



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

September 11, 2014

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.

We have received a copy of the Draft Report on modalities for the revision of the United Nations Guidelines for Consumer Protection and wish to offer our comments on one aspect of the revision, that is imperative for the adequate protection of the world's consumers in the digital age.

Digital Rights Management (DRM) technologies or "digital locks" control access to a copyrighted work, including access for lawful, non copyright-infringing purposes. 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." For example, DRM can:

- prevent e-books from being read on unapproved e-book readers, shared with friends, or donated to a library.
- prevent films or other audiovisual content on a disc from being copied onto a portable media player or other device with no disc drive.
- raise barriers on the use of smartphones, preventing certain applications from being installed and/or impeding consumers' ability to switch service providers.

Anti-circumvention laws that make it illegal to break DRM, make the DRM problem much worse. A legal ban on circumventing DRM gives rights holders a new right of controlling access to copyrighted works that is separate from and potentially unconnected to the enumerated copyrights contemplated under international law such as the Berne Convention. Thus, a legal prohibition on circumventing access control TPMs effectively overrides the traditional boundaries of copyright law.

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. It is this that has motivated measures such as Article 5 of the European Consumer Rights Directive, which ensures that consumers should not be tricked into acquiring products that are crippled with DRM restrictions.

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Often the technical restrictions placed by DRM are also supplemented by unfair terms of service in End User Licence Agreements (EULAs), that are not open for negotiation by consumers, yet may purport to prohibit them from refusing technological restrictions or from fully exercising copyright flexibilities such as fair use.

It is in this context that we believe UNCTAD has a responsibility to the world's consumers to raise the bar of protection of digital consumers against the abuse of their rights through DRM technologies. We are pleased that a number of text proposals have already been presented by Consumers International that would help to address the menace of DRM for consumers. These proposals include the following:

- Digital content products should be offered on terms equivalent to those sold in other formats, unless the consumer is clearly informed that different terms apply. 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 such 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 the exercise of these rights should be prohibited by law. Where possible, consumers should have the opportunity to try a digital content product before final purchase.
- Governments should restrict suppliers of digital content products and services from employing 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. These include any network locking technologies that restrict the use of devices to particular operator networks. 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.
- Standard provisions in non-negotiated product licenses should not prevent consumers from exercising the limitations and exceptions recognized in domestic intellectual property laws.
- Governments and industry should support, use and contribute to the development of open and interoperable standards for digital content products supplied to or hosted for consumers. Suppliers who provide a service to host such products online (other than a content streaming service) should also provide the means for consumers to extract them from online storage by that supplier, using open formats and protocols.

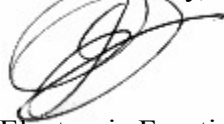
Given the gravity of the issues presented by DRM for digital consumers, it is important that these proposals are given a full and open discussion in the appropriate working

groups which may be the “e-commerce” working group, the “Other issues” working group, or both.

Consumers International has also spoken against the artificial compartmentalization of the review process that could be used to narrow the scope of the review in ways that avoid dealing with these vital issues during the current review.¹ We agree that this would be a grave error, since the wide use of DRM only arose since the Guidelines were last reviewed, and the opportunity to review them again may not arise for many years.

We offer our support to the DRM-related amendments already tabled by Consumers International as noted in the draft report on modalities for review of the Guidelines. We request that you note EFF as an interested party in this review and allow us the opportunity to participate in ongoing discussions about the review of the Guidelines insofar as these relate to digital consumers and DRM.

Yours faithfully,



Electronic Frontier Foundation
per Jeremy Malcolm
Senior Global Policy Analyst

¹ See http://www.consumersinternational.org/media/1485424/ci-other-issues-note_ungcpupdate_eng.pdf.