

Fair DRM Use

Report on the 3rd INDICARE Workshop
Held on 28 May 2005, in Amsterdam

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INDICARE Project

INDICARE – The Informed Dialogue about Consumer Acceptability of Digital Rights Management Solutions – addresses problems pointed out in the eContent work programme 2003-2004: “There has been little attention to the consumer side of managing rights. Questions remain open as to the level of consumer acceptability of rights management solutions. Interface and functionality of systems, as well as policy issues linked to privacy and access to information should be investigated. The consumer question also involves the easiness of access, the legitimate use of content and business models and the easiness of access for disabled persons” (p. 19). In addition to consumer issues INDICARE addresses the user side, in particular concerns of creators and small and medium-size information providers.

INDICARE maintains an informed dialogue about consumer and user issues of DRM. Informed dialogue means that discussions are stimulated and informed by good quality input such as news information and profound analyses. Options for participation and more information are provided at the project website:

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1 Introduction

On 28 May 2005, the Institute for Information Law of the University of Amsterdam (IViR) hosted the third INDICARE workshop under the title “Fair DRM Use”. Twenty-eight selected experts from Europe and the United States met for a roundtable discussion about DRM, its effect on digital content usage and possible legal and policy options to bridge the gap in the existing legal protection of consumer interests. Participants came from academia, consumer organisations and representatives, law and policy making bodies such as WIPO and the European Commission, and the industry. Experts were invited on the basis of their expertise and long-standing experience in this sector.

Earlier this year, INDICARE published the results of a European-wide survey about user habits and expectations regarding digital music content. User expectations also are a key-notion in the legal discussion surrounding the application of consumer protection law to DRM-protected products, such as CDs and DVDs, but also online downloading services. Some of the pivotal questions in this discussion are what exactly consumer expectations are, when do they translate into a legitimate and protection-worthy interest, and what are existing and potential legal tools available to protect consumer interests in a DRM environment. To discuss these questions was the goal of the workshop, using the results from the survey. In so doing, the workshop focused on consumer protection law in the first place, that is a somewhat new approach since DRMs have traditionally been dealt with in the sphere of copyright law.

This one-day workshop was divided into two major sections. The first section scheduled a presentation of the results from the survey (see brief summary of the presentations. The complete papers of the speakers will be published in a separate edition) and gave way to subsequent discussion of the results. Nicole Dufft, Berlecon Research, gave an overview of the results of the INDICARE survey held among 4852 European internet users highlighting consumer behaviour and expectations regarding digital music. The goal of this first section was to extract categories of consumer expectations, based on the survey, and to make the link with the legal notion of legitimate or reasonable expectations, how the notion was treated in recent court cases and what the possibilities are to translate expectations that consumers obviously have when using digital content into legally relevant interests. Earlier research done in the INDICARE project has shown that, under the existing legal framework, the legal protection of consumer interests and expectations regarding digital DRM-protected content is poor and incomplete.

Hence, the second part of the workshop was dedicated to looking more abstractly into different legal and policy options for improving the legal standing of consumers. This included an evaluation of the existing legal framework in Europe for consumer protection, in general consumer protection law, and in copyright law, and a closer examination of one tool that figures prominently in the solutions that were so far proposed to tackle the DRM-issue: the imposition of labelling obligations to increase transparency.

To support the discussion, three presentations were given in this second part of the workshop. Martien Schaub, Miotopics, spoke of consumer protection law and analysed the different instruments at hand to safeguard consumer's legitimate interests. Cornelia Kutterer, BEUC, then went on to discuss the merits of the transparency strategy which is bent on providing consumers with enough information to make an enlightened choice as to whether or not they should purchase digital content with restricted use. Pamela Samuelson, University of California, held the last presentation scouring copyright law and arguing traces of consumer protection could be found there. Although she focused on US law, a parallel was drawn with EU legislation where possible.

