



ELECTRONIC FRONTIER FOUNDATION

Protecting Rights and Promoting Freedom on the Electronic Frontier

Competition Law and Policy and Consumer Protection Branch
UNCTAD
Palais des Nations
CH-1211 Geneva Switzerland

9 January 2015

Dear Sirs,

The Electronic Frontier Foundation is the leading nonprofit organization defending civil liberties in the digital world. Founded in 1990, EFF champions user privacy, free expression, and innovation through impact litigation, policy analysis, grassroots activism, and technology development.

This submission is in response to the draft UN General Assembly resolution for consideration by the Ad Hoc Expert Group Meeting on 22-23 January 2015, and it follows on from our earlier submission of 11 September responding to the Draft Report on modalities for the revision of the United Nations Guidelines for Consumer Protection.

We thank you for the opportunity to present our comments, and would like to clarify that our remarks are limited to the areas that concern EFF's work in the proposed amended Guidelines annexed to the draft resolution. No conclusions should be drawn from the absence of comment from us on other areas of the Guidelines.

Digital Rights Management (DRM)

Other than the addition of “Access to knowledge” as a topic for consumer education and information programmes in part F of the Guidelines, we are disappointed that there has been no attempt to deal with the serious problems experienced by consumers from the use of Digital Rights Management (DRM) technologies, that can impede them from using digital products and services.

This is a surprising omission given that these technologies are a topic of considerable current interest to consumer protection authorities around the world; for example, being the subject of intensive work at the OECD, including the following policy recommendation:

In the case where digital content products are offered on terms that are more restrictive than those that apply to tangible formats, the consumer should, where the terms are not self-evident, be clearly and conspicuously informed about them.¹

Similarly they have been treated in the EU Consumer Rights Directive (2011/83/EU) that took effect from June 2014, for example in Article 5:

the trader shall provide the consumer with ... [information on] the functionality, including applicable technical protection measures, of digital content ... [and on] any relevant interoperability of digital content with hardware and software that the

¹ OECD (2014), "Consumer Policy Guidance on Intangible Digital Content Products", OECD Digital Economy Papers, No. 241, OECD Publishing. DOI: 10.1787/5jxvbrjq3gg6-en

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trader is aware of or can reasonably be expected to have been aware of.

It is difficult to reconcile the omission of this topic in the proposed revised Guidelines with the addition of other topics that received a similar degree of support during consultations. For example, tourism has been included (para 88) but provisions on access to knowledge have not, although about a third of respondents considered each of those subjects as important (the United States, being, in each case, an exception).²

Conversely, some new additions have been included in the Guidelines by the Secretariat (notably the section on Principles for Good Business Practices) on its own initiative, apparently without any mandate drawn from a consensus reached during the previous consultations, belying the argument that the topic has been omitted due to the lack of support from member states.

Why DRM should be covered

In our previous submission on the modalities report (sent 11 September), we wrote:

DRM is harmful to consumers, it undermines competition and innovation, and unnecessarily restricts users' fair uses of copyrighted content—all the while making no appreciable dent in "digital piracy." ... There is a dire need for consumer law to protect consumers against the abusive restrictions the DRM places on their use of their fair and legal use of digital products.

Here we go into some more detail about DRM-induced harms, which include restricted consumer access to public domain, fair use, or other legally available content; content deletion; geographic restrictions on access; subversion of the control a user can impose on his or her own technology; and privacy violations.³

A. ACCESS:

1. *Stymied Concepts of Ownership:* DRM stymies consumer expectations of ownership. It imposes limitations on access that render products more similar to services than to common ownable goods. The resultant gap between DRM products and expectations generates consumer perception of DRM products as unfair or unreasonable.⁴

2. *Financial and Non-Financial Detriments:* Detriments to consumers from DRM-products include financial harms such as the need to repurchase content or the loss of content if a DRM server ceases to function, and non-financial harms such as disappointment, inconvenience, stress, lost time, anger, etc.

A 2011 European Commission study attempted to quantify consumer detriment through consumer complaint surveys. While the study primarily addressed email service interruptions, DRM-induced harms are likely analogous.

