

# TACD

TRANS ATLANTIC      DIALOGUE TRANSATLANTIQUE  
CONSUMER DIALOGUE      DES CONSOMMATEURS

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## Resolution on Digital Rights Management, The Sequel

### Introduction

Digital Rights Management systems (DRMs) are technical measures that restrict certain uses of protected works, attempting to enforce licenses granted by the owner of a protected work. DRMs work like a shell around the copyrighted- or non-copyrighted work. To open it, one requires a technical key that comes with the license the consumer purchases. The key grants the consumer access to the work, limited to the sorts and amounts of usage that are granted by the license.

TACD has previously produced a resolution on Digital Rights Management systems ([www.tacd.org/docs/?id=275](http://www.tacd.org/docs/?id=275)), which set out our detailed concerns that such systems were removing traditional rights from consumers, and that the costs associated with them outweigh the benefits.

At that time, the U.S. Government and the European Commission reassured TACD that the marketplace would deal with these problems. In practice, many of our concerns have been realized; for example with the Sony rootkit scandal<sup>1</sup> and continuing consumer problems with interoperability and contract terms<sup>2</sup>. Equally a number of key industry proponents of DRMs have been having second thoughts<sup>3</sup>, although many are still working on new DRMs. We believe that with the forthcoming review of the Copyright Acquis and the Consumer Acquis in the EU and with the ongoing introduction of new DRM enforcement systems in, among others, Microsoft Vista, Blue-Ray and HD-DVD, it is now appropriate to update our resolution. TACD wants the rights of consumers to be respected when DRMs are deployed.

### Resolution

In a perfect world, competition would provide for economic choices and consumer power would lead to consumer-friendly and privacy-enhancing business models. Regrettably, in a mass-market with atomized consumers, this outcome is unlikely without safeguards for consumers. The challenge is to find an appropriate balance between owners of copyrights and related rights, innovation and consumers in the digital environment.

It is in the public and consumer interest to ensure a fair return for creative endeavor in the digital environment. The key word, however, is "fair". DRMs stand to have public support only to the extent that DRMs respect the wider interests of public policy, public access, consumer rights, the promotion of competition and technological development. In all of these areas certain types of DRMs can have negative effects. We do not believe that it is sufficient for governments just to note the negative effects. Governments must do more to ensure that the market for content

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1 [www.boingboing.net/2005/11/14/sony\\_anticustomer\\_te.html](http://www.boingboing.net/2005/11/14/sony_anticustomer_te.html)

2 <http://forbrukerportalen.no/Artikler/2006/1138119849.71>

3 Steve Jobs: "Why would the big four music companies agree to let Apple and others distribute their music without using DRM systems to protect it? The simplest answer is because DRMs haven't worked, and may never work, to halt music piracy." ([www.apple.com/hotnews/thoughtsonmusic](http://www.apple.com/hotnews/thoughtsonmusic)), and Peter Lee, an executive at Disney: "If consumers even know there's a DRMs, what it is, and how it works, we've already failed.": [www.economist.com/displaystory.cfm?story\\_id=4342418](http://www.economist.com/displaystory.cfm?story_id=4342418)

protected by DRMs respects consumer rights. We are aware that there are proposals, at least in the EU, to produce charters or codes of practice in relation to the operation of digital media. Such charters cannot be a substitute for relevant consumer protection legislation in this area. To be effective any such proposals must provide meaningful benefits to consumers and be based on consumer-centered principles.

**TACD Resolves:**

To request that the governments of the United States and the European Union endorse the following principles for DRMs, which are focused on consumer rights. These principles can be implemented in a number of ways, but several may require legislative changes, for example to limit the sale of DRM-protected content that does not live up to reasonable consumer expectations and allow for the removal of DRMs from content or devices if DRMs do not live up to these expectations.

TACD asks the EU and U.S. governments to endorse the following principles for DRMs and, where appropriate, legislate accordingly:

**1. Principle of fairness**

Consumers require fair access to, and fair use of, content. Normal consuming of content in the digital environment requires users to engage in time-shifting, place-shifting and limited sharing of a work. Therefore DRMs must respect consumer rights contained in the exceptions and exclusions in copyright law. They may not create a risk of losing access to a work due to discontinuation of a service or lack of a right to back-up copies of the work. DRMs shall not define social entities such as 'household' and 'families' in their technology more narrowly or restrictively than has been defined in local law or custom. DRMs shall not block the use of assistive technologies employed by disabled people. Finally, software producers should be allowed to make and distribute software that enables consumers to make use of their lawful rights and exceptions to copyright.