This report is a summary of the presentations and debates participants were invited to after each of the presentations. It follows the structure of the workshop insofar as it will take the reader through two parts, the first focuses on consumer expectations. On this particular subject, the discussions revolved around the forces which shape them and touched on the emergence of legitimate interests pertaining to consumers. The second part recounts the attempts made to identify political and regulatory options to protect consumer expectations, the difficulties involved and to whom responsibility for consumer protection lies with in the first place. It highlights the points made in the discussion throughout the workshop. When reporting about the discussion, the report follows a logical structure, and the way topics are treated does not necessarily represent the order in which the presentations were held.

2 Part 1: Consumer Expectations

2.1 Results from a consumer survey

The first speaker, Nicole Dufft, presented the results of a survey on digital music usage held among 4,852 internet users as part of the INDICARE Project. The survey covered seven European countries representing 64 % of the total population in the EU. The countries were selected to encompass various dimensions such as large and small, eastern and western, northern and southern countries.

The stated aim of the survey was to gather information about consumers' aspirations when it comes to digital content usage and discover how DRM affects them. In order to achieve this, survey questions focused on how consumers retrieve digital content and how it is used. The results showed that 69 % of internet users have used their computers to listen to music and the numbers stating they planned on using their computers to access digital music in future were high. Aside from computers, 40 % use MP3 players. The survey also pointed to mobile phones becoming a popular digital music device (a relatively high percentage arose from the survey despite ring tones being specifically excluded). Another finding was that usage of digital content is especially a male activity and the sources for retrieving the content ranged, in order of importance, from CDs to peer-to-peer networks as well as online music stores and subscription services. Interviewed consumers indicated online stores offer a wider range of choice than CD stores, and the internet, in turn, was found to be a good tool to discover new artists. Digital music was shown to be used in many different ways such as burning, sharing and storing.

More importantly, the survey unveiled the lack of familiarity with DRM or its legal and technical implications among consumers. 63 % of digital music users have never heard of DRM and 23 % don't know exactly what it is. This lack of knowledge of DRM among users is a problem when people want to make use of their purchased music: more than half of the music stores customers did not know what they could do with their music nor to whom to turn to in case of quality issues. All of these results are especially problematic considering the fact users are unwilling to accept any system restricting their most common use of digital music (burning, sharing, storing) and would pay a higher price rather than giving up the flexibility of the use they are making of digital content.

The speaker concludes DRM should respect consumers' expectations because, if not, they will reap no success on the market. Finally, more information about copyright is needed to educate users on the legitimacy of the use they are making of digital content.

In the subsequent discussion, participants acknowledged this technology provides the industry with means to protect its interests by steering the use consumers make of the digital content they have purchased. DRM can tie users to certain devices, formats, or contents. DRM can limit display, time, printing and forwarding attributes. All this and more, since combinations

for purposes of usage control are numerous and are likely to grow exponentially with future technological innovation. One of the most renowned DRM systems mentioned was iTunes' fair play system.

The commentators who were invited to give their reading of the INDICARE survey noted that, in practice, consumer expectations seem to be only to a limited extent shaped by copyright law: consumers did not seem to grasp the exact legal implications of such essential notions as uploading, downloading and sharing digital music. What did emerge very clearly from the survey is that users expect to be able to manipulate digital content in a range of ways such as shifting formats or devices. They were also found to attach much importance to portability and interoperability. Burning CDs and sharing music with family and friends ranked high as well and did not seem to raise much doubt among users as to the legality of these activities. This prompted an observation on the fact that consumers did seem to have an intuitive understanding of what constitutes legal usage of digital products however poor their knowledge of copyright law.

Other participants conjectured on the astonishing numbers of users who seem to be unaware of DRM's existence and/or potential of DRM to influence the way consumers use digital content. They suggested this could be due to the fact that users are not conceptualising these measures as being restrictive. Several explanations were attempted: this could be because the DRM techniques are being integrated at such a low level of the technical infrastructure that they are seen as an integral part of the digital product. The other explanation could be that these restrictions are not perceived as such because they are accepted as mere features, much in the same way a VHS owner does not expect to view his tapes on Betamax.

