking into account the presentation of the product, the use to which consumers can reasonably expect that it can be put to, and the point in time at which the product was brought into circulation.

A recent case of a faulty product was that of CDs sold by Sony-BMG. They were equipped with the company's XCP -DRM system. To listen to such a CD on their PCs, users had to install software that opened their systems to viruses and other malware. The case became known worldwide as the "Sony Rootkit Scandal".

When as a result of using a CD or DVD, your computer hard disk or your DVD player is harmed, you might bring forward a claim of product liability. However, the directive is only applicable when there is proportionally severe damage. According to the directive, damages should at least be worth € 500 to be eligible for claiming product liability. Also, the item damaged should be intended for private use or con-

sumption, and you must have used it mainly for your own private use or consumption.

The duty to respect and protect consumers' privacy

Some DRM systems can also be used to track your habits and personal information. This is particularly common in online services. Online retailers have to adhere to EU data protection regulations when they process your personal data. Personal data is any information relating to an identified or identifiable natural person, who is: you. Personal data are your address, your credit card number, account number, information about the items you bought, when you bought them, and much more. Examples of the 'processing' of data are the collection of personal data, its storage and its disclosure to third parties, e.g. other firms that use these data for advertisement purposes.

Personal data can only be collected and further used if there are legitimate reasons to do so, such as:

- when you have unambiguously given your consent;
- when data processing is necessary for the performance of a contract to which you have agreed, for instance for billing purposes; and
- when the processor or a third party has a legitimate interest in doing so and this does not conflict with the basic rights of the consumer.

A commercial entity that collects personal data is, moreover, obliged to ensure:

- the fair and lawful processing of data;
- that the data is collected for explicit and legitimate purposes and is used accordingly;
- that the data must be relevant and not excessive in relation to the purpose for which it is collected;
- that the data must be accurate and, where necessary, up to date;
- that consumers have reasonable measures available to them to rectify, erase or block incorrect data about them;
- that data which identify individuals must not be kept longer than necessary.

Generally, you have the right to know the identity of the person in charge of data collection, the purpose of the processing of your data and all other information that is necessary to guarantee a fair processing of your personal data. You also have the right to object at any time to the processing of personal data for the purpose of direct marketing.

If in doubt, it can be helpful to check the “privacy terms” or “privacy policy” descriptions on the website of the content provider. In any case: you have the right to request and obtain information by the content provider about the personal data and its processing.. If you suspect that your personal data is not being treated the way it should, we advise you to contact your national data protection authority.

A list of the National Data Protection Commissioners can be found here:

http://europa.eu.int/comm/justice_home/fsj/privacy/index_en.htm.

For more information about this subject matter, see also

<http://www.consumersinternational.org/>

So, you have some rights... but what to do with them?

In general, when you have difficulties with a CD or DVD a DRM system is in place, you should first discuss your complaint with the seller you bought the product from. Often there is a certain period of time, 7 or 14 days, in which you can return the product and ask for a refund or a voucher in return. It is best to check for these rules before you buy a product. After the purchase, you should be able to find relevant information on your receipt, the invoice or the terms and conditions. No comparable rules exist for online content from download services.

For offline and online content, you have, depending on your country of residence, the option to appeal to an Alternative Dispute Resolution Body – or directly to the courts. Alternative Dispute Resolution Bodies exist for instance in Sweden and Denmark. For more information,

check with your national consumer organization.

In some cases, your consumer organization might even be able and willing to defend your case in court (note: not all countries foresee this procedural possibility) or otherwise. For example, consumer organisations in France represented consumers who bought CDs that could not be copied or played on car stereos. Germany and Norway also allow consumer organizations to represent the collective interests of consumers in courts. In the UK, consumer organisations appealed to the national competition authority, because of consumers' complaints about the fact that Apple's iTunes Musicstore sold songs in the UK at a higher price than in other European countries. In the US, representatives of consumer interests (in this case, among others, the Electronic Frontier Foundation,) successfully pleaded against Sony-BMG's intrusive XCP technology. They were a driving force behind Sony's promise not to use this technology any longer and compensate consumers who bought XCP-equipped CDs.

6 Checklists

What to look for when you buy (the lists are not exclusive):