**2. Principle of end-user creativity**

Fair access and use to content includes the ability to transform that content. Innovation, cultural and economic prosperity can only flourish if creativity is not unduly inhibited. Users need to be allowed to interact with the work. DRMs should not limit legitimate forms of building (remix, tweak, comment) upon creative works.

**3. Principle of Transparency**

Consumers require sufficient information about any impact a DRM system may have on, for example, the potential uses of a work and the interoperability with devices in order to make informed product choices. Consumers must be given proper information on relevant product characteristics, including relevant restrictions on the work, effects on interoperability, and any modifications the DRMs may make to a user's devices. Consumers should also be made aware of applicable laws that would penalize them for circumventing DRMs. This information must not be hidden in small print or long and legalistic license agreements and it should be given prior to agreeing to a contract.

**4. Principle of proportionality**

The impact of DRMs on functionality should be limited to what is necessary to protect copyright and should not otherwise affect a consumer's use of the works.

**5. Principle of privacy and data protection rights**

DRMs should be compliant with data protection rules and privacy rights. The individual should be able to use the media without first having to disclose personal information, or consent to marketing or other secondary uses of their personal information. DRMs should not use registration, usage data, or other personal information for secondary purposes without first obtaining the individuals' informed and voluntary consent. DRMs should be able to guarantee the anonymity of the user.

## **6. Principle of internet safety and security**

The practical use of DRMs on the Internet may pose threats to consumers' security settings and therefore to the economic interests of consumers. DRMs must not result in unnecessary vulnerabilities to consumers' equipment or personal information.

## **7. Principle of Interoperability**

The lack of interoperability between different DRMs requires consumers to either purchase their content from one specific provider or use more than one device or platform to access their content. Consumers should be able to purchase content from any provider and use it on any device.

## **8. Principle of competition and innovation**

DRMs should allow innovation and facilitate new business models that fulfil previously unaddressed demand. They should give consumers the new choices that were the promise of the digital age. DRMs must not be used to lock consumers into old business models and to limit consumers' choices in services and devices. Consumers must have real options for purchasing rights to works at different price points. The menu of options must not be unduly limited by content producers using market power or acting jointly to restrict choices.

## **9. Principle of consumer rights**

Consumers must have clearly defined and enforceable consumer rights that cannot be overridden by contract terms, DRMs or other technological measures.

Among the consumer rights that should be clearly expressed are:

- the right to private copy
- the right to fair commercial practices
- the right to be informed and refunded for faulty products
- the right to privacy and data protection
- the right to free speech

A simple and speedy alternative dispute resolution system should be established for DRM disputes so consumers do not have to rely on costly litigation for low value disputes, whilst retaining the right to use court action as a last resort.

## **10. Principle of circumvention / removal**

Consumers should be allowed to circumvent DRMs if any of their usage rights are not respected. If circumvention is technically not possible service providers must provide consumers with access to the protected content in a way that lives up to these principles. Generally, service providers that offer DRMs that do not live up to the above mentioned principles should have a legal obligation to take unlawful DRMs from the market and give customers their money back or access to the protected content in a way that lives up to these principles.

# TACD Background paper on Digital Rights Management

## DRMs, Beware!!

### **Introduction**

Digital Rights Management systems (DRMs) are technical measures that enforce licenses that were granted by the owner of a protected work to an end user and that try to enforce copyright law. DRMs work like a shell around the copyrighted work<sup>4</sup>. To open it, one requires a technical key that comes with the license the consumer purchases. The key grants the consumer access to the work, limited to the sorts and amounts of usage that are granted by the license.

DRMs are an important factor in the sale of content in an online environment. They have been a pillar underlying the strategies of the recorded music and film industries to prevent copyright infringements. DRMs are systematically removing traditional rights from consumers, alienating them from legitimate exceptions to the exclusive rights granted to rights owners by copyright law. Furthermore the costs associated with DRMs outweigh their benefits.

We have decided to update this resolution as developments in this field are continuous and the position of TACD should adapt to the latest developments. TACD is calling attention to the problems produced by DRMs, and is calling on the EU and US Governments to establish preconditions complementary to the legal protection granted to DRMs.