Another participant considered the possibility of this result being misleading because those users who are familiar with DRM reject it turning to other sources of digital music such as p2p, instead of commercial, DRM-based downloading services. The results might therefore be skewed because much depends on how proficient the internet user who is being surveyed is.

The last argument offered in this respect concentrated on the surveying techniques. It was suggested some of the discrepancies in the answers given in different European countries could be due to cultural traits. Also the use of biased words (such as "never") or the failure to sufficiently quantify other words (such as "often") in the survey could have played a role. Finally, more comparative questions might have made the survey an even more accurate reflection of consumer expectations than it already was.

2.2 The forces shaping consumer expectations

The participants then turned their attention to the forces shaping consumer expectations. They speculated on three different sources: technology, the digital content industry and the law.

Technology was found to be a powerful tool to set expectations for consumers. It was stated that technology offers so many variables that it is already defining users' expectations. This was illustrated by the fact technol-

ogy is already dictating in which cases users can make private copies. In this respect, users might be forced to give up the expectation of being able to make a private copy because when technology prevents them from doing so, in practice, they have no choice but to yield to this restriction. On the other hand, it was also stated that technological developments could play their part in generating new consumer expectations. One recurring argument made was that because of technological developments consumers were no longer confined to “classic” forms of using musical content. Instead, reports about new technological innovations would also broaden their expectations of the uses they are able to perform.

The digital content industry was also deemed to be a force to reckon with. The economists among the participants contended the digital content industry suffices to shape these expectations by offering different contracts for different possibilities of use which in turn are reflected in the varying prices to the public. One participant made the point that the advent of new business models to market digital content heralded the beginning of a new paradigm that will trade the monolithic model we have so far been accustomed to, for a wide array of deals with varying restrictions of usage depending on the deal that has been chosen. This is the result of technology’s shift from the material (book, CD...) to the immaterial (digital content itself) and the increase of devices to store digital products on. To further illustrate this point, two examples were taken. The first was that of theatre plays. In this case, it is commonly accepted that what is offered for the purchase of one ticket to a play is the right for one person to view it once and prohibits that person from making a recording during that play as a personal copy. The second example was that of a 24-hour video rental as opposed to the sale of a DVD: consumers have different expectations according to the offer they choose. Thus, consumer expectations can be contractually modelled. The package deals offered by the industry determine the expectations of consumers; consumers are conditioned by the economic supply and demand cycle.

It was agreed legislation also has a part to play in shaping consumer expectations. It was pointed out that one of the recurring arguments is that whatever is technically possible defines expectations. This, however, need not be true. A parallel was drawn with the ongoing debate on privacy in the United States and in Europe, and the expectation of consumers to be able to surf anonymously is one example of this. Privacy laws at European and national level provide protection of the personal data of the consumer when surfing the internet. It could be argued, that privacy laws are the underlying reason why consumers believe they are able to surf anonymously. Vice versa, one important question to ask in this context is how legislators can translate the results of studies, such as the INDICARE study on consumer expectations when buying digital music, into legal provisions. This is a question that will be addressed in the next section. Legislation, moreover, has a prominent role to play when identifying whether certain consumer expectations are legally enforceable.

2.3 The notion of reasonable expectations in the sense of consumer protection law

Much of the discussion focused on the notion of consumers' reasonable expectations in an environment over which DRM holds sway. As Martien Schaub explained in her presentation, the notion of reasonable consumer expectations is a key notion in consumer protection law in Europe. Consumer protection law grants consumers remedies if the product they bought diverges from the "normal" or "common" qualities of a CD, DVD, etc., meaning what consumers can reasonably expect from what they buy. To illustrate this: Article 6 of the European Unfair Commercial Practices Directive lists characteristics of a product that figure prominently in consumers expectations: the existence or nature of the product; its availability, benefits, risks, execution, composition, accessories, aftersale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product; the need for a service, part, replacement or repair; or the risks he may face, to name but some. Interestingly, the directive also mentions in this list consumers' legal rights, notably under consumer protection law, such as the Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods. The mentioning of existing legal rights in this context is another indication to the role that the law can play in shaping consumer expectations (see above).