	Your next CD or DVD	Content online (Download)
Where important information is to be found	<ul style="list-style-type: none"> <input type="checkbox"/> Labels and copy protection statements on the inside or outside of the product (see Chapter 4); so called click-through or shrink-wrap licences that you are required to accept within an installation process. Shrink wrap licences are licences whose content can be seen only after opening the product. 	<ul style="list-style-type: none"> <input type="checkbox"/> Accompanying terms and conditions that can be found somewhere on the website of the provider or that pop up (more or less explicit/visible) during the installation or purchase process. (Click-through or shrink wrap licences).
Restrictions of use	<ul style="list-style-type: none"> <input type="checkbox"/> Are you allowed to make copies at all? (e.g. security copies) <input type="checkbox"/> Are there restrictions on the number of copies that you can make? <input type="checkbox"/> Can you rip the CD/DVD and convert the songs to other formats such as MP3? <input type="checkbox"/> Are you restricted in the way you can listen, watch or read the product (e.g. are these actions restricted to a certain time span or to a certain number of uses)? <input type="checkbox"/> Can you exchange, hand on or resell the content, and if so, under which conditions? <input type="checkbox"/> Are there restrictions in the use of the software? 	<ul style="list-style-type: none"> <input type="checkbox"/> Are you allowed to make copies at all (e.g. back-up copies)? <input type="checkbox"/> Are there restrictions on the number of copies? <input type="checkbox"/> Can you transform files into other formats, e.g. unprotected MP3 files? <input type="checkbox"/> Can you transfer the content to a CD or hard drive? <input type="checkbox"/> Can you record streaming content? (Streaming content is not stored permanently on the computer). <input type="checkbox"/> Are you restricted in the way you can listen, watch or read the file (e.g. are these actions restricted to a certain time span or a certain number of uses)? <input type="checkbox"/> Can you exchange, hand on or resell the content, and if so, under which conditions?
Compatibility	<ul style="list-style-type: none"> <input type="checkbox"/> Are you restricted in your use to specific player devices (CD player, computer, laptop, car stereo, etc.) to the CD or DVD? 	<ul style="list-style-type: none"> <input type="checkbox"/> Are there any restrictions as to what player devices you can use (set software, portable player, electronic reading device, etc.) to use the content? <input type="checkbox"/> Are you allowed to transfer the purchased content to other devices? <input type="checkbox"/> Are there any limitations in the number of permitted transfers?
Geographical restrictions	<ul style="list-style-type: none"> <input type="checkbox"/> Can you use a specific CD or DVD in certain places or countries only (so called region coding)? 	<ul style="list-style-type: none"> <input type="checkbox"/> Can you use a specific content in certain places or countries only?
Special software requirements	<ul style="list-style-type: none"> <input type="checkbox"/> Do you have to download or install additional software? <input type="checkbox"/> Are un-installers available once you have installed the software? 	<ul style="list-style-type: none"> <input type="checkbox"/> Do you have to download or install additional software? <input type="checkbox"/> Are un-installers available once you have installed the software?
Liability	<ul style="list-style-type: none"> <input type="checkbox"/> Does the vendor claim any restrictions or exclusions of liability? <input type="checkbox"/> If so: for what cases (damages to your 	<ul style="list-style-type: none"> <input type="checkbox"/> Does the vendor claim any restrictions or exclusions of liability? <input type="checkbox"/> If so: for what cases (damages to your

	property, loss of data, malfunctions, software failure)?	property, loss of data, malfunctions, software failure)?
Data protection policy	<input type="checkbox"/> Is your use monitored and which other personal data is collected and, if yes, for what purposes are personal data collected and by whom? <input type="checkbox"/> Will your personal data be sold to, transferred to or otherwise be used by third parties?	<input type="checkbox"/> Is your use monitored and, if yes, which other personal data is collected? For what purposes are personal data collected and by whom? <input type="checkbox"/> Will your personal data be sold to, transferred to or otherwise be used by third parties?
Amendments to the agreement		<input type="checkbox"/> Does the vendor reserve a right to unilaterally make amendments to his terms and conditions?
Applicable law		<input type="checkbox"/> Is information about the applicable law and jurisdiction provided? <input type="checkbox"/> Is the relevant court situated in your country?
Restrictions on freedom of expression		<input type="checkbox"/> Are you allowed to criticize the service publicly?

7 Useful links

“What every citizen should know about DRM” by Public Knowledge,
http://www.publicknowledge.org/pdf/citizens_guide_to_drm.pdf

“A User’s guide to DRM in online music” by the Electronic Frontier Foundation ,
<http://www.eff.org/IP/DRM/guide/>

More information on DRM, copyright law and consumers can be found here:

- BEUC - European Consumers’ Organisation: “Consumers Digital Rights” Initiative:
<http://www.consumersdigitalrights.org>
- BEUC - European Consumers’ Organisation: “Interoperability between online music stores and portable players”,
http://www.consumersdigitalrights.org/cms/test_interop_en.php
- Campaign for Digital Rights:
<http://ukcdr.org/>
- Consumers International: “5 Steps to protecting your privacy online”,
<http://www.consumersinternational.org/>
- European law:
<http://europa.eu.int/eur-lex/lex/en/index.htm>
- Euro-copyrights:
<http://www.euro-copyrights.org/>
- European Commission Data Protection Page:
http://europa.eu.int/comm/justice_home/fsj/privacy/index_en.htm
- European Consumer Law Group: “Copyright law and consumer protection”,
<http://www.ivir.nl/publications/other/copyrightlawconsumerprotection.pdf>
- EFF - Electronic Frontier Foundation: “A User’s Guide to DRM in Online Music”,
<http://www.eff.org/IP/DRM/guide/>

- FreeCultureNYU:
<http://wiki.freeculturenyu.org/wiki/index.php?title=DRM>
- IFPI (recording industry association):
<http://www.ifpi.org/>
- INDICARE Project:
<http://www.indicare.org/>

More information about EULA's can be found in: EFF, "Dangerous Terms, A User's Guide to EULA's",

- EFF - Electronic Frontier Foundation: "Dangerous Terms, A User's Guide to EULA's",
<http://www.eff.org/wp/eula.php>

More information on the application and enforcement of consumer protection law to unfair DRM use can be found here:

- M. Schaub "A breakdown of consumer protection law in the light of digital products", in: INDICARE Monitor, Vol. 2, No. 5, 29.07.2006,
http://www.indicare.org/tiki-read_article.php?articleId=123

Consumer Organisations in your country

- National Consumer Council
+44 2077303469
<http://www.ncc.org.uk>
- Which?
+44 2077707000,
<http://www.which.net>

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<http://www.indicare.org>