### **The Issue**

Much of the discussion on the digital environment has focused on the perspective of rights holders, combating “piracy” and respecting copyright laws. Strong copyright laws in the U.S. and EU give copyright holders monopoly rights, not just on content, but also on the means to protect it. One of the tools deployed are digital rights management systems (DRMs), which can take the form of technological locks, unique identifiers like watermarks and technical implementations to monitor and control use of the product.

A wide variety of technologies are involved in DRMs and they are increasingly embedded in consumer goods, such as music players, CDs and e-books. DRMs are already embedded in the HD-TV standard and soon copyright owners will be able to control the use of their works by end-users anywhere. At the same time these technologies have failed at every turn in the field: nearly every work ever “protected” by DRMs is currently available for download from P2P networks on the Internet, and there is no indication that DRMs will ever work at their stated objective of stopping indiscriminate redistribution<sup>5</sup>. However, they impose high costs on consumers by restricting use and curtailing competition.

DRMs were deployed in the name of preventing copyright infringement and therefore said to require strong legislation protecting the technological measures—the keys that are at the core of DRMs technology. But suddenly there is a shift in the argumentation of DRMs proponents. The reason for implementing DRMs, it is now argued, was not to counter piracy<sup>6</sup>. Instead, DRMs are now put forward as necessary to support viable business models.

*“ DRMs enable business models, they don't stop piracy.”*  
*Jerry Pierce, senior vice president,*  
*Universal Pictures august 2006'*

Current technological protection measures designed to enforce copyright in the digital environment threaten core exemptions in copyright laws for disabled persons, libraries, educators and authors as well as consumers, and they undermine privacy and freedom. DRMs enable their controllers to make their own private rules and in doing so can electronically override not only the legislation of their own countries, but also that of other countries in relation

<sup>4</sup> For the purpose of this document, we regard DRM systems as being the incorporation of both Technical Protection Measures and Licences together. Some have argued that Creative Commons also constitute a DRM. We regard this as a licence.

<sup>5</sup> “DRM is designed to stop the uploading of purchased songs onto file-sharing services where they will be distributed without any recompense to the rights owners.” IFPI'06 Digital Music Report page 22.

<sup>6</sup> Peter Lee, an executive at Disney told The Economist, “If consumers even know there's a DRMs, what it is, and how it works, we've already failed”, [www.economist.com/displaystory.cfm?story\\_id=4342418](http://www.economist.com/displaystory.cfm?story_id=4342418)

to consumer protection and copyright exemptions.

A consumer who seeks to secure his interests and rights is restricted by technological and legal barriers that further curtail users' rights provided under the law. Consumers are faced with a triple lock between them and the exercise of their rights: legal copyright protection, technological restriction (by using DRMs) and legal protection of the technological restriction (anti-circumvention provisions). This puts consumers in an impossible position. In the case of unreasonable DRMs consumers are locked out of the exercise of their rights and cannot break the lock in order to exercise their rights. Even if consumers are aware that their rights are being wrongly limited there is no consumer-friendly and workable means for them to exercise their rights. This is a matter of concern for TACD as U.S. and EU consumers are amongst the first to face DRMs. Current DRMs have failed to stop professional infringements as every DRMs' 'lock' has been broken, but they have successfully limited the rights of ordinary consumers. They have created a mindset whereby rights holders impose stronger and stronger controls to limit use rather than innovating to meet consumer demand. In fact, DRMs may be part of the problem, pushing frustrated consumers into the arms of unauthorized channels.

We believe that policymakers have failed to properly view the purpose and benefits of DRMs from the consumer perspective, and that current laws provide little effective consumer protection in this field. Policymakers are allowing DRMs to set the law, not just in relation to copyright, but also in consumer- and competition law. Instead, governments should require DRMs to be developed, implemented and run according to well-established principles of balance, fair description, competition and consumer choice. If the DRMs do not respect these principles, the law should not protect them<sup>7</sup>.