One recent example, where the notion of legitimate expectations triggered an intensive discussion is the ability to make a private copy. Can consumers reasonably expect, in the sense of consumer protection law, to be able to make a copy from a CD because a private copying exception is in place? In this context, participants welcomed a recent development in a French case, where, after some hesitation, a judge found the consumers' ability to make a private copy of a DVD to be a reasonable expectation (see Mulholland drive ruling). More generally, it was observed that courts play an important role in defining on a case-by-case basis what legitimate consumer expectations are. That this is so has to do with the vagueness of the term, meaning it requires further interpretation by judges who apply consumer protection law. It was referred to another case where the court decided a consumer could legitimately expect to play his CD on the CD-playing device in his car. Because DRM-mechanisms were in place that prevented the consumer from doing so, against his expectations, the judge considered the CD in question a defective product in the sense of consumer protection law, and the consumer was refunded.

As an example for a legislative initiative to give the protection of consumer expectations regarding digital content a more formal basis, the situation in Belgium was evoked. Here, the law has recently introduced a provision prohibiting TPM to prevent "normal use" of purchased products containing works covered by copyright. Unfortunately, the Belgium provision

does not further specify what the notion “normal use” refers to. Accordingly, participants criticised that the Belgian law would replace one vague notion (“reasonable expectations”) by another one (“normal use”) without defining the latter one any further. Consequently, the question of what constitutes “normal use” and thus a legitimate consumer interest would remain one that is still subject to the interpretation of judges.

It was, however, also pointed out that any more concrete, ex ante definition of what consumers’ legitimate expectations are is particularly difficult in environments that are subject to rapid innovation. This is because of the aforementioned role that the technology can play in shaping consumer expectations. Another obstacle to translating consumer expectations into legal provisions which was mentioned was the conflict of interests between the different stakeholders involved when it comes to the question of what consumers should be able to legitimately expect from digital content products or services. One commentator described this conflict by observing that consumers have become a potential competitor for copyright owners as copying is effortless and renders perfect results endlessly.

3 Part 2: Protecting Legitimate Consumer Expectations

The considerations that were made in the first part of the workshop led to the next phase of the discussion which was aimed at identifying how to protect legitimate consumer expectations regarding digital content, once one succeeded in defining them. In this phase, it was also discussed whether the optimal approach was to a) take initiatives that promote the sovereignty of consumers as market actors, for example in the form of transparency obligations or b) create explicit obligations in copyright law or general consumer protection law for providers of digital content to respect certain consumer interests.

3.1 Labelling obligations and consumer sovereignty

3.1.1 Pros and cons of transparency solutions

One of the striking revelations emerging from the INDICARE consumer survey was how little consumers know about DRM despite being experienced with digital music. The need to provide education was underlined throughout the workshop, and the benefits of making the sector more transparent were discussed. Labelling obligations figured prominently in the recent political debate about DRM and consumer protection as a possible solution to reconcile DRM use with the protection of consumers interests, and also recent court cases in France and Belgium were understood to point into this direction.

After it has been stressed in the first part of the workshop the role that information that consumers have about products plays for the range of legal remedies available to them, Cornelia Kutterer from BEUC spoke about an instrumental use of transparency and labelling obligations to protect consumers in digital markets. Ms. Kutterer pointed out that and explained how transparency obligations have traditionally been an important element of consumer protection law, however, not an undisputed one. In particular, the need to couple transparency obligations with educational measures was stressed, as was the risk of information overload. Moreover, transparency obligations may be a means to improve the position of individual consumers in relation to service providers but are no guarantee for the realisation of more general public interest goals such as cultural diversity, access to knowledge and fair distribution of wealth. This led Ms Kutterer to distinguish between competitive and social transparency, concepts that she developed in the course of her presentation. She claimed that despite the existing framework in place, there was still a lack of rules mandating both competitive and social transparency. She warned, however, from viewing transparency obligations as sole answer to the problem and supported her argument with several examples.