2 See UNCTAD (2014). "Report on modalities for the revision of the United Nations Guidelines for Consumer Protection", 8, 39, 45-46.

3 OECD (2013), "Protecting and Empowering Consumers in the Purchase of Digital Content Products", OECD Digital Economy Papers, No. 219, OECD Publishing. <http://dx.doi.org/10.1787/5k49czlc7wd3-en>, 17.

4 Sweazy, Paul (2012), "Introduction to Digital Personal Property", in *Consumers in the Information Society: Access, Fairness and Representation*, Ed. Jeremy Malcolm, 56.

The most widely reported consumer problem was “access,” but “lack of information” generated the greatest consumer financial losses.⁵

3. *Functionality and Interoperability:* DRM measures on products both copyrighted and not copyrighted limit use, copying and sharing of digital content products, as well as consumer ability to access products on multiple devices in different formats and jurisdictions.⁶ This harm is particularly acute for disabled persons who rely on technology such as screen readers in order to access electronic information. DRM is often not interoperable with such technology.⁷

B. CONTROL:

1. *“The Right to Tinker” and Prohibitions on modification:* DRM relies on the user being prevented, either through technology or law, from adding functionality to their own devices, even when that functionality is simple to add and legal to use. Innovation in the computing space has been frequently advanced by such user-driven analysis and modification; limiting such abilities results in market advances being dictated by the needs of industry rather than led by consumer wishes.⁸

2. *Preventing reuse, recycling, and renovation:* it is easier for users to extend the life of products which have user-modifiable parts and permit modification (for example, the installation of the Linux operating system on older slower computer, or the swapping out of parts in devices that have standardized, open outputs). Locked-down devices dedicated to pre-defined forms of media consumption are less able to keep up with new advances, and can be rendered obsolete by shifts in the business model of their original manufacturers.

3. *Chilling effect on the free discussion of improvements and modifications:* as well as an impediment to actual modification, laws prohibiting the trafficking in circumvention tools have the end result of prohibiting certain forms of speech, including code and simple procedural descriptions. The need to limit liability for the relaying of such speech also leads to mechanisms being enforced to filter or block speech.⁹

4. *Policing of use within end-user technology.* Advocates for DRM have pushed for not only end-user technology that prohibits certain uses of DRM-encumbered content, but technology that will refuse to record watermarked

5 OECD (2013), 21.

6 OECD (2013), 4.

7 Library of Congress (2012), *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies* available at <https://www.federalregister.gov/articles/2012/10/26/2012-26308/exemption-to-prohibition-on-circumvention-of-copyright-protection-systems-for-access-control>.

8 For instance, prohibiting phone unlocking: <https://www.eff.org/deeplinks/2013/03/ustr-secret-copyright-agreements-worldwide>

9 See EFF (2013), *Unintended Consequences: Fifteen Years Under the DMCA* available at <https://www.eff.org/pages/unintended-consequences-fifteen-years-under-dmca>

content¹⁰ or forbid the removal of tagged material¹¹. While such policy attempts have been unsuccessful, the latent desire for such capabilities may lead to engineered solutions in standards being backed with a subsequent future mandate.

C. *PRIVACY:*

DRM may track content and monitor its use. Issues concern information collected from consumers that is unnecessary to complete a purchase transaction or product function, and is often shared with third parties without consumer consent. DRM products may access user data without consumer knowledge or consent.

Often the retention of personally identifiable information (PII) by DRM systems is required to persist for long periods; eg. the UltraViolet DRM system claims to offer the user rights to access DRM-protected content in perpetuity, backed by a third-party hosted assertion of those rights.¹² The need for long-term storage of potentially compromising PII massively exacerbates the risk of that data being leaked and misused—as the notorious 2014 Sony Pictures hack vividly illustrates (although it is not known whether any DRM-related PII was leaked in that particular hack).

DRM also often introduces computer security vulnerabilities because its design is based on having better control over the device than the user does, making it a magnet for (additional) malware.¹³

Although draft provision 12(e) proposed in the Guidelines annexed to the draft resolution partly addresses data protection, it only addresses disclosure and storage of PII, and not its collection.