- **Apple- iTunes** has changed its Fairplay-DRMs several times to limit usage of downloaded material<sup>8</sup>. In their terms and conditions "iTunes reserves the right, at any time and from time to time, to update, revise, supplement, and otherwise modify this Agreement and to impose new or additional rules, policies, terms, or conditions on your use of the Service." This clause and several others are currently being challenged in Norway, France, Germany, the Netherlands and Italy, as being in violation with consumer legislation and legitimate consumer expectations.
- Due to the Apple-iTunes Fairplay DRMs it is only possible to play **AAC formatted iTunes-files** on an Apple-iPod.
- The DVD "**Mr and Mrs Smith**" (20th Century Fox) was retailed with a copy protection system. According to media reports and complaints of consumers, users had to install software in order to play the DVD on their computer. After installing the Software CD and DVD burners did not function properly.
- In 2005 **Sony BMG** put CDs on the market with the DRM "XCP"<sup>9</sup>. After usage of the CD on a computer, where it installed a piece of software called a "**rootkit**", it left computers open to hacks and attacks via the internet. Sony first denied there was something wrong but in the end lost a lot of credit, especially for a technology firm.
- **Amazon.com** uses a DRM on e-books that prevents them from being read out loud to blind people. For example, Lynn from London bought a Bible from Amazon, and found that the content was locked in such a way that she could not read it with her screen reader. She contacted Amazon who advised her to contact the publisher. Having taken this extraordinary step, she was told "there is nothing we can do about it".<sup>10</sup>

DRMs can have public support if they have respect the wider interests of public policy, public access, consumer rights, the promotion of competition and technological development.

<sup>7</sup>In that sense the large support (10.000 signatures in two weeks) received by the online petition [www.altroconsumo.it/map/show/12530/src/140553.htm](http://www.altroconsumo.it/map/show/12530/src/140553.htm) asking for fairer DRMs, launched on the 24<sup>th</sup> of January 2007 in Italy by Altroconsumo, illustrates the strength of consumer feeling about the issue.

<sup>8</sup> [www.boingboing.net/2005/03/16/apple\\_steals\\_itunes\\_.html](http://www.boingboing.net/2005/03/16/apple_steals_itunes_.html);

[www.betanews.com/article/Sony\\_President\\_Rootkit\\_of\\_No\\_Concern/1131475197](http://www.betanews.com/article/Sony_President_Rootkit_of_No_Concern/1131475197)

<sup>9</sup> [www.boingboing.net/2005/11/14/sony\\_anticustomer\\_te.html](http://www.boingboing.net/2005/11/14/sony_anticustomer_te.html)

<sup>10</sup> [www.indicare.org/tiki-read\\_article.php?articleId=170](http://www.indicare.org/tiki-read_article.php?articleId=170), "Digital rights management and people with sight loss" by: David Mann, European Blind Union, Lisburn, Northern Ireland; published at 26 Jan 2006

## **DRMs - industry arguments versus consumer realities.**

In putting our position forward over the years we have been confronted with arguments from the entertainment industry. We have compiled some central statements and address them accordingly:

### ***'DRMs help to increase consumer choice!'***

Supporters of DRMs claim that they will bring a wider choice for consumers to access and use digital content and products. The reality for consumers using many current DRMs is the opposite. DRMs are used to split current consumer usage rights so they can be exploited based on different pricing models. This will have the result of consumers having to pay more to do things that they currently expect to be a normal function of the product. DRMs may be used for price discrimination and market segmentation, such as the regional encoding used on DVDs, and iTunes' higher prices for downloading in the UK. DRMs will, in this sense, restrict the creation of a single market within the EU and undermine the goals of a global trading market. DRMs can be used anti-competitively to lock out competitors or to shut out or control complementary products. For example, other content producers, like games manufacturers or makers of digital television, will have to contract with DRMs controllers in order to access their content. Restrictions on competition threaten product diversity and choice for consumers.

Moreover, DRM licensing cartels, such as those governing the licensing of DVDs, interfaces like HDMI and DTLA, and recording technologies like DVHS, are controlled by incumbent technology and entertainment companies. New market entrants who wish to add functionality to a media device – for example, by building a hard-drive-based DVD "jukebox" - are inevitably stymied in their efforts because the licensing cartels will not allow them to lawfully produce such a device. In general, licenses that extend the functionality of cartel-licensed technologies, like DVDs, are only approved if they are proposed by companies or consortia that are represented in the cartel: the DVD licensing body only gives licenses to innovate to companies that are members of the DVD licensing body.