A transparency solution seems to be the recently favoured approach in political and judicial circles, stressing consumer sovereignty as ultimate objective of consumer protection in this sector. One difficulty that was pointed out by the participants in the following discussion is that adequate labelling obligations presuppose an adequate existing definition of who can be considered a consumer. Some participants bewailed the definition of consumer has been dramatically narrowed down in EU legislation, leaving out groups of users of digital content, such as libraries, academic institutions, small and medium size businesses, or ignoring the specific interests of special interest groups such as elderly or disabled people. Others, to the contrary, pointed out the rationale underlying consumer law is to reinforce the negotiating power of the weaker party. Therefore, extending the definition of consumer to include parties who could fend for themselves would jeopardize the purpose of consumer law which is to protect the weak.

The discussions surrounding the strategy of promoting transparency through legal instruments were, moreover, mitigated as to its efficiency. Critics suggested it should not be overrated and should be seen merely as an addition to more substantial protective measures. It was pointed out that in many situations there is little room for choice when it comes to purchasing digital content. The example of scientific research was taken or even the latest hit available on a downloading service, in both these instances it is of no or only little use to the user knowing which restrictions are attached to the purchased digital content. If the material is needed for research it will be purchased anyway, the same applies for the latest hit a consumer would enjoy listening to. As non-substitutable goods, cultural goods would be purchased regardless of the restrictions they are subject to. Knowledge that the use of these goods is restricted therefore would matter little.

Two other objections to this strategy were voiced. Firstly, labelling obligations are often confined to supplying pre-contractual information to consumers. Secondly, concentrating too much on fostering transparency could be detrimental to consumer interests since in the long run it might even undermine efforts directed at balancing copyright law towards consumer friendly provisions. Transparency obligations should not deflect attention from the necessity at hand, namely, the legislator's duty to find solutions by readjusting copyright's imbalances but also strengthening consumer law on this matter. Third, transparency obligations could also have the effect of making users accept all kinds of new restrictions as necessary evil and thereby giving the content industry a tool to shape consumer expectations regarding digital content products and services.

There was broad agreement among participants that leaning on the promotion of transparency as the sole instrument to protect consumer interests was a flawed approach. Labelling obligations could at best only serve as a supplement to legal provisions specifically designed to protect legitimate consumer expectations. The latter were extensively discussed and suggestions for their improvement were made that are described further below.

3.1.2 Possible actors to provide consumer information

The participants to the workshop investigated further where the responsibility for making the sector more transparent should lie. Several agents who are either already doing so or should be were contemplated and the pros and cons of their involvement discussed.

Content industry

The content providers were discussed as the first source customers could draw information about DRM use, side effects and benefits from. They are, after all, the ones directly supplying digital products and are at the frontline in communication with the customer. Most participants agreed that though this is the case, the practice shows that consumers face many obstacles in gathering reliable, workable and objective information from the content industry on DRM use. As one participant summarized the situation, consumers are either given a short notice or a twenty-page license agreement which consumers will be discouraged to study. Another participant pointed out how unreliable websites of such providers are when one tries to find relevant information. Elementary data relating to what exactly is offered is sometimes not posted at all. As a whole, it was acknowledged the industry had a flawed communication stream with regard to consumer information. Marketing strategy should be geared towards consumer information because from a broader perspective the industry would gain from clear communication as to what DRM restrictions come with the purchased digital product. An informed consumer often translates into a satisfied customer.

Media

The media was another source of informing and educating consumers mentioned. Because, content providers are not adequately supplying such information other sources were mentioned such as the media. Traditionally the press and broadcasting services have been a valuable source of information for the public at large, including product information and information about the rights of consumers. Here again, though the potential is great, participants could only come up with evidence the media has in many instances failed to adequately inform the public. One example was cited where rather than being incomplete or insufficient, the media's information on the subject was inaccurate altogether as it was found to be explaining how lending CDs to a friend is illegal.

Governments

Some participants suggested it becomes government's duty to organize campaigns informing consumers of their rights. A step in a similar direction was illustrated by a German campaign commissioned by the government with a view to educating the public on copyright law. More such campaigns would be welcome. Another possible source of consumer information, the consumer organisations, were not discussed in more depth.