D. *INFORMATION, DISCLOSURE AND NOTIFICATION:*

Inadequate disclosures and notification exacerbate access and privacy issues.¹⁴ Issues include withdrawing content without notice or remedy, and lack of disclosure of interoperability restrictions prior to purchase. Examples include unfair liability exclusions in EULAs; product access interruptions without notice; product modifications without notice; buried or hidden charges; disabling products created by third parties; unreasonable limitations on usage; misleading and deceptive marketing; and limitations on redress.

10 See the proposed *Digital Transition Content Security Act* <https://www.eff.org/deeplinks/2005/12/lump-coal-consumers-analog-hole-bill-introduced>

11 See the proposed *Security Systems Standards and Certification Act*, <http://www.politechbot.com/docs/hollings.090701.html>

12 <https://www.uvuu.com/en/us/faq>

13 For example, Ubisoft's Uplay platform for PC gaming silently installed an insecure Web browser plug-in (see <http://www.gamewatcher.com/news/2012-30-07-ubisoft-s-uplay-blasted-as-rootkit-installs-unsecure-browser-plug-in-update>), and Sony included a root kit on audio CDs that exposed PC users to further malware infestation (see http://news.cnet.com/Sony-settles-rootkit-class-action-lawsuit/2100-1002_3-6012173.html).

14 OECD (2013), 15.

1. *EULAs/Contracts*: End User Licensing Agreements (EULAs) may be inaccessible, long, opaque, complex and misleading. Additionally, EULAs may fail to disclose the terms of sale and ownership, or the surveillance tracking “features”.
2. *Copyright*: Insufficient or opaque information on copyright restrictions create additional obstacles to legal access.¹⁵ As example, insufficient information may cause orphan works to be unnecessarily withdrawn from public discourse.

Dispute Resolution and Redress: Availability and access to dispute resolution mechanisms may be obscured. In some OECD countries, digital products are not clearly identified as either goods or services, which may impact consumer rights.¹⁶

How DRM could be covered in the Guidelines

Even if a new section dedicated to the issues surrounding digital products and DRM is not to be added, there are two obvious ways in which these issues could be conveniently addressed in the Guidelines, narrowly tailored to be limited to consumer protection aspects of these issues and therefore remaining within scope of the Expert Group:

1. As proposed by Consumers International and acknowledged in the modalities report, it could be covered in the e-commerce section.¹⁷ The OECD itself has placed its recommendations on digital content products explicitly as a part of its broader review of its 1999 e-commerce guidelines.¹⁸ At a bare minimum, there is no reason why not to include a reference to that OECD work on digital content products in the new proposed paragraph 74 of section M on E-Commerce, where the OECD's other work is referenced.
2. Alternatively, coverage of these issues could also be incorporated into section I, “Measures related to specific areas”, where the existing draft already adds new text on energy, tourism and other areas. It would be a simple matter to add a new “specific area” titled perhaps “Digital content products”, and including there the core issues that the OECD has addressed.

At wherever position or positions in the guidelines they are addressed, we believe the key issues that must be covered (drawing on the language proposals already presented by Consumers International)¹⁹ can be reduced down to the following, corresponding to the four broad areas of consumer detriment identified above:

- *Access*: Digital content products should be offered on terms equivalent to those sold in other formats, unless the consumer is clearly informed that different terms

15 OECD (2013), 4.

16 OECD (2013), 6.

17 UNCTAD (2014), 29.

18 OECD (2014).

19 Consumers International (2013), *Proposals for amendments to the UN Guidelines for Consumer Protection* available at http://www.consumersinternational.org/media/1362222/ci_proposal_annex_a_eng.pdf.

apply.²⁰

- *Control*: Businesses supplying digital content products and services should not use technologies that have a significant effect of preventing consumers from using those products or services in ways that would otherwise be reasonable, lawful and safe.²¹
- *Privacy*: Governments and businesses should ensure effective consumer control of personal data. Personal data should be collected only with free, informed and positive consent, and when strictly necessary. Those affected by any personal data breach must be promptly notified of the details of the breach and of the available means of redress.²²
- *Information, disclosure and notification*: Governments should encourage all concerned to participate in the free flow of accurate information on all aspects of consumer products, including in the case of digital content products and services, the effect of any applicable technical protection measures and information on interoperability with hardware and software.²³