### ***'DRM is needed for digital business models to work, to ensure remuneration of all parties involved in creation of the work!'***

It is conceivable that DRMs are used to enable new business models that are truly innovative and interesting for consumers and ensure remuneration. From a business perspective, DRMs can allow more flexible and differentiated product offerings. New business models such as time-limited 'rentals', pay-per-view, pay-per-listen, subscriptions, or usage-metering can be envisioned and deployed.

Although these models are conceivable, TACD looks at this suggested "flexibility" with some reservations. The current course of DRM development seems aimed at creating a new relationship between right holders and consumers, with altered consumer rights, freedoms and expectations and towards the general replacement of copyright law with contract law and codes<sup>11</sup>. Until now, most DRMs have not supported business models based upon the first-sale doctrine. DRMs' track record shows that they have mostly been used to limit usage rights. DRMs either prevent consumers from re-selling material, or they involve the conservation of data about the history of possession. The flexibility praised by industry is closely linked to the exploitation of every conceivable use of works based on different pricing models and supported by unlimited post-purchase control over the copies.

We therefore consider that deployment of unfair DRMs causes serious risks to consumers and societal rights. Even more so, the suggestion that DRMs is necessary to make for a flourishing business case is belied by the success of eMusic: 'One online retailer has, in fact, made a healthy business of selling DRM-free MP3s. Dimensional Associates Inc.'s eMusic has made itself the No. 2 digital music retailer, by units sold, by selling all of its music as unprotected MP3

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<sup>11</sup> In this paper, the term copyright is used in a broader sense, including neighbouring rights.

files<sup>12</sup>. Even Apple, the store we suspect of using their DRM technology to strengthen its position in the marketplace, has openly admitted that if they were not required to sell DRM-protected content they would not and that would benefit the rights holders because their revenues would rise and innovative business models could bloom<sup>13</sup>.

### ***'DRM helps to manage consumer usage rights!'***

#### Transparency and Contract terms

Nearly every consumer experience of DRMs has been negative, because of unexpected and unwanted usage restrictions. This poor experience has been fuelled by a lack of transparency about the effect of the DRMs. Such secrecy is counterproductive if DRMs are to gain wider acceptance and it has led to growing consumer resistance. Protection of copyright should not be allowed as an excuse to undermine a basic principle applied to other consumer products - that a product's function, including any limitations, should be clearly stated before a consumer buys it. Information about limitations, however, is a necessary but insufficient condition. Any limitations must respect consumer usage expectations and copyright exemptions.

The terms of a DRM system can be altered by its issuer after the purchase, often without the knowledge or informed and express consent of the consumer. For example, what a consumer can record or the number of copies they can make can be changed by a software upgrade from the DRM controller, or by the expression of hidden "flags" in content - a consumer has no way of telling in the shop which restrictions can be applied to the content on the device they are paying for, no way of knowing if, for example, a music label can flag a particular piece of music for "no backup" or whether a movie company can flag a particular show for "no record."

In addition, a provider may use contract terms under which a consumer signs away copyright exemptions such as private use. These contractual terms can be written in such an unintelligible form that the consumer may not be aware of their effects. However, even with a legible contract, the consumer may have no option but to agree because there is no other means of accessing that content and the contracts are non negotiable.

***"86% of digital music users would prefer paying €1 for a song that runs on any device over only paying 50 cents for a song that runs on only one device."***

Source: Digital Music Usage and DRMs, results from a European survey, May 2005 [www.indicare.org](http://www.indicare.org)

#### Access to and use of content

DRMs are not just used to limit access to content. They are also used to prevent ways of using the product that consumers expect or are given by copyright law, such as private copying (including making private back up copies), lending, excerpting, sampling or other content modification, resale and donation. In order for consumers to benefit from the digitalization of content and the many and varied types of different digital equipment available, they expect to 'format-shift' (transfer content onto other devices), 'space-shift' (view content at a location remote from the place where it is stored), and 'time shift', (record for use at a later time, such as recording a TV program). Restrictions on usage affect not just individual purchasers but also libraries and educators and prohibit access to knowledge. Many DRMs on the market now prevent these uses, such as copy-protected CDs that won't play on computers and DVDs that are encoded to only play in certain regions of the world.