Professional intermediary services

The last source of information which was briefly considered was that which could be provided by an intermediary. This could be an independent third, also commercial party whose business model is based on providing consumers with comparable service information. This independent third party could inform consumers in much the same way some intermediary service providers are already now advising people on which telephone subscription is optimal for them, which telecommunications provider suits their needs best, or where they can find the best fares for airplane tickets.

What is also possible is a mixed approach, where the government sets certain quality standards for labelling and leaves the task of informing and educating consumers to other stakeholders, such as the industry. This is basically the idea behind statutory labelling obligations.

3.2 Substantive consumer protection law

3.2.1 General consumer protection law

Assisting consumers through the maze of contractual terms has become one of the EU's consumer policy's priorities. Martien Schaub's, Miotopics, presentation revolved around the question: does consumer law set a standard for the use of digital content. The speaker confirmed that general consumer protection law also applies to digital content. She explained how consumer protection law can serve to protect consumers from contractual non-compliance, unfair contract terms, misleading advertising, misrepresentation and in case a product is defective. In her presentation, Ms. Schaub made very clear that the key-role that the notion of reasonable consumer expectation plays in consumer protection law imposes much legal uncertainty on consumers, especially in innovative markets offering a range of new and formerly unknown services. She also pointed towards the potential of content providers to shape already in the pre-contractual phase the expectations of consumers, in the form of contractual conditions or pre-contractual information, and thereby limit the scope of legal protection consumers can hope to get if they are dissatisfied with the product (e.g. because it does not play in a car radio, cannot be copied or shared, etc.). This is different where certain unfair commercial practices or contractual conditions have been explicitly listed in so called grey or black lists.

Participants observed in response to Ms. Schaub's presentation that the potential of general consumer protection law to guarantee a certain standard of consumer protection in Europe, however, is rendered difficult by the fact that consumer laws often operate with open and rather general notions, and that it is up to judges to decide and formulate the standard of protection ex post and for each individual case. The overall-level of legal certainty brought to consumers and service providers by general consumer protection law is, hence, relatively low. To create a more reliable ex ante standard of consumer protection in digital content markets, more substantive rules were needed that fixed such a standard explicitly.

The famed black and grey lists of deemed or presumed unfair contractual terms were found a useful tool to increase the overall standard of consumer protection in digital product markets. It was suggested the exercise of certain copyright limitations could be included in the grey list. As a result, any contractual provision taking away the ability to make use of these copyright limitations would be presumed unfair and the burden of proof would lie with the party who has imposed this provision. It would therefore be this party's responsibility to demonstrate the contractual provision was indeed reasonable. This approach could be taken also for other kinds of legitimate consumer interests, once such interests are defined. One example could be the ability to play a CD on all hardware devices that are designed to play CDs. In the same line of thought, participants considered the possibility of introducing standard form contracts as a means to protect consumer interests. It was remarked that some areas of legislation are familiar with this sort of contracts, labour law was a prime exponent of this strategy, and it could be the way of the future where DRM and consumer interests are concerned. The major obstacle, in this respect, was twofold. Firstly, a lack of cooperation between legislators and the industry pervades the matter. Secondly, though negotiations between groups representing the different stakeholder have been undertaken they are often arduous and strand several times before reaching an agreement. This was exemplified by the procedures surrounding the American Uniform Computer Information Transactions Act (UCITA).

The example of privacy law was taken to introduce another possible solution. The way privacy law has approached the protection of legitimate consumer expectations is a combination of legal provisions and technological solutions. The stance that has been taken in privacy regulation is that after having identified which essential (privacy) rights should enjoy protection, the legislator dictates technology must protect them. The question which arose was whether this approach would be viable in the field of DRM as well. For example, statutory rules could oblige DRM-implementing content providers to use DRMs that are designed to respect certain consumer interests, such as the ability to make private copies.