The ease with which these four issues could be covered by the Guidelines in the current revision process can hardly be overstated. The first two on issues “Access” and “Control” require nothing more than a short insertion into the new “E-commerce” section, in line with the OECD’s classification of this topic as part of its e-commerce work, or alternatively, as noted above, under “Measures related to specific areas”.

The latter two issues on “Privacy” and “Information” are even simpler to include within the Guidelines, as they would simply be amendments to provisions either already contained in the Guidelines, or that are proposed for them in the annex to the draft General Assembly resolution, respectively at paragraphs 12(e) and 27.

Conclusion

DRM is a quintessential consumer protection issue—in that it attempts to control what

20 We also support the following text from Consumers International’s proposal, but have omitted it above for reasons of brevity: “This includes the normal incidences of product ownership, such as permanent possession, privacy of use, the ability to gift or resell such goods together with all of the rights with which they were first sold, and the ability to lend or perform them within a family, household or similar limited circle. To the extent required to facilitate these uses of works, and to allow the consumer to access them at a convenient time and place, governments should allow consumers to time, space and format shift digital content products, to make temporary copies of them, and to bypass technical protection measures applied to them. Hindrance of these rights should be prohibited by law.”

21 Again this is an abbreviated version of the Consumers International proposal which most relevantly goes on to say “In the case of products that are sold or later supplied with software that is required for their normal operation, the consumer’s use of such software cannot be taken as a waiver of the right to use the product as expressed above, nor as consent to the removal of any functionality that the product possessed at the time of purchase.”

22 This is a condensed version of the Consumers International proposal that recognizes the partial treatment of this topic already contained in proposed paragraph 12(e) of the Guidelines annexed to the draft resolution.

23 Unlike the other paragraphs which are stand-alone, this text is proposed by Consumers International as an amendment to existing para 23 of the original Guidelines, 27 of the Secretariat’s renumbered draft. It follows closely the EU Consumer Rights Directive.

users can and can't do with the media and hardware they purchase. Just as it would be an actionable consumer wrong to sell a movie disc that won't play due to a manufacturing flaw, so too consumer law should offer redress if the disc won't play due to DRM restrictions.

The ills of DRM go beyond the simple case of content that can't be accessed, also enabling anti-competitive geographical restrictions on the free flow of information; limiting users' ability to create and innovate with the products they own; preventing legitimate reuse and recycling: impeding independent repair services and product compatibility; and placing the privacy of users' data at risk.

The negative impacts of DRM on consumers make this a timely and appropriate topic to be dealt with in this process of revision of the UN Guidelines for Consumer Protection. Yet the current draft only identifies and treats the issues of e-commerce (narrowly defined) and financial consumer protection. Whilst those issues are doubtless also of major significance, our reading of the consultations to date does not reveal any consensus to so limit the revision of the Guidelines.

On the contrary we agree with Consumers International that it would be a grave mistake to omit other current issues besides those two in the revision of this 30 year-old text, as the opportunity to revise the Guidelines again may not arise for another decade or more.²⁴ DRM should be at the top of the list of omitted topics to be addressed.

This submission has illustrated how simple it would be to address four of the core issues that bedevil consumers of DRM-encumbered digital content products and services, within the scope of the current revision process, while retaining a tight and focused document. If we can offer any further assistance to the Secretariat or to Member States in settling on an appropriate form of language to address these important issues, we would be only too pleased to do so.

Yours faithfully,



Electronic Frontier Foundation
per Jeremy Malcolm
Senior Global Policy Analyst

²⁴ Consumers International (2014). "The revision of the UN Guidelines for consumer protection: Note for the 'other issues' working group", http://www.consumersinternational.org/media/1485424/ci-other-issues-note_ungcpupdate_eng.pdf.