### ***'DRM is designed to stop the uploading of purchased songs onto file sharing services where they will be distributed without any recompense to the rights owners!'***

As mentioned before, current DRMs have failed to stop professional infringements as every DRM 'lock' has been broken. Every piece of content that is deemed worthwhile can be found on alternative sources. In fact, using consumer-hostile DRMs drives potential customers to consume more illegally downloaded material, as this is generally available without abusive

<sup>12</sup> Wall street Journal, December 6 2006, "In a Turnabout, Record Industry Releases MP3s" [http://online.wsj.com/public/article/SB116537603826741985-TFD3l60iYwyYgj2wH5P9gTDGDy0\\_20070105.html](http://online.wsj.com/public/article/SB116537603826741985-TFD3l60iYwyYgj2wH5P9gTDGDy0_20070105.html)

<sup>13</sup> Steve Jobs, February 6, 2007, [www.apple.com/hotnews/thoughtsonmusic/](http://www.apple.com/hotnews/thoughtsonmusic/)

DRMs. By freeing up the content, business could very well flourish and rights owners may stand to gain much more.

***'The biggest challenge is to make them operate so smoothly that they are not inconvenient to consumers!'***

TACD sees the challenge of DRMs in a different light – how best to balance in the public interest the rights of right holders and consumers in the digital environment. The biggest challenge is to provide a proper and working legal context in which consumers get protection of their rights and which is enforced effectively.

***'Record companies are actively licensing music to meet consumers' needs for flexibility and portability'***

'The industry has licensed 2 million songs to over 330 online partners to encourage strong competition between retailers and improve choice!' Although these figures look impressive the lack of diversity of business models is also quite impressive. The promised strong competition has not materialized. In fact, TACD holds that the entertainment industry has not delivered on its key objective: making money from delivering content.

*"Among all record labels 48% of all executives thought ending DRM would boost download sales - though this was 58% at the larger labels. Outside the record labels 73% of those questioned thought dropping DRM would be a boost for the whole market. Among all those questioned, 70% believed that the future of downloadable music lay in making tracks play on as many different players as possible. But 40% believed it would take concerted government or consumer action to bring this about. "*

"Music execs criticise DRM systems", BBC news, 15 February 2007.  
<http://news.bbc.co.uk/2/hi/technology/6362069.stm>

There is money to be made; technology is sold by the billions. For instance, portable media players are a prominent feature in the public sphere. The content that can be carried on these however is not. It has been locked behind technical doors that only open with the rights owner's permission in the way the rights owner wants.

Consumers are willing and able to pay a reasonable price; a price that is set by fair market powers and which delivers the

quality and quantity desired for a fair price.

***'Consumer choice remains frustrated by the interoperability limits imposed on them; achieving interoperability is a high priority!'***

We do not believe this is a genuine argument. Indeed, the purpose of DRMs is to block interoperability: that is, to stop manufacturers from interfacing their equipment with existing equipment, except on terms set out by rights holder companies. The ability for consumers to use DRM-locked products on different devices and in different ways crucially depends on the ability of these products to work on all these different devices. Many DRMs on the market lock consumers into using a particular provider or piece of equipment, such as Apple iTunes, as they will not play (interoperate) on other devices. Many DRMs require specific software platforms to work, which means that certain users are excluded from using the product - no DRMs work on Linux or other open or free software platforms.

For consumers with disabilities, digital technologies have the potential to offer many benefits for people with sensory or mobility impairments. However, DRMs can prevent those benefits from being realized. DRMs can block the use of assistive technologies employed by people with disabilities, including blind and deaf people. For example, they can make conversion into other formats such as Braille either impossible or expensive and difficult.

Some of the issues are not even touched upon by the industry although they should be dealt with in line with the issues mentioned above.



### **DRMs invade the personal sphere**

DRMs incorporate into their restrictions definitions of social entities such as 'household' and 'families', but these definitions are often narrow or restrictive. Such systems contain upper limits on the size of 'families', the number of physical locations that can be considered part of the 'household', and even on the number of times that a device can leave a single household - in effect a technological limit on custody arrangements, divorce and property ownership. TACD is concerned that, in Europe, the DVB standard is developing the concept of an 'authorized domain' which will define when, where and who can use a piece of content. It is unacceptable for an unaccountable industry group to seek to mandate definitions of such social and cultural importance. Such unprecedented interference into personal life goes way beyond the justification for the protection of copyright.