3.2.2 Copyright law

In the last presentation for this day, Professor Samuelson, University of California, explained why copyright law, after all, can contribute to setting a standard of consumer protection, even if copyright law is not explicitly designed to protect consumers, and some even would describe the relationship between copyright law and consumer protection "orthogonal". Professor Samuelson brought arguments why, on the contrary, consumer protection does have a history in copyright law, and why the importance of consumer protection elements in copyright law will increase. She gave concrete examples in existing US and European copyright law that hint to the fact that consumer protection is a concept that is not entirely alien to copyright law. Examples included the way exclusive authors rights are restricted in time and scope, first sale rules, fair use rules, the right to alter or destroy archi-

tectural works. Very interesting was also the cited example of the US Digital Millennium Copyright Act, particularly the provisions making for exceptions to the protection of technological measures for reasons of privacy or parental control, provisions that are clearly consumer-oriented. Professor Samuelson, however, also reported a mismatch between, on the one hand, statutory copyright rules and licensing terms and, on the other hand, consumer expectations. Professor Samuelson also referred to the recent extensions of exclusive rights of authors that are not corresponded by rules protecting the interests of consumers, and a lack of competition.

In the discussion that followed, copyright law was extensively discussed and found to be, in its present form, fundamentally hostile towards consumer interests. The US model was cited where the system considers copyright from a very utilitarian perspective and consumers have traditionally been confined to the role of the agent purchasing a pre-packaged offer. Despite this fact, it was demonstrated that traces of consumer protection could be found in both the US and the European copyright systems.

Participants especially focused on the European situation which is reflected in the 2001/29 EC Copyright Directive. Though meant to govern the exploitation of authors' works and their communication to the public, Art. 6.4 of this Directive can be interpreted to serve some consumer interests. It gives Member States the option to introduce in their legislation measures providing consumers with private use exemptions when rightholders fail to voluntarily do so. It was stressed this provision is, however, a mere option rather than an obligation. A commentator therefore suggested this state of affairs should be altered by making this option a mandatory provision. Overall, participants expressed their doubts whether existing copyright law alone will serve consumer interests. Having said that, although there is no user right as such within the copyright system the fact that limitations are set to copyright is a recognition of existing users' interests which can give impetus to reasoning in terms of rights. Participants, moreover, agreed reforming the copyright system's imbalances is a necessity to be addressed if the position of consumers is to be improved.

Professor Samuelson left open the question whether to meet these concerns is a matter of copyright law or consumer law protection outside copyright law. Some participants favoured a solution in general consumer protection law. They found consumer law to be a promising instrument to protect these interests but stressed the importance of perfecting its provisions. The fact consumer law functions on the basis of open norms need not be a disadvantage. What was needed is a list of best practice standards that assists judges in their work. It was, remarked, moreover, that judges have in many instances already deployed their interpretation skills in favour of consumers, as the recent French cases have demonstrated. A concrete suggestion that was made, as reported above, was to add to existing grey lists of unfair commercial practices conditions that would touch upon legitimate interests (as to the notion see above) of users of digital content, including interests that are the result of existing copyright law, such as the private copying exception. Others suggested amending the existing European Copyright Directive and introducing rules on consumer protection into copyright law

itself. Overall, it was also suggested that moving this discourse at an international level could prove fruitful and participants agreed WIPO could be the right setting to do so.

4 List of Speakers and Commentators

Speakers

Nicole Dufft, *Berlecon Research, Germany*

Martien Schaub, *Miotopics, The Netherlands*

Cornelia Kutterer, *BEUC, Belgium*

Professor Pamela Samuelson, *University of California, Berkeley, US*

Commentators

Mark Fetscherin, *University of Bern, Swiss, Harvard University, US*

Deirdre Mulligan, *University of California, Berkeley, US*

Timo Ruikka, *Nokia, Finland*

Till Kreutzer, *Büro für Informationsrechtliche Expertise, Germany*

Lucie Guibault, *Institute for Information Law, University of Amsterdam, The Netherlands*

Kamiel Koelman, *Free University, Amsterdam, The Netherlands*

Richard Owens, *WIPO, Swiss*