DRMs often incorporate the collection and processing of personal data. This has the tendency to render anonymous or pseudonymous transaction in the digital environment impossible. DRMs that are designed to generate and transmit huge quantities of data about the personal use of a product or service carry out an unprecedented level of monitoring. This is akin to having an irremovable camera owned and operated by the publisher attached to every book to monitor and record how its used and by whom. The consumer will often not be aware of these monitoring devices or the information they collect and will have no control over its use by the DRMs controller. Moreover, DRMs that are entangled with intellectual consumption and do monitor user behavior invade a sphere with sensitive personal data potentially revealing political convictions, religious or philosophical beliefs or sexual orientation.

Under the umbrella of copyright enforcement, DRMs can be abused to profile consumers by collecting and reporting back personal data or data that can be linked to an individual. DRMs can therefore operate as 'spyware' which serves purposes that are different to the original purpose of DRMs and are harmful for consumers.

### **Security issues**

Some DRMs can impair or limit the use of security measures in a consumer's equipment, such as security settings on a computer. This not only weakens the security of the consumer's equipment itself, it requires the consumer to relinquish personal control over the equipment to the maker of the DRMs. They can also require an Internet connection for registration that could leave a computer open to external attack. In neither of these cases is the consumer, if they are even aware of it, able to control these risks.

### **Consumer protection and redress**

DRMs shift the burden of proof onto consumers who are the weaker party in any litigation and, as is well known, are often reluctant to litigate due to concerns over costs. Previously the burden was on the rights holder to enforce its rights against infringers, which required them to establish proof of infringement and also provided defenses to consumers.

Under the anti-circumvention provisions in U.S. and EU legislation the burden is now on consumers to enforce their rights if a DRM system infringes them, through procedure that is so costly that it has never successfully been managed.

Instead, consumers should have clearly defined and enforceable consumer rights that cannot be overridden by contract terms, DRMs or other technological measures. They should not have to rely, as now, on the restraint or goodwill of the rights holders or, as in Europe, on the whims of each Member State as to which consumer exemption they will allow. A simple and speedy alternative dispute resolution system should be established for DRMs disputes so consumers do not have to rely on costly litigation for low value disputes, whilst retaining the right to use court action as a last resort.

## Conclusion

In a perfect world, competition would provide for economic choices and consumer power would lead to consumer-friendly and privacy-enhancing business models. Regrettably, in a mass-market with atomized consumers, this outcome is not likely to happen without any safeguards for consumers. TACD endorses the point that currently costs seem to outweigh the benefits of DRMs from a consumer point of view. Many arguments in favor of DRMs either do not bear a closer examination or need time and further development until they become valid.

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

### **A fair, competitive and balanced regime**

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

### **Levies**

In Europe levies have been deployed, in some Member States, to remunerate rights owners for a private copy exception for several decades. The blunt taxation scheme of a levy system may well be preferable to DRMs. But in a system where a DRM is in place, levies have to be phased out and vice versa. TACD holds that DRMs and levies are mutually exclusive. If DRMs are deployed, levies should be removed.

The system of levies started off as a system to remunerate creators for the copying of their works on audiotape. This system has evolved to levies on other blank media like CD-r/w and DVD-r. And now, with the take-up of MP3-players and other machines that have a memory that the user can copy to, from and with, rights owners want a piece of that pie as well. A fair copyright system should remunerate rights owners for economic harm done by private copying. But the current blunt system of a tax for all who buy hardware that contains a hard disk or memory that could be used for copying copyrighted content should be accompanied by a clear and properly constituted right to a private copy or it should be abolished.

Arguably one of the most intrusive and burdensome practices faced by consumers today are the legal actions taken by the entertainment industry against file sharing of copyrighted works. During the implementation process of the Copyright Directive in France a solution to this problem was introduced: a flat fee for the free exchange of copyrighted material. Several other commentators and organisations have supported similar ideas. The proposal, however, was finally voted down by the French parliament.

TACD believes that the idea of a so-called global license for copyrighted works on the Internet needs to be further discussed. We do not have the solutions, but we would like to initiate a world-wide, non dogmatic and open discussion on the subject, involving all stakeholders.

### **Concluding remark**

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

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

The shortcomings and potential negative effects on consumers and society of the current copyright framework and of the current deployment of technical protection measures highlighted in this paper must be addressed by policy makers and all stakeholders.

Any actions and policy initiatives by governments must take into account the rights and interests of consumers.